

COMMERCIAL AND GENERAL LAWYER;

A PLAIN AND PRACTICAL EXPOSITION OF THE

LAW OF ENGLAND

IN ALL ITS DEPARTMENTS;

WITH A MORE PARTICULAR CONSIDERATION OF THOSE BRANCHES
WHICH RELATE TO

COMMERCE, TRADE, AND MANUFACTURES.

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OF LINCOLN'S INN, BARRISTER AT LAW.

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THE
COMMERCIAL AND GENERAL
LAWYER.

INTRODUCTION.

DIVISION OF THE LAW OF ENGLAND INTO COMMON LAW AND STATUTE
LAW.—OF THE COUNTRIES SUBJECT TO THE LAW OF ENGLAND.—
ECCLESIASTICAL AND CIVIL DIVISIONS OF ENGLAND.

THE term *law* has been defined, comprehensively, as “a rule of action,” and in this view has been considered applicable to action of all kinds, animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of mechanics, as well as the laws of nature and of nations. But this is too general a definition as well as application of the term; for it is evident, that when applied to the action of natural agents, which cannot but conform to the necessary condition of their existence, it means nothing more than is expressed by the words *quality*, *property*, or *influence*, and that it loses its essentially inherent ideas of free agency and accountability. In strictness, therefore, the term may be confined to the rules of voluntary or intellectual action, or, in other words, to the precepts dictated by competent authority for the government of man; in which sense it will be found sufficiently comprehensive, including laws both human and divine, of which may be enumerated, 1. The law of nature; 2. The revealed law of God; 3. The law of nations; and 4. The municipal or civil law. Dismissing the consideration of the three first-mentioned kinds, we shall observe, that *municipal* or *civil* law is that which is instituted for the government of the component members of the same body politic, and is properly described as “a rule of civil conduct prescribed by the supreme power in a state.”¹ This it is to which we apply the term *law*, in ordinary discourse, simply and without addition; we need scarcely add, that it is the municipal or civil law of England that forms the subject of the following pages.

¹ Blac. Com. Introd. § 2.

The municipal law of England consists of two kinds: the *unwritten* or *COMMON LAW*, and the *written* or *STATUTE LAW*.

I. *COMMON LAW*.—When we speak of *unwritten* laws, it is not to be understood that these laws are at this time merely *oral*, or that they have been communicated from former ages to the present solely by word of mouth; they are termed *unwritten* because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws by long and immemorial usage, and by their universal reception throughout the kingdom. It is true, indeed, that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional, because the nations among which they prevailed had little idea of letters. But with us at present the muniments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from times of remote antiquity.¹

This unwritten or common law is distinguishable into three kinds. It includes—1. *General customs*, which are the general rule of the whole kingdom, and form the common law in its stricter and more usual signification; 2. *Particular customs*, which affect the inhabitants of particular districts only; and 3. Certain *particular laws*, which are by custom adopted and used only in some particular courts.

1. *General Customs*, or the common law proper, form that system by which proceedings and determinations in the ordinary courts of justice are guided and directed. This, for the most part, settles the course by which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligations of contracts; the rule of expounding wills, deeds, and acts of parliament; the respective remedies for civil injuries; the several species of temporal offences, with the manner and degree of their punishment; and an infinite number of minute particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. These customs are ascertained, and their validity determined, by the judges in the several courts of justice, who are the depositories of the laws, the living oracles who must resolve all cases of doubt, and who are bound by oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study, and from having been long personally acquainted with the decisions of their predecessors. Indeed, these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of *records*, in public repositories set apart for the purpose; and to them recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance. For it is an established rule to abide by former precedents where the same points come again into litigation, as well to keep the scale of justice even and steady, as also because the law having been solemnly declared and determined, that which was before uncertain, and perhaps indifferent, is now become a permanent rule. Yet this rule admits of exception, when the

¹ See History of the Common Law, by Sir Matthew Hale.

former determination is evidently contrary to reason; though even in such cases the judges do not pretend to make a new law, but to vindicate the old one from misrepresentation, and it is declared, not that the former sentence was a *bad law*, but that it was not *law*, that is, it is not the established custom of the realm, as had been erroneously determined.

The decisions of the courts are not only preserved as authentic *records* in the treasuries of the several courts, but are published in the numerous volumes of *reports*. These reports are in brief what the records are at large, which records they serve as indexes to, and also to explain. Reports are extant in a regular series from the reign of Edward II. inclusive; and from his time to that of Henry VIII. they were taken by the prothonotaries of the court at the expence of the crown, and published *annually*, whence they received the appellation of "Year Books."

2. The second branch of the unwritten law consists of *particular customs*, or laws which obtain only in particular districts. These customs, or some of them at least, are doubtless the remains of a multitude of local customs, out of which the common law was originally collected by Alfred, and afterwards by Edgar and Edward the Confessor. Each district mutually sacrificed some of its own special usages, in order that the whole kingdom might enjoy the benefit of one uniform system of laws; but, for reasons that are now probably forgotten, particular counties, cities, towns, manors, and lordships, were indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation; which privilege is confirmed to them by several acts of parliament.

Gavelkind is one of those particular customs, which still obtains in Kent and some other parts of England, and probably was pretty general before the Norman Conquest. It was abolished in Ireland in the year 1604. This custom ordains that not the eldest son only, but *all* the sons alike, shall succeed to the inheritance of the father; that though the ancestor is attainted and hanged, yet the heir shall succeed to his estates, without any escheat to the lord. Such, likewise is the custom of *borough English*, prevailing in divers ancient boroughs, that the youngest son shall inherit the estate in preference to his elder brothers. Such also is the custom in others, that a widow shall be entitled for dower to all her husband's lands, whereas at the common law she is entitled to one-third part only. Such also are the special customs of manors binding copyhold and customary tenants. Such is the custom of holding divers inferior courts in cities and trading towns, the right of holding which, where no royal grant can be shown, depends on usage. Such also are many particular customs within the city of London with regard to trade, apprentices, widows, orphans, and a variety of other matters. All these depend on special usage, though the customs of London are also confirmed by act of parliament. To this head may be referred the *lex mercatoria*, or law merchant, which, however different from the common law, is yet engrafted into it, and allowed for the benefit of trade to be of validity in all commercial transactions, it being a maxim of the law, that "*cuiuslibet credendum est in sua arte.*"

The rules relating to particular customs regard, 1. The proof of their existence; 2. Their legality, when proved; and 3. Their usual method of allowance.

As to gavelkind and borough English, the law takes particular notice of them, and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded, and as well the existence of the custom must be shown, as that the thing in dispute is within the custom alleged. The trial in both cases is by jury, unless the custom has been before tried, determined, and recorded in the same court. If, however, a custom of London be brought into question, its existence is determined, not by a jury, but by a certificate from the lord mayor and aldermen by the mouth of their recorder; unless it be such a custom as the corporation itself is interested in, when the law does not permit them to certify in their own behalf.

When a custom is proved to exist, there are several things requisite to establish its *legality*, or to make it a *good* custom. It must have been used immemorially; that is, it must be so ancient that the memory of man runneth not to the contrary. If any one can show the beginning of it within legal memory (that is, since the beginning of the reign of Richard I.), it is not a good custom. It must have been *continued*, or have had the undisputed right to have been continued; for an interruption of the right will destroy it, though not an interruption of the possession. It must have been *peaceably* acquiesced in, and not subject to contention or dispute. It must be *reasonable*, or rather, it must not be unreasonable. It must also be *certain* and *compulsory*, and not left to any man's option whether he will use it or not. And lastly, customs must be *consistent* with each other, for opposite customs relating to the same object cannot be of equal antiquity.

As to the *allowance* of customs, it must be observed, first, that all customs in derogation of the common law are construed most strictly; and secondly, that all special customs yield to the crown's prerogative. Thus, by the custom of gavelkind, a person aged fifteen may, by deed of feoffment, convey away his lands in fee-simple for ever, but he cannot at that age convey them by any other deed, or even make a lease for seven years. And if the king purchase lands of the nature of gavelkind, where all the sons inherit equally, yet on his demise his eldest son alone shall succeed to those lands.

3. The third branch of the common law are those *peculiar laws* which by custom are adopted and used only in certain courts and jurisdictions; namely, the *civil* and *canon* laws. By the *civil* law is generally understood the civil or municipal law of the Roman empire, as comprised in the Institutes, the Code, and the Digests of the Emperor Justinian, and the Novel Constitutions of himself and some of his successors. By the *canon* law is meant a body of Roman ecclesiastical law relative to such matters as that church either had or pretended to have the proper jurisdiction over.

There are four species of courts in which the civil and canon laws, under certain restrictions, are permitted to be used; *viz.* 1. The Ecclesiastical Courts; 2. The Military Courts; 3. The Courts of Admiralty; and 4. The Courts of the two Universities. In all these courts

their reception in general, and the different degrees of that reception, are grounded upon custom, corroborated in the instance of the university courts by acts of parliament. With respect to all, however, it is to be remarked, that the courts of common law have superintendence and controul over them; that the common law has reserved to itself the exposition of all such acts of parliament as concern either the extent of the courts or the matters depending before them; and lastly, that an appeal lies from them to the crown in the last resort.

II. STATUTE LAW.—The *written* or statute law consists of statutes or acts of parliament, of which the oldest extant is *Magna Carta*, as confirmed in parliament in the 9th of Henry III.; though, doubtless, there were many acts of parliament before that time, the records of which are now lost, and the determinations of them are perhaps at present currently received for the maxims of the old common law. The method of enacting these statutes we shall show hereafter; at present we shall notice—1. The different kinds of them; and 2. The general rules for their construction.

1. Of acts of parliament, some are *public* or *general*, of which the courts of law are bound to take notice judicially, without their being specially pleaded; and others are *special* or *private*, which require to be specially pleaded. A private act, however, if once recognised by a public act, must afterwards be noticed as a public act by the courts. Public acts, again, are of two kinds. There are *public general* acts, which relate to the whole community or the kingdom at large, and which alone, in common parlance, are generally signified by the term *public* acts. There are others, however, which, applying only to particular places, are local or private in their application, but containing a clause declaratory of their being public acts, enjoy the privilege of such in not being required to be specially pleaded. These are termed *public local* acts, but are distinguished from the former or public general acts, by being separately classed and numbered.

Statutes also are either *declaratory* or *remedial*. *Declaratory*, when, for avoiding doubts and difficulties, they declare what the common law is and ever hath been; and *remedial*, when made to supply such defects, or abridge such superfluities in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, or from any other cause; and this being done either by enlarging the common law where it was too narrow and circumscribed, or by restraining it where it was too lax, hath occasioned a farther division of remedial acts into *enlarging* and *restraining* statutes.

2. The principal rules to be observed in the *construction of statutes* are the following:—

In construing remedial acts, regard must be had to three points—the old law, the mischief, and the remedy; and it is the business of the judge, in general, so to construe the act as not to extend the remedy beyond the mischief which the act was intended to suppress. For instance, at common law, spiritual persons were empowered to grant leases, which, however long or unreasonable, were good. But as such persons often abused their power to the impoverishment of their successors, the *restraining* statute of 13 Eliz. c. 10 remedied the mischief by rendering void all leases made by such persons for a longer term

than twenty-one years or three lives. If, however, a bishop lets a lease for a longer term, the judges, in the construction of this act, will hold that such lease is good during the bishop's continuance in his see; because the mischief which the act was intended to remedy, namely, the impoverishing of the successor, is sufficiently suppressed by avoiding it at the determination of the grantor's interest, and the commencement of that of the successor.

Again, a statute which treats of things and persons of an inferior rank cannot by any *general words* be extended to those of a superior. Thus, a statute treating of "deans, prebendaries, vicars, and *others* having spiritual promotion," is held not to extend to bishops.

Penal statutes must be construed strictly; but statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction, as most statutes against frauds are penal in their consequences. But this distinction is to be taken: where the statute acts upon the offender, and inflicts a penalty, it is then to be taken strictly; but when it acts upon the offence by setting aside the fraud, it is to be construed liberally.

One part of a statute must be so construed by another, that the whole may, if possible, stand; but a saving totally repugnant to the body of the act is void. If the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one. But if a statute that repeals another be itself repealed, the first statute is thereby revived, without any formal words for that purpose, unless the repealing act contains a clause to the contrary. Acts of parliament derogatory to the power of subsequent parliaments bind not. And lastly, acts of parliament that are impossible to be performed are of no validity.

These are the several groundworks of the law of England; over and above which, EQUITY is frequently called in to assist, to moderate, and to explain them. Courts of equity are therefore established in order to supply the defects of the common law; and for this purpose they assume the power of enforcing the principles upon which the ordinary courts also decide, where the powers of those courts, or their modes of proceeding, are insufficient for the purpose, and also of deciding on principles of universal justice, where the interference of a court of judicature is necessary to prevent a wrong, but the positive law (as in the case of *trusts*) is silent. These courts, however, are only conversant in matters of property; for in criminal cases the freedom of our constitution will not entrust a power to any judge of construing the law otherwise than according to the letter. This protects public liberty without bearing hard upon individuals. The law cannot inflict a penalty beyond what the letter will warrant; but when the letter induces any hardship, the crown has power to pardon.

OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

The kingdom of England, over which our municipal laws have jurisdiction, includes not, by the *common law*, either Wales, Scotland, or Ireland, or any other part of the king's dominions; that is to say, it includes only the territory of England. Yet the laws and local customs of this country do now obtain, more or less, in these and many other adjacent countries, of which it will be proper first to take a

review before we consider the kingdom of England itself, the original and proper subject of these laws.

Wales continued for many centuries independent of England; but in the reign of Edward I., the blood of its ancient sovereigns being extinguished, the territory of Wales was formally annexed to the crown of England. The statute of 12 Edw. I. adapted the Welsh laws and forms of judicial procedure to the English standard; but the Welsh were still suffered to retain much of their original polity, particularly their rule of inheritance, that lands were equally divisible among the issue male. In 1535, however, the 27 Hen. VIII. c. 26 gave the finishing stroke to their independence, at the same time that it advanced their civil prosperity, by admitting them to a thorough communication of laws with the subjects of England. This statute enacted, that the dominion of Wales shall be for ever united to the kingdom of England; that all Welchmen born shall have the same liberties as others the king's subjects; that lands in Wales shall be inheritable according to the English tenures and rules of descent; that the laws of England, and no other, shall be used in Wales; with many other provisions with regard to the regulation of the police of this ancient principality. The 34 & 35 Hen. VIII. c. 26 confirmed the above statute with additions, divided the principality into shires, and reduced it into the order in which it has almost ever since continued, differing only from the kingdom of England in a few particulars, such as having courts within itself independent of the process of those at Westminster. But even this trifling distinction is at length removed; for by the 1 Wm. IV. c. 70, its separate judicature is abolished, two additional circuits are formed for the administration of justice in that country, and Wales is now in every respect assimilated to and may be considered an integral part of this kingdom.

Scotland continued a distinct kingdom from England for more than a century after the union of the two crowns in the person of James I. The union of the two kingdoms was not accomplished till the sixth year of Queen Anne, when the parliaments of both kingdoms agreed to twenty-five articles of union, the purport of the most considerable of which was, That on the 1st May, 1707, and for ever after, the kingdoms of England and Scotland should be united into one, by the name of Great Britain; that the succession to the monarchy should be the same as before settled with regard to that of England; that the united kingdom should be represented by one parliament; that there should be a communication of all rights and privileges between the subjects of both kingdoms, except where it was otherwise agreed; that the coin, weights and measures, and the laws relating to trade, customs, and the excise, should be the same as in England; that sixteen peers should be chosen to represent the peerage of Scotland in parliament, and forty-five members to sit in the House of Commons. Besides these articles, which were ratified and confirmed by the 5 Anne, c. 8, the preservation of the two churches of England and Scotland in the same state they were in at the time of the union, and the continuance of the municipal laws of Scotland, except as they might be altered by parliament, were declared to be "fundamental and essential articles of the union." As but little alteration has since been made by parliament in the municipal law of

Scotland, which is chiefly founded on the civil law, it remains, so far as it is unaltered, in full force, and the law of England, generally speaking, has no force or validity there. Acts of parliament, however, extend to that country, and also to Ireland, unless their operation is particularly restricted by express words with regard to either or both of those countries.

The town of *Berwick-upon-Tweed* was originally part of the kingdom of Scotland. After having been many times alternately in the hands of the English and of the Scots, it was at length reduced into the possession of the crown of England by Edward I. It received a charter from that prince, and was confirmed in all its privileges and customs by the legislature in the reigns of Edward IV. and James I. Although, therefore, it has some local peculiarities derived from the law of Scotland, it is clearly a part of the realm of England, being represented by burgesses in the House of Commons, and bound by all the acts of parliament of the United Kingdom, whether specially named or otherwise. And though certain of the queen's writs do not usually run into Berwick, yet all prerogative writs (as those of mandamus, prohibition, habeas corpus, certiorari) may issue to Berwick as well as to every other of the dominions of the crown; and local matters arising in Berwick may be tried by a jury of the county of Northumberland.

Ireland was formerly governed by kings of its own, till conquered by Henry II., who, as well as his successors, were styled *lords* of Ireland. In the 33 Henry VIII. it was erected into a kingdom, and the title of *king* of Ireland was conferred upon that sovereign and his successors. But, as Scotland and England, though united, differ in their municipal laws, so Ireland and England, though distinct kingdoms, and possessing till recently separate legislatures, in general agree in their laws. For the English colonists transplanted into Ireland after its conquest by Henry II. introduced there the same laws under which they were born and bred; a privilege conceded to them by the conqueror, and confirmed by the charters of John and Henry III. Although, however, the laws of England were received and sworn to by the Irish nation assembled at the council of Lismore, yet the Irish continued for centuries after to be governed by their Brehon law (so styled from the Irish name of *judges*, who were denominated *Brehons*); and it was not till the reign of James I. that this Brehon law was finally abolished, and that of England actually and effectually extended to the inhabitants of Ireland at large. It is to be observed also, that as Ireland was a distinct dominion, with a parliament of its own, although, subsequent to its conquest, the *common* law of England was the rule of justice within the English pale, yet no acts of the English parliament, as such, extended to or were in force there.

The original method of passing statutes in Ireland was nearly the same as in England, the chief governor holding parliaments at pleasure, which enacted what laws they thought proper. But an ill use being made of this liberty, a set of statutes were enacted in the tenth year of Henry VII., Sir Edward Poyning's being then lord deputy (from whence they are called *Poyning's laws*), by which it was provided, that, before summoning a parliament, the lieutenant and Irish council should certify to the king under the great seal of Ireland the causes thereof,

and the articles of the acts proposed to be passed therein. But the delay occasioned by sending over the heads of bills to the British ministry before they could pass into a law created much inconvenience; and that evil, with some others, turned the thoughts of the English cabinet to an union of the two countries. This great political measure was completed in the year 1800; and by the 39 & 40 Geo. III. c. 57 of the English parliament, and the 40 Geo. III. c. 38 of the Irish parliament, it was provided, that the two kingdoms should, from the 1st January, 1801, and for ever after, be united into one kingdom, by the name of the United Kingdom of Great Britain and Ireland, to be represented in one and the same parliament; that the succession to the crown should continue limited and settled as at present; that the representation of Ireland in parliament should consist of four lords spiritual of Ireland, sitting by rotation of sessions, and twenty-eight lords temporal of Ireland, elected for life by the peers of Ireland, to sit and vote in the House of Lords; and that one hundred commoners be the number to sit and vote in the House of Commons on the part of Ireland (since increased, by the Reform Act, to 105); and that any peer of Ireland may be elected to sit in the House of Commons, unless previously elected to sit in the House of Lords. It is further provided, that the churches of England and Ireland should be united into one protestant episcopal church, and the church of Scotland remain as formerly established; that the subjects of Ireland shall have the same privileges as the subjects of Great Britain; that all laws in force at the time of the union, and all courts of jurisdiction within the respective kingdoms, should remain, subject to such alterations as might appear proper to the united parliament; and that writs of error and appeals, before determinable by the Irish House of Lords, should thence forward be determined by the House of Lords of the United Kingdom.

The *Isle of Man* is a distinct territory from England, and not governed by our laws; neither does any act of parliament extend to it, unless particularly named therein, and then it is binding there. This island was formerly subject to the kings of Norway; then to John and Henry III. of England; and afterwards to the kings of Scotland. It was conquered from the Scots by Montacute, earl of Sarum, to whom Edward III. gave the title of *king of Man*. It continued in the possession of the earls of Derby for many centuries, under the title of the lordship of Man, and at length fell by inheritance to the duke of Athol in 1735, of whom it was purchased for 70,000*l.* and annexed to the crown of England in 1765, and subjected to the regulations of the British excise and customs. Though the title of king had been long disused, the earls of Derby, as *lords of Man*, had maintained a sort of royal authority therein, by assenting or dissenting to laws, and exercising an appellate jurisdiction. Yet, though no English writ or process from the courts at Westminster was of any authority in Man, an appeal always lay from the lord of Man to the king of Great Britain in council.

The islands of *Guernsey*, *Jersey*, *Sark*, *Alderney*, and their appendages, formerly belonged to the duchy of Normandy, and were united to the crown of England by the first princes of the Norman line. They are governed by their own laws, being mostly the ducal customs of Normandy, and are not bound by acts of the British par-

liament, unless specially named therein. The queen's writ is of no force there; but her commission is.¹ All causes are determined by their own officers, the bailiffs and jurats of the island; but an appeal lies to the queen in council.

Besides these, our *colonies* in more distant parts are also, in some respects, subject to the laws of England. Colonies are of three sorts: they are such by right of occupancy, of conquest, or of cession by treaty. When an uninhabited country is discovered and peopled by English subjects, English laws, which are the birthright of every subject, are immediately in force there; though this is to be understood with some restrictions. But in conquered or ceded countries that have already laws of their own, although the queen may change those laws, yet till she does so they remain in force. The common law of England, therefore, has no authority in such countries, they being distinct, though dependent dominions; and they are not bound by any act of parliament, unless specially named therein. The form of government in most of our colonies is similar to that of England. They have a governor, named by the queen, who is her representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the queen in council here in England.

We come now to consider the kingdom of *England*, the direct and immediate subject of the laws treated of in the following pages, and which includes not only Wales and the town of Berwick, as we have already noticed, but also part of the sea. The main or high seas are a part of this realm, for thereon the courts of admiralty have jurisdiction, though they are not subject to the common law. The main sea begins at low water mark. But between the high and the low water mark, where the sea ebbs and flows, the common law and the admiralty have an alternate jurisdiction—the latter, upon the water when it is full sea; and the former, upon the land, when it is ebb.

ECCLESIASTICAL AND CIVIL DIVISIONS OF ENGLAND.

England is divided—1. Ecclesiastically; and 2. Civilly.

1. The ECCLESIASTICAL division is primarily into two provinces, Canterbury and York. A *province* is the circuit of an archbishop's jurisdiction. Each province contains divers *dioceses*, or sees of suffragan bishops; of which Canterbury includes twenty, and York four, besides the bishopric of the Isle of Man, which was annexed to the province of York by Henry VIII. Every diocese is divided into *archdeaconries*, whereof there are sixty in all; and each archdeaconry into *rural deaneries*, which are the circuits of the archdeacon's and rural dean's jurisdictions; and every deanery is divided into *parishes*.

A *parish* is the circuit of ground committed to the charge of one parson, vicar, or minister, having cure of souls therein; of which districts there are nearly 10,000 in England. The exact period of the division of the kingdom into parishes is uncertain; it most probably took place gradually. It would seem that the boundaries of parishes were origin-

¹ But in the case of Carus Wilson, imprisoned by the Royal Court of Jersey for contempt of court, a writ of habeas corpus having been issued out of the Court of Queen's Bench, and a rule obtained to show cause why it should not be set aside,

among other things for want of jurisdiction, Lord Denman observed, that it was now admitted that a *habeas corpus ad subjiciendum* issued out of that court would enforce obedience in the island of Jersey. Q. B. Hil. T. 1845.

ally ascertained by those of manors, since a manor seldom extends over more parishes than one, though often many manors are in one parish. The lords of manors built churches on their demesnes to accommodate their tenants in one or two adjoining lordships, and, to secure service therein, obliged their tenants to appropriate their tithes to the one officiating minister; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish, the patronage whereof became thus vested in the lord. This will account for the frequent intermixture of parishes; for if a lord had a parcel of land detached from his main estate, but not sufficient to form a parish of itself, he would naturally endow his newly erected church with the tithes of such parcel, especially if no church was then built in any lordship adjoining it. Still, however, some lands, either as belonging to irreligious or careless owners, or as situated in desert places, or for other now inscrutable reasons, were never united to any parish, and continue to this day *extra-parochial*, and their tithes by immemorial custom are payable to the queen, not to the bishop, in trust that she will bestow them for the general good of the church. Yet, by the 17 Geo. II. c. 37, *extra-parochial* waste and marsh lands, when improved and drained, are to be assessed to all parochial rates in the parish next adjoining.

The settling of the bounds of parishes depends upon immemorial custom; and care is, or ought to be taken, by annual perambulations, to ascertain and preserve them. In times of popery these necessary excursions were accompanied with great abuses of feastings and superstitious processions. And it is even now usual for the parishioners on such occasions to call for refreshments at the houses of certain persons in the boundaries; but no claim of this nature can be made as of *right*, the custom having been declared to be against law and reason.

2. The *CIVIL* division of England is into counties, hundreds, and tithings or towns. This division is said to owe its original to king Alfred, who, to prevent the rapine and disorder which formerly prevailed in the realm, instituted *tithings*, so called because originally consisting of ten freeholders with their families, who were sureties to the king for the good behaviour of each other, and, if any offence were committed among them, were bound to have the offender forthcoming. A tithing-man, headborough, or borsholder (that is, borough's elder), was annually appointed to preside over the tithing.

The terms *tithing*, *town*, or *vill*, have the same signification in law. *Town* or *vill*, indeed, has become a generic term, comprehending the several species of cities, boroughs, and common towns. A *city* is a town incorporate which is or has been a bishop's see. A *borough* is a town, whether corporate or not, which sends burgesses to parliament. There are other towns which are neither cities nor boroughs, some of which have the privilege of markets, and others not, but in either case they are equally *towns* in law. To many of them are appendages called *hamlets*, which are sometimes under the same administration as the town itself, and in other cases are governed by officers of their own; in the latter case, they are, for some purposes, in law regarded as distinct townships. Towns, it is most probable, originally contained but one parish and one tithing; but now many are divided into separate parishes and tithings, and sometimes there are two or more vills or tithings in one parish.

As ten families of freeholders made up a tithing, so ten tithings composed a *hundred*. The hundred is governed by a high constable or bailiff, and formerly there was a hundred court for the trial of causes; but these are now fallen into disuse. In some of the northern counties, the hundreds are called *wapentakes*, because, it is said, the people at the hundred courts were accustomed to *touch* the *weapon* or lance of the bailiff or constable of the hundred with their weapons or lances, in token of union.

A *county*, or *shire*, is a district made up of an indefinite number of hundreds. Shire is a Saxon word, signifying a division; but county, *comitatus*, is plainly derived from *comes*, the count of the Franks, that is, the earl or alderman (as the Saxons called him) of the shire, to whom the government of it was entrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English *sheriff* or shire-reeve, signifying the officer of the shire, upon whom the civil administration of it is now totally devolved. In some counties there is an intermediate division between the shire and hundred, as *lathe*s in Kent, and *rapes* in Sussex; and there were formerly *lathe-reeves* and *rape-reeves*, subordinate to the shire-reeve. When a county was divided into three of these intermediate jurisdictions, they were called *trithings*, an instance of which still exists in the county of York, where by an easy corruption the term has been converted into *ridings*. There are at present forty counties in England, and twelve in Wales.

The counties of Chester, Durham, and Lancaster, are *counties palatine*, so called a *palatio*, because the owners thereof, the earl of Chester, the bishop of Durham, and the duke of Lancaster, had in these counties *jura regalia* as fully as the king in his palace. They might pardon treasons, murders, and felonies; they appointed judges and justices; writs ran in their name; and offences were said to be done against their peace. None of these jurisdictions, however, now remain in the hands of a subject. The earldom of Chester was united to the crown by Henry III., and has ever since given title to the king's eldest son. By various acts of parliament the inheritance to the duchy of Lancaster is vested in the crown. And by the 6 & 7 Wm. IV. c. 19, the palatine jurisdiction was separated from the bishopric of Durham, and transferred to the crown as a separate franchise and royalty.

The Isle of Ely was not a county palatine, but a *royal franchise*; the bishop having, by grant of Henry I., *jura regalia* within the same, whereby he exercised jurisdiction over all causes, as well criminal as civil. These rights, however, have been abrogated, and the Isle of Ely is now merged in the county of Cambridge in so far as the administration of justice is concerned.

Counties corporate are certain cities and towns to which, out of special grace and favour, the kings of England have granted the privilege to be counties of themselves, and to be governed by their own sheriffs and magistrates, so that no officer of the county at large within which they are locally situate have any power to intermeddle therein. These are the cities of London, York, Bristol, Norwich, Worcester, Canterbury, Chester, Coventry, Exeter, Gloucester, Litchfield, and Lincoln, and the five towns of Kingston upon Hull, Nottingham, Newcastle upon Tyne, Poole, and Southampton.

BOOK I.

OF THE RIGHTS AND DUTIES OF PERSONS.

As municipal law is "a rule of civil conduct, commanding what is right, and prohibiting what is wrong," it follows that the principal objects of the laws of England, as of every other political community, are **RIGHTS**, which those laws are framed to assert, and **WRONGS**, which they are calculated to prevent, or, if committed, to redress or punish.

Rights may be divided into two classes: 1. **RIGHTS OF PERSONS**, of which private property is *not* the direct immediate subject; and 2. Those rights of which private property *is* the direct immediate subject, and which may be entitled, for distinction's sake, the **RIGHTS OF THINGS**.

Wrongs also, considered as objects of the laws of England, are divisible into **PRIVATE** and **PUBLIC** wrongs. Those wrongs or injuries, in respect of which the law provides for the relief of the party injured by civil action, are termed **PRIVATE WRONGS**, or civil injuries; while those in respect of which the law provides for the punishment of the wrong-doer by indictment, at the prosecution of the crown, are termed **PUBLIC WRONGS**, crimes, or misdemeanors.

RIGHTS OF PERSONS, therefore, are the subject of our first consideration, including the various means of acquiring and losing them.

The *rights* of persons comprise those due *from* as well as those due *to* them, or *rights* and *duties* in the popular acceptation of the terms; and under the term *persons* we include *natural* persons, as a man's own self, and *artificial*, as corporations or bodies politic.

The rights and duties of individuals may be considered either as *absolute* or *relative*. The former class, or *absolute* rights, are such as concern them merely as individuals, independently of any condition with which they may be invested, or relation in which they may be placed with regard to other individuals; *relative* rights are those which belong to them as members of society, and standing in various relations to each other.

The **ABSOLUTE** rights of man, considered merely as a rational free agent, are usually summed up in the term *natural liberty*; which consists properly in a power of acting as one thinks fit, without any restraint, except from the law of nature. But a state of civil society necessarily implies a surrender from its members of part of this natural liberty; and every man, on entering into such society, in consideration of receiving the advantages of mutual commerce and intercourse obliges

himself to conform to those laws which the community has thought fit to establish. The absolute rights of individuals, therefore, considered as members of society (in which point of view only it is our province to consider them), may be included in the terms *civil* and *political liberty*. Civil liberty consists in the subjection of individuals to every human law which does, and their exemption from every such law which does not conduce and contribute to the general welfare. Political liberty is made up of *constitutional* security that laws of public utility, and none other, shall be enacted; and that every individual shall have the full benefit of such laws. Civil and political liberty are blessings which the members of every state, commonwealth, or nation, are entitled to enjoy, as considerations for the sacrifice of their natural liberty, but which are enjoyed in the greatest perfection by the people of this country.

The absolute rights, then, of Englishmen, or, as they are usually called, their *liberties*, which are secured to them by the constitution and laws, may be reduced to these three heads: 1. The right of personal security; 2. The right of personal liberty; and 3. The right of property.

1. The right of *personal security* consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

The laws which assert and protect these rights will be the subject of future discussion, as in other places incidentally, so in particular when we come to treat of their infringement under the heads of private and public wrongs. We shall here merely observe, that the constitution of England is a stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. Not only by *Magna Carta*, but by many subsequent statutes it is expressly enacted, that no man shall forfeit life or member without being brought to answer by due process of law. So also the preservation of a man's health and reputation are provided for by the law, as without these it is impossible to have the perfect enjoyment of any other right.

2. The *personal liberty* of the subject is strictly a natural right, and one that cannot be guarded with too great watchfulness; for if once the magistrate be left to imprison arbitrarily whom he chooses, there will soon be an end of all other rights and privileges. The language of the Great Charter is, "That no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land." If any Englishman is deprived of his personal liberty by the arm of power, or the decree of an illegal court, the 16 Car. I. c. 10 enacts, that he shall, upon demand of his counsel, have a writ of *habeas corpus* to bring his body before the Court of King's Bench or Common Pleas, who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II. c. 2, commonly called the Habeas Corpus act, the methods of obtaining this writ are so plainly pointed out and enforced, that while this statute remains in force, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. Any judge who shall deny a writ of *habeas corpus* forfeits 500*l.* to the party aggrieved; and lest the act should be evaded

by demanding unreasonable bail or sureties, it is declared by 1 W & M. st. 2, c. 2, that unreasonable bail shall not be required.

By these acts, and the judicial regulations founded upon them, the remedy is now complete for removing the injury of illegal confinement. No subject of the realm can be kept in confinement, by any power or under any pretence whatever, if he can find means to convey his case to either of the courts at Westminster, or during vacation to any judge of the same, unless such confinement be pronounced, by the court or judge applied to, to be *legal*.

To make imprisonment lawful, it must be either by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing under the hand and seal of the magistrate, and express the *cause* of commitment, in order to be examined into, if necessary, upon a *habeas corpus*; for if there be no cause expressed, the gaoler is not bound to detain the prisoner. Circumstances may sometimes arise which render it necessary, for the safety of the state, to *suspend* the Habeas Corpus act for a limited time; but the legislature only can authorize the executive power to imprison suspected persons *without assigning any cause*.

The crown may, by its prerogative, prevent any person going abroad by issuing the writ *ne exeat regno*, as this may be sometimes for the safety of the state; but it cannot *send* any subject out of the kingdom *against his will*, excepting sailors and soldiers, the nature of whose employment necessarily implies an exception. A man cannot even be constituted lord lieutenant of Ireland, nor made a foreign ambassador, against his consent.

3. The third absolute right of Englishmen is that of *property*, which consists in the free use, enjoyment, and disposal of one's acquisitions, without control or diminution, save only by the laws of the land. So great is the regard of the law for private property, that it will not authorize the least violation of it. In instances where the property of an individual is necessary to be obtained for the accommodation of the public, as in the case of enlarging or turning highways &c., all that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power indulged with caution, and which none but the legislature, or those acting under its immediate direction, can perform. No subject can be constrained to pay any aids or taxes, even for the defence of the realm or the support of the government, but such as are imposed by his own consent or that of his representatives in parliament. By many statutes, and lastly by the Bill of Rights, 1 W. & M. st. 2, c. 1, it is declared, that levying money for or to the use of the crown by pretence of prerogative, without grant of parliament, or for longer time or in other manner than the same is granted, is illegal.

It is unnecessary to pursue this subject any farther in this place, as the protection afforded by the law to these rights will more clearly appear in those parts of the work which treat of the wrongs that injure or detract from them.

It would be in vain, however, that these rights were declared and asserted by the mere letter of the law, if the constitution had provided

no means for securing their actual enjoyment. There are, therefore, certain other auxiliary and subordinate privileges of the subject, which may be termed his *political rights* or *liberties*, to enable him to maintain the three principal rights of personal security, personal liberty, and private property. These are—

1. The constitution, powers, and privileges of parliament.
2. The limitation of the crown's prerogative by bounds so certain and notorious that it is impossible it should either be mistaken or exceeded, without the consent of the people.
3. The independence of the judiciary power, with the right of every Englishman of applying to the courts of justice for redress of injuries.
4. The right of petitioning the crown or either house of parliament for the redress of grievances, in cases of any uncommon injury or infringement of the rights before mentioned, which the ordinary course of law is too defective to redress. This right appertains to every individual; and the only restrictions placed upon it, while they are intended to promote the spirit of peace, are no check upon that of liberty, care only being taken lest, under pretence of petitioning, riot and tumult ensue, as at the opening of parliament in 1640. The 13 Car. II. st. 1, c. 5, therefore provides, that no petition to the king or either house of parliament, for alteration in matters of church or state, shall be signed by more than twenty persons, unless the matter thereof be approved by three justices or the major part of the grand jury in the country, or in London by the lord mayor, aldermen, and common council; nor shall any petition be presented by more than ten persons at a time. Under these regulations the subject has a right to petition; and commitments or prosecutions for such petitioning are illegal.

Thus far of the *absolute* rights of persons, considering them merely as individuals, without reference to any condition or relation in which they may be placed. Their *relative* rights and duties, or those which belong to them as standing in various relations to each other, embrace a much wider and more extensive field, and are either of a *public* or *private* nature. The most universal *public* relation is that of government. We shall therefore first consider the rights and duties of individuals with reference to their political condition or relation, as governors and governed, or magistrates and people; and afterwards with regard to the more *private* relations of society, as masters and servants, husbands and wives, parents and children, guardians and wards, executors, administrators, trustees, &c., and a variety of others, each of which will form a subject for separate consideration.

CHAPTER I.

Of the Parliament.

THE origin, and even the derivation of the name, of *parliament* are quite uncertain.

1. *How and when assembled.*—Parliament is summoned by the queen's writ or letter issued out of chancery by advice of the privy council, at least forty days before it begins to sit¹ (extended to fifty days by uniform practice since the Union); and without the queen's authority it cannot meet.² But when the parliament is sitting, and a vacancy occurs in the representation of any particular place, the speaker, and not the chancellor, issues his writ for filling it up.³

In case of the demise of the crown between the dissolution of parliament and the day appointed for the assembling of a new one, the last preceding parliament shall meet and continue for six months, unless sooner prorogued or dissolved by the successor; and in case of the crown's demise on or after the day of the assembling of a new parliament, such new one shall continue to sit, subject to the will of the successor, as above stated.⁴ The queen may also issue her proclamation for the meeting of parliament in fourteen days from the date thereof, notwithstanding a previous adjournment to a longer day.⁵

The crown is bound, *if need be*, to convoke a parliament every year, that is, to allow *some* parliament, not necessarily a new one, to meet thus often for the purposes of business.⁶

2. *How constituted.*—The parliament consists of the queen's majesty; the lords spiritual and temporal, who form the House of Lords; and the commons, or representatives of the people, styled the House of Commons. Unless at their coming together the queen, as their head, meets them, either in person or by her commissioners, there can be no beginning of a parliament. So also the queen alone has authority to dissolve it. This constitution forms a balance of power and of interest in the state; each of the three estates being able to check any encroachment upon their order by either of the other two, and to propose such laws as are adapted to their peculiar benefit. Yet the power of the crown consists rather in the liberty of rejecting than resolving or proposing any matter, as the crown cannot of itself begin any alteration in the established law, but may approve or disapprove of the alterations proposed by the other two branches of the legislature.

Of the QUEEN'S majesty we shall have occasion to treat further hereafter.

THE HOUSE OF LORDS consists of the lords spiritual and temporal.

The Lords Spiritual consist of two archbishops and twenty-four bishops; and, by the act of Union with Ireland,⁷ four Irish lords spi-

¹ 7 & 8 Wm. III. c. 25.

² Chit. jun. Prerog. of Crown, 68.

³ 24 Geo. III. c. 26; Male, 21—23.

⁴ 7 & 8 Wm. III. c. 15; 6 Ann. c. 7.

⁵ 37 Geo. III. c. 127, and 39 & 40 Geo. III. c. 14.

⁶ 4 Ed. III. c. 14, and 36 Ed. III. c. 10.

⁷ 39 & 40 Geo. III. c. 67.

ritual are added. Though the lords spiritual are in the eye of the law a distinct estate from the lords temporal, yet in practice, to all intents and purposes, they are blended together as one estate.

The Lords Temporal consist of all the peers of the realm,—dukes, marquisses, earls, viscounts, and barons. Some sit by descent, as do all ancient peers; some by creation, as all new-made ones; and others by election, as the sixteen Scotch and twenty-eight Irish peers. The number of peers is indefinite, and may be increased by the crown at any time.

The HOUSE OF COMMONS, speaking *theoretically*, consists of all such men of property in the kingdom as have not seats in the House of Lords, that is to say, every such man is supposed to sit there either by himself or by his representative.

Every member, though chosen by a particular district, when elected, acts for the whole realm; for the end of his coming thither is not particular, but general,—not barely to advantage his particular constituents, but the common weal, and to advise her majesty upon the affairs of church and state; and therefore he is not bound to consult with and take advice of his constituents upon any particular point, unless he himself think it proper so to do.

These are the three estates of parliament; and, to pass any law, the consent of all three is absolutely necessary.

3. *The Laws and Customs relating to Parliament collectively.*—Its powers are sovereign, and its authority uncontrollable, in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal.

Members of either house, to be *qualified*, must be twenty-one years of age.¹ They must also take the oaths of allegiance, supremacy, and abjuration,² except Roman Catholics, for whom another oath is provided by the 10 Geo. IV. c. 7 (the Roman Catholics Relief Act). Quakers may be admitted on their affirmation.³ Formerly, in addition to the aforementioned oaths, members of either house were required to repeat and subscribe the declaration against transubstantiation, the invocation of saints, and the sacrifice of the mass: these forms, however, were abolished by the 10 Geo. IV. c. 7.

Aliens, though naturalized, cannot sit in parliament;⁴ and any one may be adjudged incapable, though created a peer or chosen a member of the House of Commons, upon complaint and proof of any crime.

Inter se, the two houses have this maxim, that every matter which arises concerning either house of parliament in particular ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere. The commons have no power to interfere in set-

¹ This is expressly declared with regard to the House of Commons by statute 7 & 8 Wm. III. c. 25.

² 30 Car. II. st. 3, c. 1. The oath of allegiance was settled according to its present form by 1 Geo. I. st. 2, c. 13; that of supremacy, by 1 W. & M. st. 1, c. 8; and that of abjuration by 6 Geo. III. c. 53. Until the 1 & 2 Wm. IV. c. 9, the oaths of allegiance

and supremacy were required to be taken by members of the House of Commons before the lord steward or his deputy as well as in the body of the house; but now they are taken in the house only.

³ Mr. Pease's case, House of Commons, March, 1833.

⁴ 12 & 13 Wm. III. c. 2.

ting the election of a Scotch peer, nor the Lords in the election of a Burgess. Nor have the subordinate courts power in either case.¹

The *privileges* of parliament are indefinite, lest, it is said, some new case should be devised by the executive, not within the line of privilege, to harass a member or violate the freedom of parliament. The most prominent ones are privilege of speech (which is confined to speeches in the House, for to publish one tending to calumniate any person may be the subject of a suit or indictment²), and privilege of person from arrest; but this does not extend to indictable offences.³ Formerly their servants, lands, and goods were likewise privileged, but that protection is done away with.⁴ By the common law, peers and peeresses of England, and by statute those of Scotland and Ireland, are privileged from arrest.⁵ But by the statutes 12 W. III. c. 3, 2 & 3 Ann. c. 18, 11 Geo. II. c. 24, and 10 Geo. III. c. 50, most of their other ancient personal privileges are abolished; and by the 6 Geo. IV. c. 16, members are liable to the bankrupt laws. It seems, however, a privilege of the House of Commons, in those cases where the arrest of a member is justifiable, to have information of such arrest communicated to them by their speaker.

Having thus noticed the most essential particulars relating to the parliament collectively, it remains to treat of each house separately.

HOUSE OF LORDS.

The House of Lords has a right to be attended by the judges, queen's counsel, masters in chancery, the secretary of state, and attorney and solicitor-general. A peer may give his vote by proxy under licence from the queen, which is always presumed; and he may enter his protest against any vote by leave of the house.⁶ All bills affecting the peerage must, by custom, take their rise in the House of Lords, and suffer no alteration in the Commons.

Peers are *created* either by writ or patent. The creation by writ, or the queen's letter, is a summons to attend the House of Peers by the style and title of the barony which the crown is pleased to confer; that by patent is a royal grant to the subject of any dignity and degree of peerage, as baron or viscount.

When a peer of the realm is newly created, he is introduced into the House of Peers by two lords of the same rank in their robes, Garter king at arms going before, and his lordship presents his writ of summons &c. to the lord chancellor, which being read and the oaths being taken, he is conducted to his place. Lords by descent are introduced with the same ceremony, the presenting of the writ excepted. The mode of election of the sixteen peers of Scotland is regulated by the 6 Ann. c. 23.

It is the privilege of a peer, independent of his capacity as a member of parliament and hereditary counsellor of the crown, that in all cases of treason and felony and misprision of the same he shall be tried by

¹ 8 T. R. 314; 14 East. 110; 3 Bar. & A. 420; 2 Chit. R. 207; 1 Salk. 505; 2 Ld. Raym. 1114.

² Rex v. Creevy, 1 M. & S. 273; Rex v. Abingdon, 1 Esp. 226; 1 Saund. 133.

³ 1 Chitty's Bla. Com. 167.

⁴ 10 Geo. III. c. 50.

⁵ See 1 Ch. Bla. Com. 165, n. 23, 24.

⁶ Id. 168, n. 28, 29, 30.

his peers; but in misdemeanors, as libels, riots, perjury, and conspiracies, he is tried, like a commoner, by a jury. This privilege, it is said, does not extend to bishops. Peeresses also (whether in their own right or by marriage) are to be tried before the same judicature as peers of the realm. 20 Hen. VI. c. 9. Although a peer or peeress (whether in her own right or by marriage) cannot be arrested in civil cases, yet their goods may be taken in execution. They have also many peculiar privileges annexed to their peerage in the course of judicial proceedings. A peer sitting in judgment does not give his verdict upon oath like a commoner, but upon his honour; he also answers bills in chancery upon his honour, and not upon his oath. But when he is summoned as a witness, either in civil or criminal cases, he must be sworn. In criminal trials, on arraignment he is not required, like other culprits, to hold up his hand. He cannot be outlawed in civil actions, nor his house searched by the sheriff without the authority of the queen's special warrant. He is privileged to sit on the bench in courts of justice, and to give his opinion to the judge. He is exempt from civil offices, but may exercise the power of a justice of peace in any part of the kingdom where he happens to be present.

Besides its legislative functions, the House of Lords has judicial duties. It is a court of justice, constituting the highest tribunal in the country, and one before which the final appeal in any matter is to be tried. We shall have occasion to consider it more fully in this view hereafter.

HOUSE OF COMMONS.

The peculiar laws &c. of the House of Commons relate principally to the raising of taxes and the elections of members.

It is a privilege of this house, that all grants of subsidies or parliamentary aids or taxes begin here, in the same manner as a bill touching the peerage does in the Lords.

With regard to the ELECTIONS of members, we must consider, *first*, Who may be elected; *secondly*, Who are the electors; and *thirdly*, The proceedings at elections.

I. WHO ARE, AND WHO ARE NOT, CAPABLE OF BEING ELECTED MEMBERS OF PARLIAMENT.

No rank is now necessary to qualify a party to sit as member, though formerly otherwise. But county members must have a clear yearly income of 600*l.*, and those for cities and boroughs of 300*l.*, free from all incumbrance; which, before the 1 & 2 Vict. c. 48, was required to arise from real property, but now, by that act, may accrue from either real or personal estate, or from both conjointly; and in which the member must have at least either a life interest (for his own or some other person's life) or an interest for a term of years of which not less than thirteen are unexpired at the time of his election.¹ But the eldest son

¹ Of the nature and particulars of his qualification the member is required to deliver in a statement to the clerk at the table of the House of Commons, at the same time making and subscribing a declaration of its truth, before he can sit or vote, on pain of rendering his election void; and if the same

be untrue in any material particular, he is guilty of a misdemeanor. Every candidate at an election, also, may be called on, at the instance of any other candidate, or of any two duly registered electors, to make a similar declaration. 1 & 2 Vict. c. 48.

of a peer or lord of parliament, or of a Scotch peer, or of a peeress, or of a bishop, or of any person qualified for a knight of the shire, and the members for the universities, do not require such qualification by estate.

Minors, aliens, denizens, naturalized persons, deaf and dumb, idiots and madmen, persons attainted of treason or felony, outlaws, peers (except Irish peers, by the act of union), and the judges, are ineligible; but the master of the rolls, and the judges of the inferior courts, unless restrained by their appointment, are eligible. The attorney-general was not, but now is, eligible. The eldest sons of Scotch peers cannot sit for places in Scotland. No person having been ordained priest or deacon, or being a minister of the church of Scotland, or a Catholic priest, is eligible.

Scotch judges, commissioners of revenue, of the Navy or Victualling office, pensioners of the crown, and several other public officers of that class, are ineligible; but any of these may become eligible by throwing up his appointment or pension. So the acceptance of office under the crown by a member vacates his seat, but he may be re-elected.

Sheriffs of counties, and mayors and bailiffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers; but it would seem that they can sit for any other place.¹

Prisoners in execution for debt do not seem ineligible.² Nor are persons being or going abroad. But bribery disqualifies the guilty party even for subsequent elections.

Some disqualifications are partial, as bankruptcy, by 52 Geo. III. c. 144, or being concerned in any contract with government.

Though formerly otherwise, Roman Catholics may now, by 10 Geo. IV. c. 7, sit as members.

II. WHO ARE THE ELECTORS, OR THE CONSTITUENCY OF THE HOUSE OF COMMONS.

1. *What Aggregate Bodies are entitled to elect.*

The House of Commons consists of 658 members, elected by the several counties, cities, and boroughs of the United Kingdom, and thence respectively styled knights, citizens, and burgesses. The number of members has varied at different periods. At the time of the union with Scotland, however, the number of representatives for England and Wales was 513, and 45 members were then added for Scotland. These numbers continued unchanged (with the addition of 100 members for Ireland at the time of the union with that country) until the passing of the Reform Act, which has somewhat altered the relative proportions for each country, without affecting the total number, which continues, as before, 658. We shall here therefore, consider the alterations effected in the representation by that act.

The chief objects of the Reform Act (2 & 3 Wm. IV. c. 45) were the *disfranchisement* of some places and persons, the *enfranchisement* of others, an *increase of members for counties*, and a *new mode of qualifying voters*, and of *taking votes* at the poll. Some of these alterations commenced immediately after the dissolution of the then existing parliament; others were prospective, depending upon the extinction or abandonment of present interests.

¹ 4 Doug. 87. ² But see *contra*, 1 Ch. Bla. Com. 175. n. 44: Sim. Elec. Law, 33.

Disfranchisement of Places.—By the first section 56 boroughs, named therein and also in Schedule A, were totally disfranchised; 30 other boroughs, enumerated in section 2 and again in Schedule B, were partially disfranchised, being henceforth to send no more than one member each; and Weymouth and Melcombe Regis, formerly returning two members each, now return two members jointly.

Enfranchisement of Places.—The right of returning members thus taken from these boroughs was transferred to other places not before represented. Each of the 22 places named in section 3 and Schedule C, is created a borough, and sends two members. Each of the 20 places named in section 4 and Schedule D, is created a borough, and sends one member. By section 5, the boroughs of New Shoreham, Cricklade, Aylesbury, and East Retford,¹ are further extended, and their extent respectively defined. By section 6, Penryn is made to include the town of Falmouth, and Sandwich to include the parishes of Deal and Walmer, each sending two members as before. By section 7, the extent and boundaries of every city and borough in England sending members to parliament (except the four last mentioned and those in Schedule A) and of each of the forty-two new boroughs named in C and D, are declared to be as settled and described by the Boundaries Act, which is to be taken as part of this act. Merthyr Tydvil (Schedule D) is a new borough in Wales; Swansea and the four other towns named in section 10, including the places assigned to each by the Boundaries Act, form one borough, and return one member; but no person shall, from any right accruing in these towns, vote for Cardiff. Each of the eleven shire-towns of Wales named in Schedule E is enlarged by the addition of the places named in the first column of that schedule; and those places and shire-towns, and also the borough of Brecon, are to be as settled and described by the Boundaries Act.

Increase of County Members.—Each of the three ridings of Yorkshire has two members, elected as if the ridings were separate counties; the courts for the elections to be held at the cities of York, Wakefield, and Beverley. There are two members for the parts of Lindsey, and two for Kesteven and Holland in Lincolnshire, elected as if they were separate counties, at courts held at Lincoln and Sleaford. Each of the 25 counties named in Schedule F is divided into two divisions (section 14), each division returning two members, to be elected as if each division was a separate county. Each of the seven counties named in Schedule F 2, returns three members; each of the counties of Carmarthen, Denbigh, and Glamorgan, two; and the Isle of Wight, separated from Hampshire, is to be deemed a county, and to return one member, at a court held at Newport.

Thirteen cities and towns, being counties of themselves, named in Schedule G, are included in the several counties mentioned in conjunction with them in the same schedule.

Thus, 112 members were taken from the boroughs in Schedule A, 30 from those in Schedule B, and 2 from Weymouth and Melcombe Regis, making altogether 144. The counties in England have had

¹ As to these, see 11 Geo. III. c. 55; 22 Geo. III. c. 31; 44 Geo. III. c. 60; and 1 Wm. IV. c. 74.

6 added to their former number; the new boroughs in England have 63; three counties in Wales have 8 additional members, and two new boroughs there have 2,—in all 131. The remaining 13 were given to Scotland and Ireland, *viz.* 8 to the former, and 5 to the latter country. The present state of the representation, therefore, is as follows:—

ENGLAND—471.	
41 Counties (including the Isle of Wight, which for this purpose is deemed a county of itself) return 144 knights of shires, <i>viz.</i>	
1 (Yorkshire) consisting of 3 divisions, 2 for each division	6
26 Counties consisting of 2 divisions, 2 for each	104
7 Counties, 3 each	21
6 Counties, 2 each	12
1 (Isle of Wight)	1
	144
24 Cities return 50 members, <i>viz.</i>	
1 (London)	4
23 Cities, 2 each	46
	50
163 Boroughs return 273 members, <i>viz.</i>	
110 Boroughs, 2 each	220
53 Boroughs, 1 each	53
	273
2 Universities (Cambridge and Oxford), return 2 each	4
230 ———	471
WALES—29.	
12 Counties return 15 knights of the shires, <i>viz.</i>	
3 Counties, 2 each	6
9 Counties, 1 each	9
	15
14 Boroughs, and Districts of Boroughs, 1 member each	14
26 ———	29
SCOTLAND—53.	
30 Counties and Districts of Counties, <i>viz.</i>	
27 Counties, 1 each	27
3 Districts of Counties, each district returning 1 member	3
	30
21 Cities, Burghs and Towns, and Districts of Burghs and Towns—	
2 (Edinburgh and Glasgow) return 2 members each	4
5 (Aberdeen, Paisley, Dundee, Greenock, Perth) 1 each	5
14 Districts of Burghs and Towns, each returning 1	14
	23
51 ———	53
IRELAND—105.	
64 Counties, 1 each	64
39 Cities and Boroughs, 1 each	39
1 University (Trinity College, Dublin)	2
104 ———	105
411 Places.	Members 658

2. *Persons who cannot be Electors.*

Females, minors, idiots and lunatics, and aliens. Denizens are not disqualified from voting, though they cannot sit in the house; so also of persons naturalized.

British peers, ministers of state, lords lieutenant of counties.

Persons convicted of perjury and bribery, or subornation of perjury.

Felons convicted and under sentence of punishment.

Persons excommunicated in the ecclesiastical courts.

Outlaws in criminal proceedings, but not in civil.

Bankrupts uncertificated, and insolvents, as they have no property.

Receivers of alms within a limited time before the election, generally a year, though in particular cases this period is extended, either by act of parliament (as in London by the 11 Geo. I. c. 11, a determination of the House of Commons, or special usage.

Persons having received parochial relief within a year, in cities and boroughs. 2 Wm. IV. c. 45, § 36.

Commissioners and officers employed in the excise, customs, stamp duties, or assessed taxes; the postmaster general and other persons employed in the Post Office; and the captain, master, or mate of any vessel employed in conveying the mail, are all of them disqualified during the time of holding any such office, and for twelve months afterwards, under penalty of 100*l*. But commissioners of land tax and persons employed by them are not disqualified, being specially excepted by the act (22 Geo. III. c. 21), as are also those holding freehold offices by letters patent.

Justices, receivers, and all other persons belonging to the London police, are excluded from the franchise in the counties of Middlesex, Surrey, Hertford, Essex, and Kent, and from Westminster, Southwark, and the new boroughs in the Metropolitan districts.

Counsel and all agents of candidates at election, for fee or reward, are excluded from voting at the same, but not from being registered.

3. The Qualifications of Electors.

Electors for Counties.—Before the passing of the Reform Act, the right of voting for knights of the shire was confined to persons having freehold lands or tenements within the county of the value of 40*s*. by the year above reprises.¹ That act, however, while it extended the elective franchise to other descriptions of property, has somewhat restricted this class of voters. The qualification remains as before so far as relates to freeholds of *inheritance*, which, if of the clear annual value of 40*s*., still confer the right of voting, when duly registered according to that act. But as to *freeholds for life*, it is enacted by § 18, that no person shall vote in the election of a knight of the shire, or of a member to serve in parliament for any city or town being a county of itself, in respect of any freehold for life or lives of a less annual value than *ten pounds*, unless he be in the actual *occupation* of the same, or unless it have come to him by marriage, marriage settlement, devise, or promotion to a benefice or office; saving, however, the rights of all persons then seised of freeholds for life, so long as they continue so seised, if they had or might have had a right of voting in respect thereof before the passing of that act, and are registered.

As the estate must have been freehold both in respect of tenure and interest, *copyholders* were formerly excluded both by common law and statute.² Now, however, by § 19 of the Reform Act, persons seised at law or in equity of lands or tenements of copyhold or any other tenure whatever, except freehold, of the annual value of *ten pounds*, for life or lives, or any larger estate, are entitled to vote in the election of knights of the shire for the county in which the lands are situate. Under this qualification are included customary freeholders or tenants by copy of court roll, by the verge or tenant right, tenants in ancient demesne, charter tenants, &c., also equitable copyholders, as heirs, devisees, &c., according to the custom of the manor, before admission.

The *original lessee* or assignee of a term originally created for not

¹ 8 Hen. VI. c. 7; 10 Hen. VI. c. 2; c. 24; 14 Geo. III. c. 58; 20 Geo. III. & 8 Wm. III. c. 7, § 3, 24; 10 Anne, c. 17; 53 Geo. III. c. 49.
² 23, § 3; 18 Geo. II. c. 18, § 1; 3 Geo. III. c. 31 Geo. III. c. 14.

less than *sixty* years in lands or tenements of the clear yearly value of *ten* pounds above all rents and charges, or of a term originally created for not less than *twenty* years in lands or tenements of the clear yearly value of *fifty* pounds, whether in the occupation thereof or not; and the *sublessee* or *assignee* of an *underlease* of either of the before-mentioned terms, *if in the occupation thereof*; and any person *occupying* as tenant any lands for which he is *bonâ fide* liable to a yearly rent of not less than *fifty* pounds, are each of them entitled to vote for knights of the shire for the county in which the lands &c. are situate.¹

But, as to *property situated in cities and boroughs*, no person can vote in the election of county members, as a *copyholder*, *leaseholder*, or *tenant*, in respect of any house, warehouse, counting-house, shop, or other building, or any land occupied therewith, in any city or borough, which (either separately or jointly with the land occupied therewith) is of sufficient value to confer the right of voting for such city or borough; nor can any person vote as a *freeholder* of any such, *if occupied by himself*, whether in either case the right to vote for such city or borough has been actually acquired or not.²

And, whatever be the qualification, in order that a party may be entitled to vote, he must be *registered*, that is, his name must be entered on the Register of Voters; and, unless the property came to him by descent, succession, marriage, marriage settlement, devise, or promotion to a benefice or office, he must have been a certain time in *possession* thereof, or in the receipt of the rents and profits for his own use (so that trustees, and mortgagees not in possession, are excluded),³ before he can be registered, namely, if claiming as a freeholder or copyholder for six months, and if as a leaseholder or occupying tenant for twelve months, previous to the last day of July in the year of registration.⁴

In county votes, it is not necessary that the party should have been rated, or have paid rates or taxes; nor is it now necessary that the property should in any case be assessed to the land tax.⁵

Electors for Cities and Boroughs.—The Reform Act has not taken away the old right of voters in scot and lot and corporation boroughs, but it has conferred a new qualification upon all *occupiers* of houses or buildings, either as owners or tenants, of the clear annual value (whether alone or with land) of not less than *ten* pounds. This is the *only* qualification in all the *new* boroughs, with the exception of Swansea, in which freemen also are entitled to vote. The party must have *occupied* the premises for twelve months previous to the 31st July,⁶

¹ 2 & 3 Wm. IV. c. 45, § 20. The lands &c. in respect of which an occupying tenant of 50*l.* claims to vote need not be the *same*, but may be different lands and tenements occupied in immediate succession. And *joint* occupying tenants are each entitled to vote, if the amount of rent be such as, divided by the number of tenants, would give 50*l.* for each.—6 & 7 Vic. c. 18, § 73.

² 2 & 3 Wm. IV. c. 45, § 24, 25.

³ As to the right of *trustees* and *mortgagees* to vote, much difficulty formerly prevailed in the construction of the Reform Act; but the 6 & 7 Vic. c. 18, § 74, declares and enacts, that no mortgagees of lands or tenements shall vote, unless in the actual possession or receipt of the rents

and profits; but the mortgagor in actual possession or in receipt of the rents and profits may vote, notwithstanding such mortgage. And that no trustee shall have a right to vote; but the cestuique trust in actual possession or in receipt of the rents and profits, though he may receive the same through the hands of the trustee, may vote, notwithstanding such trust.

⁴ 2 & 3 W. IV. c. 45, § 26. ⁵ *Ibid.* § 22.

⁶ Occupation of the *same* premises for the whole time is not necessary; it may be different premises occupied in immediate succession. And *joint* occupiers are each entitled, where the premises are of such value as, divided by the number of occupiers, would give 10*l.* for each.—2 & 3 Wm. IV. c. 45.

have been rated during that time to all rates made for the relief of the poor,¹ have *paid* on or before the 20th July all the poor's rates and assessed taxes payable previous to the 6th April preceding, and have *resided* for six calendar months previous to the last day of July, within the city or borough, or within seven miles thereof.

Another class of voters for cities and boroughs are *freemen*, members of a corporation. This right was formerly acquired by birth, servitude, marriage, or election; and *admission* in due form at any time before the election was sufficient till the 3 Geo. III., which requires admission twelve months previous to the election (except entitled by birth, marriage, or servitude); but *residence* was not in any case necessary. Now, however, by the Reform Act (§ 23) no burgess or freeman, or freeman and liveryman of the city of London, can be registered, unless he were qualified on the last day of July, in such manner as would then entitle him to vote if such were the day of election, nor unless he has *resided* six calendar months within the borough, or within seven miles of the place where the poll is taken. And no burgess or freeman admitted since the 1st of March, 1831, otherwise than in respect of *birth* or *servitude*, can hereafter be entitled. And no person can be entitled in respect of *birth*, unless his right be originally derived from some person who was admitted or was entitled to be admitted before the said 1st of March, or from some person who since that time shall have become a freeman in respect of servitude. All non-resident freemen, therefore, are disfranchised; and this franchise cannot now be conferred by election, or by marriage with the daughter or widow of a freeman.

Freeholders or *burgage tenants* form another class of voters in cities and towns being counties of themselves. They must have been in actual possession, or in receipt of the rents and profits for their own use *twelve* months previous to the last day of July (except it came by descent, marriage, devise, or promotion to a benefice or office), and must have *resided* six months within such city or town, or within seven miles thereof. Freehold or burgage tenements within the new boundaries confer the right in the same manner as those within the former limits. But no person can be entitled to vote for any city or borough other than a city or town being a county of itself, in respect of any burgage tenement or freehold acquired since the 1st of March, 1831, unless it came to him since that day and previous to the passing of the act (7th June, 1832) by descent, succession, marriage, marriage settlement, devise, or promotion to a benefice or office.

Other freeholders, who vote in respect of a freehold of the clear yearly value of 40s. in such cities and towns, are put upon the same footing as freehold electors for counties at large, and are not required to have more than six months' possession.

¹ No misnomer or inaccurate description, in a rate, of the person occupying, or of the premises occupied, shall prevent such occupier from being registered and entitled to vote, if, being the person liable, he shall have been called upon to pay, and shall have paid the poor rates during the time required in respect of such premises.—6 & 7 Vic. c. 18, § 75.

Where occupiers are not rated, they may

claim to be rated; and, upon claim made, and payment or tender of the rates due, their names are to be put on the rate-book, and they shall be deemed rated from the time of the rate made. But where the landlord is liable by any act of parliament for payment of the rates, such claim on the part of the tenant will not exonerate him from his liability, in case the tenant makes default.—2 & 3 Wm. IV. c. 45, § 30.

It would occupy too much space to enumerate all the various modifications of the elective franchise prevailing in cities and boroughs. Almost every one of them had rights of voting peculiar to itself, established by act of parliament, charter, usage, the last determination of election committees, or by common law.

4. Registration of Voters.

The names and qualifications of all voters are required to be registered before they can exercise their privilege. This system of registration was introduced by the Reform Act, but the provisions of that act on the subject have been repealed, and others substituted by the 6 & 7 Vic. c. 18.

1. First, As to the registry of county voters :—

On or before the 10th of June in every year, the clerk of the peace of each county delivers his precept to the overseers of the poor of every parish therein, with the requisite forms and notices,¹ and a copy of such part of the existing register of voters as relates to their respective parishes.

On or before the 20th of June, the overseers are to publish a notice,¹ requiring persons entitled to vote in respect of property situate in their parish, and whose names are not already on the register, or who, being on the register, do not retain the same qualification or continue in the same place of abode, to give or send in to them before the 20th of July a notice of their claim to vote.¹ Any person whose name is already on the register need not make a fresh claim while he retains the same qualification and place of abode as are there described, although he may do so if he think fit. This notice of the overseers is to be published by affixing a copy signed by them, on or near the outer doors of every church and chapel in the parish, including dissenters' chapels, or if there be no church or chapel then in some public or conspicuous situation, and keeping the same so affixed during a period including two Sundays at least.

On or before the last day of July the overseers are to make out an alphabetical list of all persons who have sent in their claims; and where they have any reason to believe that any person so claiming, or any person whose name is on the register, is not entitled to be registered, they are to add the word "Objected" in the margin, and the word "Dead" before the name of any person whom they have reason to believe to be dead. They are to cause a sufficient number of such list of claimants, and of the said copy of the register, to be written or printed, and to sign and publish the same on or before the 1st of August, and keep copies thereof for inspection without fee between the hours of ten and four of every day except Sunday during fourteen days, and also for sale.

Any person whose name is in the register may object to the insertion of any other person's name, by giving a notice on or before the 25th of August, to the overseers,¹ and to the person objected to,¹ and, if the latter do not reside in the parish, a duplicate notice to his tenant in possession.

On the 1st of September, the overseers are to make out and publish a list of all persons so objected to, and keep copies thereof for inspection during fourteen days, and also for sale, as before directed with respect to the list of claimants.

And on or before the 29th of August they are to deliver the copy of the register, the list of claimants, and the list of persons objected to, respectively signed by them, to the clerk of the peace, that he may make out an abstract of the number of persons objected to in each parish, and transmit the same to the revising barrister when he shall be appointed, in order that he may fix the times and places for holding courts for the revision of the lists.

2. The proceedings as to the registration of voters for cities and boroughs are similar to those above detailed with regard to county electors. The town clerk issues his precept to the overseers of the several parishes on or before the 10th of June; who are required, on or before the 20th of June, to publish a notice, that no person will be entitled to be registered in respect of the occupation of premises of 10*l*. yearly value unless he shall have paid on or before the 20th of July all rates and taxes due on the 6th of April preceding. But no person is required to send in his claim to vote, as in the case of county voters, at this stage of the proceedings; the duty of inserting in the list of voters the names of all persons entitled devolving upon the overseers, who have the rate-books for their guidance, and are at liberty to inspect the tax assessments. They are accordingly required, on or before the last day of July, to make out two lists,—one including all voters in right of the occupation of premises of 10*l*. yearly value, and the other of all persons entitled by virtue of any other right, except freemen; which lists are to be published and kept for inspection and sale, in the same manner as is directed with regard to

¹ Forms of all the Notices &c. are given in the Schedule to the Act 6 & 7 Vic. c. 18.

the county lists. The list of freemen is made out by the town clerk, and published by being affixed on the town hall, &c. In London the lists of the liverymen are furnished to the returning officers by the clerks of the several companies. Persons whose names are omitted from the lists, and those who have objections to make against persons whose names are inserted, may then send in their notices of claim or of objection to the overseers or town clerk respectively, at any time on or before the 25th of August. Lists of such claimants, and of persons objected to, are then to be published, at the same time and manner as in the case of county lists.

Revising Barristers.—In order to correct the registers, and decide on the validity of claims and objections, one or more revising barristers are appointed to revise the lists of each county, and of every city and borough therein. They are appointed yearly by the senior judge of assize when on the summer circuit, except those for the county of Middlesex and the metropolitan cities and boroughs, who are appointed by the lord chief justice of the Court of Queen's Bench. No member of parliament, or person holding any place of profit under the crown, is eligible for this office; and no such barrister can serve in parliament for any place for which he is thus appointed for eighteen months afterwards.

The barristers thus appointed make circuits and hold open courts, for the purpose of revising the registers, between the 15th of September and the last day of October; and when two or more are appointed for any county, they may sit separately, either at the same time and place, or at different times and places, as they may deem most expedient. The lists are laid before them by the clerk of the peace and the town clerks respectively, who, as well as the overseers, must attend and answer all questions on oath. They are then to correct mistakes in the register; to insert the names of all persons who shall be proved to their satisfaction to have been entitled on the preceding 31st of July, and whose claims have been made in due time; and to expunge the names of persons objected to, where the objection shall be made good, and also those of persons deceased.

Parties cannot appear or be attended by counsel at these courts.

In cases of groundless or frivolous and vexatious claims or objections, the revising barrister may order costs not exceeding 20s.

An appeal against the revising barrister's decision on any point of law may be had to the Court of Common Pleas, upon a statement, drawn up by the barrister immediately after his decision, at the instance of the party aggrieved, of the facts proved in evidence, with his decision upon the whole case as well as on the point of law in question, after the manner of a special case to the Queen's Bench upon a decision of a court of quarter sessions; and where several claims or objections depend upon the same point of law, the appeals may be consolidated, and any agreement of the parties as to the expenses thereof may be made a rule of court.

The registers, when thus revised, are signed by the revising barrister, and transmitted to the clerk of the peace, or to the town clerk of cities or boroughs, and by them to the returning officer, and continue in force from November to November.

III. PROCEEDINGS AT ELECTIONS.

When a new parliament is summoned, the lord chancellor sends his warrant to the clerk of the crown in chancery, who thereupon issues out writs to the sheriff of every county for the election of all the mem-

bers to serve for that county, and for every city and borough therein. But after the parliament is assembled, and during its continuance, the House of Commons alone has, by its speaker, the right of issuing the writs to fill up vacancies.

On the receipt of the writ, the sheriff sends his precept under his seal to the returning officers of the cities and boroughs in his jurisdiction, who are to proceed to election within eight days after the receipt of the writ or precept, giving three clear days notice at least, exclusive both of the day of proclamation and the day appointed for the election.¹

But the elections of knights of the shire must be proceeded to by the sheriffs themselves in person. By 25 Geo. III. c. 84, the sheriff, having indorsed on the back of the writ the day on which he receives it, shall, within two days after, cause proclamation to be made at the place where the election ought by law to be held, of a special county court to be there held for the purpose of such election only, on any day (Sunday excepted) not later from the day of making such proclamation than the sixteenth day, nor sooner than the tenth.

One day at least before the election, all soldiers (except those entitled to vote, soldiers in garrison, and the guards at Westminster or Southwark or on duty at a royal residence) are to remove to a distance of at least two miles from the place of election.

No lord of parliament, lord lieutenant of a county, or any person disqualified from voting, is in any manner to interfere in an election. And if any officer of the customs, excise, stamps, or certain other branches of the revenue, presume to intermeddle in any election, by persuading any voter or dissuading him, he forfeits 100*l.*, and is disabled from afterwards holding any office.

No candidate shall, after the date (usually called the *teste*) of the writ, or after the vacancy, give any money or entertainment to the electors, or promise to give any, either to particular persons or to the place in general, on pain of being incapable to serve for that place in that parliament. And if any money, gift, office, employment, or reward be given or promised to any voter at any time in order to influence him to give or withhold his vote, as well he that takes as he that offers such bribe forfeits 500*l.*, and is for ever disabled from voting, or holding any office in any corporation, unless before conviction he discovers some other offender of the same kind, and then he is indemnified. 7 & 8 W. III. c. 4.²

¹ 3 & 4 Vic. c. 81.

² The 5 & 6 Vic. c. 102, § 20 (reciting that a practice had prevailed in certain places of making payments to voters on behalf of candidates in such manner that doubts were entertained whether the same was bribery) declares and enacts, that the payment or gift of any money or valuable consideration to any voter, or other person on his behalf either before, during, or after any election, on account of such voter having voted or refrained from voting, or being about to vote or refrain from voting, whether under the name of head money or any other name, and whether in compliance with any usage or practice or not, shall be deemed bribery. And the same act (§ 22), reciting that the 7 & 8 Wm. III. c. 25, had been found insufficient to prevent corrupt treating, enacts,

that if any candidate shall, by himself, or by or with any person, or in any manner, directly or indirectly, give or provide, or cause or knowingly allow to be given or provided, wholly or partly at his expence, or pay, wholly or in part, any expences incurred for any meat, drink, entertainment, or provisions to or for any person, at any time, either before, during or after the election, for the purpose of corruptly influencing such person or any other person to give or refrain from giving his vote, or for the purpose of corruptly rewarding such person or any other person for having given or refrained from giving his vote at such election, he shall be incapable of being elected or sitting in parliament for that county, city, or borough, during the parliament for which such election shall be holden.

As treating of voters is regarded as bribery, and therefore illegal, no action can be maintained by an innkeeper against a candidate for the price of provisions &c. furnished to voters at his request.¹

If an estate be conveyed to a party to qualify him as a voter or candidate, with a secret condition for its re-conveyance, such condition cannot be enforced, and the party is entitled to retain such estate.²

On the day of election, the sheriff or other returning officer must first take an oath against bribery, and for the due execution of his office, and then read or cause to be read the Bribery Act. The candidates likewise, if required, must swear to their qualification. If a candidate, upon the request of two electors, or of another candidate, either at the time of election, or at any time prior to the return of the writ, refuse to swear to his qualification (unless rendered unnecessary by any of the exceptions in the statute), his election would be void. 1 & 2 Vict. c. 48.

If no more candidates are nominated than the number of representatives to be chosen, the returning officer has no authority to open a poll, but must return those nominated as duly elected. If more are proposed than the number to be returned, and a poll be *duly* demanded (either by a candidate or an elector), he has no power to refuse; and if he refuse, the election is void. When a poll is once granted, the sheriff must proceed with it, though the party who demanded it afterwards waive it; but if, after demand, no votes are tendered within a reasonable time, he may return according to the view taken at the nomination.

By the Reform Act (§ 62, 67), the polling at every contested election for counties is to commence at nine o'clock in the forenoon of the next day but two after the day fixed for the election (unless it be Saturday or Sunday, and then on the Monday following), and continue for two successive days, seven hours on the first, and eight on the second day, upon which it is to be closed not later than four in the afternoon. But in cities and boroughs, by the 5 & 6 Wm. IV. c. 36, the polling is to commence at eight o'clock in the forenoon of the day next following, and continue during such *one day only*, and not be kept open later than four o'clock. If the day following be Sunday, then the poll is to be taken on the Monday; if Good Friday, on the Saturday; and if Christmas Day, on the day following, not being Sunday.

By the Reform Act and Boundaries Act (c. 64) each county is divided into districts, and a convenient place appointed in each district for taking the poll.³ Polling booths are to be erected at each polling-place,⁴ the expence of which is to be borne by the candidates jointly, who may contract for their erection if they think proper; if not, the sheriff is to erect them, and charge the candidates not exceeding 40*l.* for each polling-place in counties, and 25*l.* in cities or boroughs. Or the sheriff may hire houses &c., instead of erecting booths, if he think proper. The returning officer may appoint deputies to preside at each

¹ Ribbins v. Bickett, 1 Barn. & A. 264.

² See Cases in Chit. Eq. Index, 304.

³ The number of polling-places in any county may be increased by order of the privy council, upon a petition to that effect from the quarter sessions; in which case the justices at sessions are to divide the county into convenient polling districts. 6 & 7 Wm. IV. c. 102.

⁴ In county elections the sheriff is to erect as many booths as shall allow one for every 450 electors. 6 & 7 Wm. IV. c. 102. In cities or boroughs not more than 300 electors are to be allowed to each booth; or, on the requisition of any candidate, or of his proposer or seconder, and paying the expences thereof, not more than 100. 5 & 6 Wm. IV. c. 36.

polling-place, and poll clerks: the former to have two guineas, and the latter one guinea a day, at the expence of the candidates. If any person be proposed as a candidate without his consent, the person nominating him is liable to his share of the expence. No nomination can be made or election holden for any city or borough in any church, chapel, or other place of public worship.

At the time of polling, every person whose name is on the register is entitled to vote, but only at the booth erected for the particular parish, district, &c. The returning officer cannot scrutinize any vote further than by asking the voter (on oath, if he thinks proper) whether he is the person whose name is on the register, and whether he has or has not already voted. And the 5 & 6 Wm. IV. c. 46, provides that no elector shall be required at any election to take the oaths of allegiance, abjuration, or supremacy.

Any person whose name has been omitted from the register in consequence of the decision of the revising barister may tender his vote, and the returning officer or his deputy must enter all such votes upon the poll book, distinguishing them from the votes admitted. But these votes can be of no avail, except the election be afterwards controverted on a petition to the House of Commons, where only the correctness of the register can be impeached.

At the close of each day's poll the clerks deliver their books, inclosed and sealed, to the returning officer or his deputy; and at the final close the deputies deliver them to the returning officer; who is, the next day but one (except it be a Sunday, and then on the Monday) to cast up the votes, declare the state of the poll, and proclaim the members chosen not later than two o'clock; or he may proceed to make the return immediately after the poll is closed.

In case of riot, either at the nomination of candidates or the taking the polls, the sheriff or returning officer may adjourn the proceedings till the following day. 5 & 6 Wm. IV. c. 36.

If there be an equality of votes, or the returning officer is doubtful whether the candidate having the majority is not disqualified, he must make a double return; in which case the parties returned are not entitled to sit till the return has been decided on by a parliamentary committee.

Votes given to a candidate disqualified by perjury, bribery, &c., after notice to the electors of such disqualification, are absolutely void; and if, on summing up, the striking out of these bad votes turns the number in favour of another candidate, he becomes duly elected, and no new election is necessary. If, however, the number still remains in favour of the disqualified candidate, as he cannot sit, a new election is necessary. So it is, if the returning officer expresses a doubt of such candidate being disqualified, or votes for him.

The returning officer in boroughs returns his precept to the sheriff with the person elected; and the sheriff returns the whole, together with the writ for the county, and the knights elected, to the clerk of the crown before the day of meeting, if it be a new parliament, or within fourteen days after the election, if it be an occasional vacancy; and this under a penalty of 500*l*. If the sheriff do not return such knights only as are duly elected, he forfeits 100*l*.; and the returning

¹ After the declaration of the poll, the Clerk of the Crown in Chancery.—6 & 7 Vic. c. 18, § 93.

officer in boroughs, for a like false return, 40*l.*; and they are, besides, liable to an action by the candidate aggrieved, who may within twelve months, or within six months after a decision of the House of Commons upon the subject, bring the same, and recover double damages with full costs. 9 Geo. IV. c. 22, § 66. But the members returned are the sitting members, until the House of Commons, upon petition, adjudge the return to be illegal. Any person bribing the returning officer forfeits 300*l.*

A member once duly chosen cannot relinquish his seat, nor be discharged from it, but by operation of law. If a person is elected for two places, which sometimes happens at a general election, he may choose for which he will serve, and a new writ issues for the other. But having once taken his seat, he cannot resign in order to be elected for another place. It is therefore usual, when a member wishes to retire, to obtain an appointment to the stewardship of the Chiltern Hundreds, or of the manor of East Hendres,—places of no profit, but which, being appointments under the crown, enable members to vacate their seats.

Mode of passing Acts of Parliament.—The two houses of parliament meet principally to make laws, the method being very similar in either house. Each house has a speaker. The speaker of the Lords (commonly called the *prolocutor*) is the Lord Chancellor: the speaker of the Commons is chosen by the house, and approved by the queen. In each house the majority decide; but in the commons the speaker has, in case of an equality of votes, a casting vote. Forty members at least are required to be present to form a house; and if that number be not present, the house may be adjourned.

Acts of parliament, as before noticed, are either private or public. For a private bill, a petition is presented, stating the grievance, &c.; which is usually referred to a committee; and if their report be favourable, leave is given to introduce the bill. For a public bill, a member moves at once for leave to introduce it; it is read a first and second time, and referred to a committee, which on important bills is one of the whole house, then read a third time and passed; after which it goes up to the Lords, is passed there, and finally receives the royal assent and becomes law. If the Lords make any amendments, the bill is sent back to the Commons; if the latter disagree thereto, a conference follows of members deputed by each house; if both remain inflexible, the bill drops, and the subject cannot be again introduced in that session. The same forms are followed, *mutatis mutandis*, when the bill begins with the Lords. The royal assent is given either in person or by commissioners of the House of Lords. The act is then placed among the records of the kingdom, and forms part of the law of the land.

Adjournment, prorogation, and dissolution.—Parliaments are, 1st, *adjourned* from day to day, or for a week or month, as at Christmas and Easter—this is the act of each house; 2. *prorogued* from one session to another—this is by the queen, or her commissioners; and 3. *dissolved*, or put an end to—this is by the queen's act; by the demise of the crown, or by efflux of time, which is now at the end of seven years, if not sooner dissolved by either of the other modes.

CHAPTER II.

Of the King or Queen, and the Royal Family.

THE supreme executive power is vested in the crown, whether it be possessed by a king or a queen.

The title to the crown is properly hereditary, that is, it descends to the next heir on the death of the last possessor. It is not so *jure divino*, as has sometimes been urged, but by the constitution of the country. The mode of succession to the crown in England is nearly the same as that to landed estates, though it may be limited or defeated by act of parliament; but after such limitation it still retains the same hereditary quality.

The DUTIES of the crown, as comprised in the coronation oath, are, to govern according to the laws; to cause justice in mercy to be executed; and to maintain and uphold the laws of God, the protestant religion, and the privileges of the church.

The PREROGATIVES of the crown consist in that special pre-eminence which the sovereign hath over and above all other persons, and out of the ordinary course of the common law, in right of the regal dignity.

Prerogatives are *direct* or *incidental*. The former are subdivided into those concerning—1. The *character* or *dignity*, 2. The *authority*, and 3. The *revenues* of the crown.

1. *The dignity of the crown.*—The attributes of this are sovereignty or pre-eminence. The king, or queen, is superior to all, and amenable to none. “The king can do no wrong,” is an axiom of the constitution; by which is meant, not absolutely that his actions are unimpeachable, but that he is not personally responsible. It is another axiom, that “the king never dies;” that is, king Edward, George, or William, may die, but the crown survives them all in the person of the successor.

2. *The authority of the crown.*—In this consists the whole executive branch of the government of the kingdom, her majesty being the chief magistrate, and all others her delegates. She is the representative of her people in all intercourse with foreign nations, and as such sends and receives ambassadors, &c., makes treaties and alliances, declares war and peace, and, as incident thereto, issues letters of marque and reprisal, and grants passports.

With regard to domestic affairs, the crown is regarded in a variety of characters. First, her majesty is a constituent part of the supreme legislative power, having power to reject or approve all bills. She has the sole power of raising and regulating all the military and naval forces of the kingdom; though the supplies for supporting them can only be granted by parliament. She erects garrisons, and has the government of all castles and forts; appoints all ports and havens, wharfs and quays; and erects light-houses. To this branch of the prerogative may also be referred the power of prohibiting the exportation of arms and ammunition, and of restraining her subjects from leaving the kingdom by the writ of *ne exeat regno*.

The crown is the fountain of justice and general conservator of the peace in the kingdom, and alone has the power of erecting courts of justice, one portion of which judicial authority is delegated to and exercised through the various judges and subordinate magistrates. All criminal offences are said to be committed against her majesty, so that she is nominally the prosecutor in all such cases, and has incidentally the power of pardoning all offences. She also issues all proclamations, which are a sort of *edicts* enforcing and modifying the execution of existing laws.

The crown is the fountain of all titles of honour or dignity, offices, and privileges; can grant place or precedence to private persons, convert aliens into denizens, and erect corporations by letters patent.

The crown also has the general superintendence of commerce and its laws; may establish public markets and fairs, and regulate weights and measures, and has power to declare what metals and coins &c. shall constitute the currency of the realm, and their value, and has the right of coining the same.

Lastly, her majesty is head of the church; and by virtue of this she convenes, prorogues, regulates, and restrains all ecclesiastical synods or convocations, has the right of nominating bishops, and of appointing to certain other preferments; and to her lies the final appeal in all ecclesiastical causes.

We have hitherto been speaking of a **QUEEN REGENT OR REGNANT**, who has, as we have said, all the powers and capacities of a king; and, if married, her husband is her subject. It remains to speak of queens consort and dowager.

A **QUEEN CONSORT** derives her title by marriage with a king of England. In ordinary cases, as we shall see hereafter, a married woman has very little power or separate existence in legal signification; but a queen consort is, in the eye of the law, distinct from her husband, and has all the qualities which the law attaches to a feme sole, or single woman. She has many exemptions and minute prerogatives; she pays no toll, nor is liable to be amerced; she is, nevertheless, a subject, and not an equal of the king; and has a separate establishment and revenue. By the stat. 25 Edw. III. it is declared treason to compass or imagine the death of the queen, or to violate her person. She is, if accused of any species of treason, entitled to be tried by the peers of parliament, as in the case of Queen Caroline.

A **QUEEN DOWAGER**, or the widow of a king, enjoys most of the privileges of a queen consort. But no man can marry her without special licence from the crown, on pain of forfeiting his lands and goods. Sir Edward Coke says, that this was enacted in the 6th Henry VI.; but the statute is not in print, and cannot be found. Blackstone states, that a queen dowager, when married again to a subject, does not lose her regal dignity, as peeresses dowager do their peerage when they marry commoners.

The eldest son, or heir apparent to the crown, (who is usually made Prince of Wales by special creation and investiture), and his wife, and the princess royal, that is, the eldest daughter, are also protected by law as to life and person in the same manner as we have mentioned respecting a queen consort; and the younger children and grandchildren are regarded in law above other subjects.

CHAPTER III.

Of the Privy Council.

THE COUNCILS of the crown consist of—1. The parliament, as we have already seen; 2. The peers of the realm, who are liable to be called on, and by birthright are entitled to an audience, in order to give their advice in any case of need or emergency (and this may form the basis of their several privileges, as freedom from arrest, &c.); 3. The judges, who are its counsellors in legal matters; and 4. The privy councillors, who form the principal council of the crown.

Privy councillors are made by the nomination of the crown, without either patent or grant. Their number is indefinite; but those only attend who are specially summoned for the particular occasion upon which their assistance at the council is required.

The *cabinet council* is distinct from the privy council, and is not *per se* a recognized branch of the constitution. It consists usually of those ministers of state who for the time being are more immediately honoured with the confidence of the sovereign, and are summoned to consult on the executive authority. Their existence depends solely on the pleasure of the crown, each receiving a particular summons for every attendance. These are the really efficient and responsible advisers of the crown.

To be *qualified*, privy and cabinet councillors must be natural-born subjects; and persons born abroad, unless of English parents, cannot be capable even by act of naturalization.

Their *duties*, according to their oath of office, are, to give their best advice for the honour and public good of the crown, without bias, and with secrecy; to avoid corruption (an attempt to bribe them is an indictable offence¹); to uphold that which is resolved, and withstand all opponents thereto; and to do and keep all that a good councillor ought to do.

The court of privy council is of great antiquity. The government of England was originally by the king and privy council; though at present they only intermeddle in matters of complaint on sudden emergencies, their constant business being to consult for the public good in affairs of state. Acts of the privy council continued of great authority until the reigns of Charles I. and II.; and by them were controversies sometimes determined touching lands and rights, as well as the suspension of penal statutes. But their authority in that respect was never considered consonant with law, and was formally abolished by statute.

The crown, with advice of the privy council, publishes proclamations which are binding on the subject; but they must be consonant with and in execution of the laws of the land.

The power of the privy council is to inquire into all offences against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law. But their jurisdiction

¹ 4 Burr. 2494; and Com. Dig. tit. Roy, E. 2.

herein is only to inquire, and not to punish; and the persons committed by them are entitled to their *habeas corpus* by the 16 Car. I. c. 10, as much as if committed by an ordinary justice of the peace. And by the same statute the Court of Star Chamber and the Court of Requests, both of which consisted of privy councillors, were dissolved; and it was declared illegal for them to take cognizance of any matter of property belonging to the subjects of this kingdom. But in plantation or admiralty causes, which arise out of the jurisdiction of the kingdom, and in matters of lunacy or idiotcy (being a special flower of the prerogative), although they may eventually involve questions of extensive property, the privy council continues to have cognizance, being the court of appeal in such cases; or rather, the appeal lies to the queen's majesty herself in council. Whenever also a question arises between two colonies or dependencies of the crown, as concerning the extent of their charter, and the like, the queen in her council exercises *original* jurisdiction therein, upon the principles of feudal sovereignty. So likewise when any person claims an island or a province in the nature of a feudal principality by grant from the crown, the determination of that right belongs to her majesty in council, as was the case of the Earl of Darby with regard to the Isle of Man in the reign of Queen Elizabeth, and the Earl of Cadogan and others as the representatives of the Duke of Montague with relation to the island of St. Vincent in 1764. But from all the dominions of the crown, excepting Great Britain and Ireland, an *appellate* jurisdiction in the last resort is vested in this tribunal, which exercises its judicial authority in a committee (formerly of the whole privy council), who hear the allegations and proofs, and make their report to her majesty in council, by whom the judgment is finally given.

The *judicial* business of the privy council has been considerably increased, and its constitution as a court of appeal improved, by recent enactments.¹ The 3 & 4 Wm. IV. c. 41 (after reciting that by the 2 & 3 Wm. IV. c. 92, the powers of the High Court of Delegates, both in ecclesiastical and maritime causes, had been transferred to his majesty in council; that, by letters patent under the great seal, certain members of the privy council, together with the barons and judges of the superior courts at Westminster, had been from time to time appointed His Majesty's Commissioners for hearing and determining Appeals in Prize Cases; that an appeal lies to his majesty in council from the decisions of various courts of judicature in the East Indies and other dominions of his majesty abroad; that appeals to his majesty in council had been usually heard before a committee of the whole privy council, and it was expedient to make provisions for the more effectually hearing and reporting on appeals and other matters, enacts, "That the President of the Council, the Lord Chancellor, and such of the privy council as shall be Lord Keeper or First Lord Commissioner of the Great Seal, Lord Chief Justice or Judge of the Court of King's Bench, Master of the Rolls, Vice Chancellor, Lord Chief Justice of the Court of Common Pleas, Lord Chief Baron or Baron of the Court of Exchequer, Judge of the Prerogative Court of

¹ For a further extension of the powers of the Judicial Committee of the Privy Council, see 7 & 8 Vic. c. 69, and 8 & 9 Vic. c. 30.

Canterbury, Judge of the Court of Admiralty, and Chief Judge of the Court in Bankruptcy, and also all members of the privy council who shall have been President thereof or have held the office of Lord Chancellor, or any of the other offices before mentioned, shall form a committee, to be styled 'The Judicial Committee of the Privy Council;' and his majesty may from time to time, by his sign manual, appoint any two other privy councillors to be members of such committee. And all appeals or applications in prize suits and in all other suits in the Admiralty or Vice Admiralty Courts, or in any other court in America or other his majesty's dominions abroad, which before might be made to the High Court of Admiralty in England, or to the Lords Commissioners in Prize Cases, shall be made to his majesty in council, and as such appeals might before have been made to the said Court of Admiralty or to the Lords Commissioners in Prize Cases; and that all appeals, or complaints in the nature of appeals, which may be brought before his majesty or his majesty in council, and appeals then pending and unheard, shall be referred by his majesty to such Judicial Committee, and shall be heard, and the report or recommendation be made in open court; and his majesty may refer to this committee for hearing or consideration any other matters whatsoever." But no matter can be heard, or order or report made but in the presence of at least four members, and by a majority. Her majesty in council, on the recommendation of the committee, on any appeal, may remit the subject matter thereof to the court below to be reheard; and the committee may direct an issue to try any fact in a court of common law, either at bar, before a judge of assize, or at the sittings for trials of issues in London or Middlesex, and either by a special or common jury. The committee may examine witnesses on oath by word of mouth (and either before or after examination by deposition); and the powers of the 13 Geo. III. c. 63, and 1 Wm. IV. c. 22, for the examination of witnesses by commission, are extended to it. The committee may direct depositions to be taken before the registrar, and may refer any matters to be examined and reported on by him, in the same manner as matters are referred by the Court of Chancery to a master; and for these purposes the same powers are given to him as are possessed by a master or examiner of the Court of Chancery or of any court ecclesiastical. Writs of subpoena for the attendance of witnesses and production of deeds &c. are to be issued by the President of the Privy Council in like form, and with the same penalties, as from the Court of Queen's Bench. Costs in the prosecution of appeals, and of issues directed by the committee, are to be paid as the commissioners direct. Orders and decrees are to be enrolled; and the committee have the same power of punishing contempts and compelling appearances, and her majesty in council the same powers of enforcing judgments, decrees, and orders, as the Court of Chancery or Court of Queen's Bench (both *in personam* and *in rem*), or as are given to any court ecclesiastical by the 2 & 3 Wm. IV. c. 93.

The *privileges* of privy councillors, as such, besides their honorary precedence, consists principally in the security which the law has given them against attempts and conspiracies to destroy their lives. By the 3 Hen. VII. c. 14, if any of the king's household conspire or imagine to

take away the life of a privy councillor, it is felony, though nothing be done upon it. This extends only to the queen's menial servants. But the 9 Ann. c. 15 enacts, that *any person* who shall unlawfully attempt to kill, or unlawfully assault, strike, or wound any privy councillor in the execution of his office, shall be a felon without benefit of clergy.

The *dissolution* of the privy council is entirely at the queen's pleasure. By the common law it was dissolved *ipso facto* by the demise of the crown; but now, by the 6 Anne, c. 7, it continues till six months after, unless sooner determined by the successor.

CHAPTER IV.

Of the Revenue of the Crown.

THE constitution has vested in the crown a revenue, in order to support its dignity and power. It is either *ordinary*, that is, inherent in the crown, or *extraordinary*. That portion of the revenue devoted to the support of the queen and her personal establishment and dignity is called the *civil list*; the rest, being rather the revenue of the public, is appropriated to the public service.

The *ordinary* revenue has for the most part, by lapse of time and the altered state of things, or the express relinquishment of its possessors, long ceased to be of any actual value. In this class was comprised the *custody of the temporalities* of bishops, that is, all the lay revenues, lands, and tenements (in which is included his barony) belonging to the archbishop's or bishop's fee; and these, upon the vacancy of the bishopric, are immediately the right of the crown, which has the custody and an absolute right to the intermediate profits till a successor is appointed. This, however, can scarcely be called a source of profit in the present day, as the new bishop receives the restitution of his temporalities quite entire. The crown is entitled to a *corody*, that is, to send a chaplain to be maintained by the bishop and to receive a pension till he is promoted by him to a benefice; this, however, is now disused. The crown has a right to the *tithes of extra-parochial places*, but under an implied trust that they will be disbursed for the general good of the clergy. So also to *first-fruits* and *tenths*, the one being the first year's profits of a spiritual preferment, the other a tenth part of the annual profits of the same. These were first claimed by the Pope in the reign of king John, and afterwards in the time of Henry VIII. annexed to the crown (but with certain exemptions) by 26 Hen. VIII. c. 3, and 1 Eliz. c. 4; at length they were applied by Queen Anne to the augmentation of poor livings (2 Ann. c. 11), and called Queen Anne's Bounty. The crown is entitled also to the *rents and profits of the demesne lands*, which, though formerly extensive, have been almost entirely granted away to private subjects. So to the *profits of military tenures*, which have been mostly abolished. Also to the rights of *purveyance* and *pre-emption*, that is, buying up provisions for the use of the household at a certain settled price; but this is now abolished, and an hereditary tax substituted. So to *reine licences*; but this was abolished

by 30 Geo. II. c. 19, and a sum of 7000*l.* per annum instead was settled on the crown out of the stamp duties. So to the profits of *royal forests*, now out of date. Again, it had the *profits of the ordinary courts of justice*; but these having been mostly granted away, return but little to the crown. Next, the crown is entitled to *royal fish*, that is, to certain parts of the whale and to sturgeons caught near or cast on our coast. Also to *ships wrecked* on the coast, wherein nothing living escapes; for, to constitute a wreck, this is necessary, as also that the goods should be cast ashore (which distinguishes *wreck* from either *jetsam*, *flotsam*, or *ligan*—three old and barbarous appellations; the first signifying things cast into the sea, and remaining there; the second, things floating on the surface; and the third, things sunk but marked by a buoy in order to be reclaimed). Wrecks are rendered by this definition very rare; and the owner may, moreover, assert his claim at any time within a year and a day. To prevent an old disgraceful and brutal practice, very severe laws are enacted against the plundering of wrecks, or contributing to damage a vessel; and persons contributing to the saving of the goods or vessel, in cases of wreck, are entitled to *salvage*.¹ All *mines* in England of *gold and silver* were part of the revenue; but this was put an end to by 1 W. & M. st. 1. c. 33, and 5 W. & M. c. 6. *Treasure trove* still belongs to the crown; and secreting such is punished by fine and imprisonment. Goods stolen and thrown away by the thief in his flight, called *waifs*, belong to the crown; but the goods of a foreign merchant are not (for the benefit of trade) so considered. *Estrays*, that is, animals wandering without an owner, after proclamation and non-claim for a year and a day, belong to the crown. Another branch of revenue is the forfeiture of lands or goods for certain offences, the particulars of which will be mentioned hereafter.

The forfeiture called *deodand*, or of any personal chattel which had been the immediate occasion of the death of any reasonable creature, was also originally vested in the crown, though it seems to have been generally granted out to lords of manors. This has been abolished by the 9 & 10 Vic. c. 62, from 1st September, 1846. *Escheats*, that is, where by a defect of heirs there is no one to inherit, belong to the crown, as the original proprietor of all lands. And lastly, the *custody of idiots* supplied a part of the revenue of the crown.

Extraordinary Revenue.—From the falling off of the ordinary revenue, it became necessary to raise a revenue by other means, whence it is termed *extraordinary*. This is done by aids, subsidies, and supplies voted by the House of Commons, who, when they have voted a supply to her majesty, and settled the quantum of it, usually resolve themselves into what is called a *committee of ways and means*, to consider how it is to be raised.

The chief sources of the public revenue at present are the land tax, the post office, the customs and excise, stamps, assessed taxes, licences for hackney coaches, post horses, hawkers and pedlars, &c. &c.; for the management and collection of which several duties the laws and regulations are so numerous and important, that a separate and detailed consideration of each is indispensable.

¹ See 9 & 10 Vic. c. 99, by which the laws relating to Wreck and Salvage are consolidated and amended.

LAND TAX.

The land tax originated in those monthly assessments which were imposed in the time of the commonwealth, and were occasionally levied in the reign of Charles II. It has been assessed without intermission since the time of William III. It was at first intended as a rate on every species of income or property, and with that view was laid on personal estates as well as real: the profits of public offices and pensions, indeed, are still chargeable; and other personal estates were only relieved from it by an act of the 3 & 4 Wm. IV. The tax was formerly voted annually, and is so still as far as regards personal estates; but the charge on land was made perpetual by the 38 Geo. III. c. 60, for the purpose of being redeemed. The amount of the tax was then estimated at £2,037,527. 9s., of which £47,954. 1s. 2d. was the portion raised in Scotland, being an assessment of 4s. in the pound on a valuation made in the year 1692.

The plan for the *redemption* of the land tax was brought forward at a time when the public funds were exceedingly depressed; and the government of that day hoped, by enabling persons to discharge their estates from all future assessments of the land tax on payment of certain proportionate sums, to be able to pay off a considerable portion of the national debt. The tax was made subject to redemption either by the owner of the land, or, on failure of redemption by him within a certain period, by any other person: in the one case the land is actually exonerated from the tax, and in the other the tax remains chargeable on the land, but becomes payable to the person purchasing; the first is, therefore, properly, *redemption*; the latter, *purchase*. The sums paid for such redemption or purchase are laid out in stock, the purchase money being in all cases so regulated by the price of the funds as to produce an interest 1-11th part more than the amount of the land-tax redeemed or purchased. The plan, however, does not appear to have answered the expectations formed of it; for, five years after the passing of the act,¹ no more than £19,180,587 of the public debt had been redeemed by it, and that amount has not been since much increased.

The method of levying this tax is by charging a particular sum on each county, according to the valuation made in 1692, which is assessed and raised on individuals by commissioners appointed by act of parliament, and who must have been assessed to the tax at the rate of 100l. at least a year before. A receiver-general is appointed for each county by the crown, and the commissioners appoint assessors, collectors, clerks, and other subordinate officers. They also sign the assessment, and warrant to collect it. Parties considering themselves aggrieved may appeal, but to the commissioners alone whose decision is final.

¹ This act has been amended by several subsequent acts, viz. the 42 Geo. III. c. 116, 45 Geo. III. c. 77, 46 Geo. III. c. 133, 49 Geo. III. c. 67, by which more effectual provisions have been made for carrying the measure into effect, and powers

given to corporations, tenants in tail, &c. to sell part of their estates for the purpose of exonerating the remainder from the tax. By the 46 Geo. III. c. 133, small livings and the lands of charitable institutions may be exonerated *gratis*.

The collectors have power to demand the sums assessed of the parties on the premises; and they may levy a distress on refusal to pay, without any further warrant than that of their appointment; and may break open doors in the day time, and chests wherein any goods or effects are secreted. The tax may be levied on wood lands by cutting timber; and the collector may seize tithes, tolls, and other annual profits. The sums due from the last quarterly payment may be levied at any time during the current quarter; but the collector is bound in that case to allow a reasonable time before distress.¹ Tenants having paid the tax may deduct it out of their rent.

The provisions of the 57 Geo. III. c. 93, relating to the costs of distresses under 20*l.* are extended to distresses for the land tax, by the 7 & 8 Geo. IV. c. 17.

POST OFFICE.

The acts relating to the regulation of the Post Office were very numerous, but a consolidation of them was effected in the year 1837 by the 1 Vict. cc. 32 to 36. The first act repealed all former acts on the subject; the second, c. 33, provides for the management of the Post Office, granting the exclusive privilege of conveying letters to the postmaster general, his deputies and agents; cc. 34 & 35 regulated the duties of postage and the franking of letters (but these have since been superseded by the 3 & 4 Vict. c. 96); and the last, c. 36, relates to offences against the Post Office, and the judicial administration of the Post-Office laws.

EXCLUSIVE PRIVILEGE OF THE POST OFFICE.—By 1 Vict. c. 33 it is enacted, that wheresoever, within the United Kingdom and other her majesty's dominions, posts or post communications are established, the postmaster-general shall have the exclusive privilege of conveying from one place to another all letters, except in the following cases:—

Exceptions from the Exclusive Privilege of the Post Office.

Letters sent by a private friend in his way, journey, or travel, so as such letters be delivered by such friend to the party to whom they are directed;

Letters sent by a messenger on purpose, concerning the private affairs of the sender or receiver;

Commissions or returns thereof, and affidavits and writs, process or proceedings, or returns thereof, issuing out of a court of justice;

Letters sent out of the United Kingdom by a private vessel (not being a packet boat);

Letters of merchants, owners of vessels of merchandize, or the cargo or loading therein, sent by such vessels of merchandize, or by any person employed by such owners for the carriage of such letters, according to their respective directions, and delivered to the respective persons to whom they shall be directed, without paying or receiving hire or reward, advantage or profit, for the same in anywise;

Letters concerning goods or merchandize sent by common known carriers, to be delivered with the goods which such letters concern, without hire or reward or other profit or advantage for receiving or delivering such letters.

But nothing herein is to authorize any person to make a collection of such excepted letters. And the following persons are *expressly forbidden* to carry a letter, or to receive or collect or deliver a letter, although without hire or reward:—

Special Prohibitions.

Common known carriers, their servants or agents, (except a letter concerning goods in their carts or waggons or on their pack-horses); and owners, drivers, or guards of stage coaches;

¹ Gibbs v. Stead, 8 B. & Cres. 528.

Owners, master or commanders of ships, vessels, steam boats, passage or packet boats, passing coastwise or otherwise between ports or places within Great Britain or Ireland, or between, to, or from a port or ports within her majesty's dominions or territories out of the United Kingdom, or their servants or agents, except in respect of merchants, owners of ships, or goods on board.

Passengers or other persons on board any such ships, vessels, steam boat, passage or packet boat ;

The owners of, or sailors, watermen, or others on board of a ship, vessel, steam boat or other boat or barge passing or repassing on a river or navigable canal within the United Kingdom or other her majesty's dominions.

And by 1 Vict. c. 36, § 1, not only all persons concerned in conveying letters (not exempt from the Post Office privilege) otherwise than by the post, but the *senders* thereof, are liable to a penalty of 5*l.* for every letter so conveyed, and of 100*l.* for every week during which the practice is continued. The penalty is incurred whether the letter be sent singly or with any thing else; and the *onus* lies on the party prosecuted to prove that the act was done in conformity to the Post Office laws.

POSTAGE DUTIES.—By the introduction of what has been termed “The Uniform Penny Postage,” (which first received the sanction of the legislature in the year 1839 by the passing of the 2 & 3 Vict.c. 52, which was brought into gradual operation by successive warrants of the Treasury, and has been confirmed and rendered permanent by the 3 & 4 Vict. c. 96) the whole system of postage duties has been entirely re-modelled. Increased facilities are afforded to the public for the reception and transmission of letters; the mode of charging “double, treble, &c.” postage according to the number of inclosures is altered to one by which the postage is ascertained by weight; the privilege of franking is abolished; and, to facilitate the dispatch of business, adhesive stamps, and stamped envelopes, for the pre-payment of letters, are issued by the Stamp Office, which may be obtained at any post office in the United Kingdom.

Scale of Weight.—All letters transmitted by post, whether inland, foreign, or colonial, and whether by packet or private ship, are charged by weight according to the following scale, without reference to the number of pieces of paper of which they consist, or the number of inclosures they contain:—

If not exceeding half an ounce in weight . . . *One* Rate of Postage.

If exceeding $\frac{1}{2}$ oz. and not exceeding 1 oz. in weight . . . *Two* Rates.

“ “ 1 oz. “ “ 2 oz. “ . . . *Four* Rates.

“ “ 2 oz. “ “ 3 oz. “ . . . *Six* Rates.

“ “ 3 oz. “ “ 4 oz. “ . . . *Eight* Rates.

And so on, charging for every ounce above four ounces *two* additional rates, and the same for any fraction of an ounce.

Inland Letters.—The *single* uniform rate of postage on all letters passing between one part of the United Kingdom and another (including the Channel Islands and the Isle of Man), whether by the General or the London District or any other local post, and without reference to the distance they may be conveyed, is *one penny* if prepaid or stamped, and *twopence* if unpaid. When, therefore, exceeding half an ounce in weight, they become liable to the progressive rates of the above scale, the charge is 2*d.* an ounce for paid, and 4*d.* an ounce for unpaid letters, and the same for any fraction of an ounce.

In the case of letters being insufficiently stamped, double the amount of such insufficiency is chargeable on their delivery.

Letters re-directed and again forwarded by post are charged from

the place of re-direction to the place of ultimate delivery at the rate of prepaid letters, whether the original postage was prepaid or not.

No letter exceeding sixteen ounces can be sent by the post between places in the United Kingdom; but this limitation of weight does not extend to letters to or from places beyond sea. The following also are farther exceptions: 1. Petitions and addresses to her majesty; 2. Petitions to either House of Parliament; 3. Printed votes and proceedings of parliament; 4. Letters to or from the public offices; 5. Deeds, when sent in covers open at the ends; and 6. Bankers parcels from London, if delivered at the office in St. Martin's-le-Grand. With these exceptions, all packets above the weight of sixteen ounces are immediately forwarded to the Dead Letter Office.

The 3 & 4 Vict. c. 96 directs, that no letter shall be sent by the post containing any explosive or other dangerous material or substance.

Registration of Letters.—Letters may be registered, in order to secure their safe delivery, on payment of a fee of one shilling in addition to the postage; which registration fee must always be paid in money. A printed acknowledgment, stamped with the office stamp, is given to the person registering a letter; and the person to whom the letter is addressed is required, on its delivery, to acknowledge its receipt in writing. This system of registration furnishes a secure mode of transmitting bank notes, bills, drafts, &c.

In the case of foreign, colonial, or ship letters, the registration does not extend beyond the port of dispatch in the United Kingdom. But letters addressed to France, and letters passing through France, are an exception to this rule; as the French government undertake to provide for the security of registered letters until they shall be delivered if addressed to any place in France, or *so long as they remain in the French territory* if passing through France. For this purpose, besides the English registration fee of one shilling, and the English rate of postage to France, double the French rate to the place of destination must be paid.

Money Orders.—Persons having occasion to send small sums of money by the post may avoid risk by sending them through the Money Order Office. The commission charged is 3*d.* for any sum not exceeding 2*l.*, and 6*d.* for sums exceeding 2*l.* and not exceeding 5*l.* They may be obtained at every post-town, upon any other post-town.

Foreign and colonial letters, are subject to progressive additional rates according to the same scale of weight as inland letters, but are without limitation as to weight. When sent by private ship, they are called *ship letters*.

Letters to or from any of the British colonies, when sent by packet, are charged 1*s.* the single rate; if from one colony to another, through the United Kingdom, 2*s.*

Letters between the United Kingdom and foreign countries by packet-boat vary according to their destination. They are for the most part required to be paid in advance; and if posted or delivered at any other place than the port of the ship's arrival or departure, they are, in general, subject to an inland postage of 2*d.* the single rate in addition to the packet postage.

If stamps are used for the pre-payment of letters addressed to places

out of the United Kingdom, care should be taken that they are to the proper amount. For when insufficiently stamped, they will, if addressed to places to which pre-payment is not compulsory, be charged on delivery as though no stamp had been affixed, and, if addressed to places to which pre-payment is compulsory, they will not be forwarded, but returned to the senders through the Dead Letter Office. This regulation applies also to printed votes and proceedings of parliament, and to newspapers.

Ship Letters.—Letters between the United Kingdom and places beyond the seas when conveyed by *private* ships (that is, by vessels not being packet-boats), in whatever part of the United Kingdom they may be posted or delivered, are charged *eight-pence* the single rate, or *1s. 4d.* the ounce; those between places beyond seas through the United Kingdom, *1s. 4d.* the single rate, or *2s. 8d.* the ounce.

Exemptions from Ship-Letter Postage.—The owners, charterers, or consignees of vessels inward-bound, and the owners, consignees, or shippers of goods on board vessels inward-bound, are entitled to have their letters by such vessels free from postage if delivered at the port of arrival—if elsewhere, they are subject to the same duties as prepaid inland letters, provided the letters brought by any one vessel to any one such person shall not collectively exceed six ounces in weight (except in the case of letters brought by vessels coming from Ceylon, the Mauritius, the East Indies, or the Cape of Good Hope, for an owner, charterer, or consignee of the vessel, in which case they may be collectively twenty ounces in weight), and the owner, charterer, or consignee shall be described as such on the address and superscription, and, in the case of owners, shippers, or consignees of goods, it shall also appear by the ship's manifest that they have goods on board the vessel. The persons hereby exempted are entitled to have their letters coming within the above conditions before the master delivers the other letters in his charge to the Post Office.

If any person, with intent to evade the postage, falsely superscribe a letter as being the owner or the charterer or the consignee of a vessel conveying the same, or as the owner or the shipper or the consignee of goods shipped in such vessel, he shall forfeit *10l.* for every such offence.

Regulations as to Ship Letters.—Masters of vessels, not being post-office packets, are allowed by the post office *2s. 6d.* per 100 for letters and newspapers conveyed between places within the United Kingdom; and masters of vessels outward-bound to the East Indies are allowed *1d.* for every letter, and *3d.* for every newspaper. In all other cases the uniform sum of *2d.* is allowed for each letter, whether outward or inward; the letter to be delivered at the first port.

The master of every vessel inward-bound must cause all letters on board (except those belonging to the owners of the vessel or of goods on board, not exceeding the prescribed weights) to be inclosed in a bag or envelope, sealed up, and addressed to any of her majesty's postmasters in Great Britain or Ireland, that they may be in readiness to be sent on shore by his own boat, or by the pilot boat, or by any other safe and convenient means, and delivered at the first regular post office which can be communicated with; and the master shall sign a declaration, in the presence of the person authorized by the postmaster general at such port, that he has delivered every letter bag, package, or parcel of letters that were on board, except such as are exempted by law. And no collector, comptroller, or officer of the customs shall permit such vessel to report until such declaration be made and produced; and no vessel shall be permitted to break bulk, or to make entry in any port of the British dominions, until all letters on board be delivered to the post office where posts are established, and from whence such letters may be dispatched by post, except such letters, commissions, and other matters as are exempted, and also except letters brought by a vessel liable to the performance of quarantine, which shall be delivered to the persons appointed to superintend the quarantine, that proper precautions may be taken before delivery thereof. And the principal officer of customs at every port shall search every vessel for letters on board contrary to the Post Office acts, and may seize all such, and forward them to the nearest post office; and the officer so seizing and sending them shall be entitled to a moiety of the penalties recovered. And in case an officer of the customs shall find a letter superscribed as the letter of an owner or charterer, or consignee or shipper, exceeding the weight limited, then he shall seize so many of the letters as shall reduce the remainder within the proper weight, and take the same to the nearest post office; and the postmaster of the place shall pay him such sum as is allowed by the postmaster-general, with consent of the Treasury, (not exceeding *2s. 6d.*) for every letter so seized.

Every master of an outward-bound vessel refusing to take a post letter-bag delivered to him by any officer of the post office, is liable to a forfeiture of 200*l.*; and every master of a vessel who shall refuse or neglect to make the declaration of having delivered his ship's letters to the post office is liable to forfeit 50*l.* Every collector &c. permitting vessels to report before the above requisites have been complied with is also liable to forfeit 50*l.*

Any master of a vessel inward-bound, or any of the officers or crew, or any passenger, who shall knowingly have in his possession a letter, not exempted from the privilege of the Post Office, after the master shall have sent any part of his letters to the post office, shall forfeit 5*l.* for every letter; and every person who shall detain any such letter after demand made by an officer of customs, or by a person authorized by the postmaster-general to demand ship's letters, shall forfeit 10*l.* for every letter. Whether the letter be in the baggage or on the person of the offender, or otherwise in his custody, it shall be held to be in his possession.

Parliamentary Proceedings.—Printed votes and proceedings of parliament are forwarded by post between places in the United Kingdom, or sent to any of the colonies by packet boat (but not through France, nor to the East Indies by the Mediterranean packet boats *viâ* Syria or Egypt), and the printed votes and proceedings of colonial legislatures are brought to the United Kingdom by packet boat, at the rate of *one penny* for every four ounces. If forwarded by private ships, the charge is 2*d.* for the same weight.

Newspapers, &c.—Newspapers by the post from one town to another within the United Kingdom, are delivered *free*. But if addressed to a person within the limits of a district post, and passing only by that post, they pay 1*d.* each. So also when they go between places in the United Kingdom by private ships, they are charged 1*d.* each.

Newspapers printed in the United Kingdom are sent to the colonies, and newspapers printed in the colonies are brought to the United Kingdom, by the regular packet boats, *free*; but if by private ships, they are charged 1*d.* each.

Newspapers may be sent from one British colony to another *viâ* the United Kingdom by her majesty's packets, free of postage; but they pay 1*d.* when sent by private ships.

British newspapers sent to any foreign part, or foreign newspapers brought to the United Kingdom, whether by packet boats or private ships, are charged 2*d.* each. But where British newspapers are allowed to pass by post in a foreign country free, British newspapers addressed to such foreign country are transmitted, and newspapers printed in that country are brought by packet boats *free*, and by private ships for 1*d.* each.

Newspapers, and printed votes and proceedings of parliament, forwarded by post, must be sent without a cover, or in a cover open at the sides, without any paper or thing inclosed, and without any words or communication printed on the paper after its publication, or any writing or mark upon it or upon the cover, except the name and address of the person to whom it is sent; and in case any of these conditions be not fulfilled, such paper &c. will be liable to treble the duty of letter postage.

Newspapers intended to be sent either to the British colonies or to foreign parts must be put into the post within seven days after the day on which they were published; and foreign newspapers must be printed in the language of the country from which they have been forwarded. On failure of either of these provisions, they will be charged as letters.

In case any person to whom a printed newspaper brought into the United Kingdom is directed shall have removed, it may (provided it has not been opened) be re-directed, and forwarded by post to such person at any other place within the United Kingdom free of charge for such extra conveyance; but if the newspaper has been opened, it shall be charged with the rate of a single letter from the place of re-direction to the place at which it is ultimately delivered.

Soldiers' and Seamen's Letters.—Soldiers and seamen while actually employed in her majesty's service, either at home or abroad, and soldiers while actually employed in the service of the East India Company, may send and receive letters on their own private concerns only, *not exceeding half an ounce in weight*, for 1*d.* each.

The penny must be paid at the time the letter is put into the post office, or, if posted within the United Kingdom, it may be stamped; and on the letters sent by them must be superscribed the name of the writer, his class or description in the vessel, regiment, corps, or detachment, and the officer having the command must sign his name, specifying the name of the vessel, regiment, corps, or detachment.

Letters sent or received by such persons from parts beyond seas without the said postage of 1*d.* being pre-paid, are charged 2*d.*

Soldiers' and sailors' letters when sent or received by private ships are liable to the ship letter gratuities in addition.

They are not liable to any additional postage on re-direction.

The above privilege does not extend to letters liable to any foreign postage; nor to the letters of commissioned or warrant officers, either in the army or navy, or of midshipmen or master's mates of the navy.

Any act by which an improper evasion of postage duties is attempted through the means of this privilege subjects the party offending to the forfeiture of 5*l.*

Petitions and addresses forwarded by post to her majesty are exempt from postage. And members of either house of parliament may receive by the post petitions and addresses to her majesty, and petitions to either house of parliament, not exceeding 32 ounces in weight, exempt from postage, provided they are sent without covers, or in covers open at the ends. If they exceed 32 ounces in weight, they are charged at the same rate as inland letters.

With these exceptions, all privileges whatsoever of sending letters by the post free of postage, or at a reduced rate, have been entirely determined. 3 & 4 Vict. c. 96, § 56.

RECOVERY OF POSTAGE DUTIES.—Duties of postage may be recovered by suit, action, or information in any of her majesty's courts of record, in the same manner as other revenue duties.

And any sum not exceeding 20*l.* due for postage from any person in her majesty's dominions, or from any person employed in the Post Office, or from the sureties of any such, may be recovered, under the warrant of a justice of the peace, by distress and sale of the goods of the person indebted; which warrant the justice is required to grant after having summoned the party before him, and on due proof that the sum is owing. The warrant is to be executed by a constable or other peace officer, who, for the purpose of taking such distress, may break open in the day-time any house or place where any goods of the

party may be. And if no sufficient distress can be had, the justice may commit the person indebted to prison until the debt and all charges be paid.

OFFENCES AGAINST THE POST OFFICE.—The Post Office acts contain numerous provisions for the security of letters &c. committed to the Post Office, providing against the misconduct of their own servants as well as of other persons. The following are the most important, from their general application.

Persons employed in conveying Letters &c. misconducting themselves.—The 1 Vict. c. 36 enacts, that every person employed to convey or deliver a post-letter bag or a post letter who shall, whilst so employed, or whilst the same shall be in his care, leave a post-letter bag or a post letter, or suffer any person (not being the guard or person employed for that purpose) to ride in the place appointed for the guard in or upon any carriage used for the conveyance of letters, or to ride in or upon a carriage so used and not licensed to carry passengers, or upon a horse used for the conveyance on horseback of letters; or if any such person shall be guilty of any act of drunkenness, or of carelessness, negligence, or other misconduct, whereby the safety of a post-letter bag or a post letter shall be endangered; or who shall collect or receive, or convey or deliver, a letter otherwise than in the ordinary course of the post; or who shall give any false information of an assault or attempt at robbery upon him; or who shall loiter on the road or passage, or wilfully mis-spend his time, so as to retard or delay the progress or arrival of a letter bag or letter; or who shall not use due care and diligence safely to convey the same at the rate of speed appointed by the regulations of the Post Office, being thereof convicted, shall forfeit 20*l*.

Officers of the Post Office opening or delaying Letters.—Every person employed by or under the Post Office who shall, contrary to his duty, open or procure or suffer to be opened a post letter, or shall wilfully detain or delay, or procure or suffer to be detained or delayed, a post letter, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet. But nothing herein shall extend to the opening or detaining or delaying of a post letter returned for want of a true direction, or by reason that the person to whom the same is directed is dead, or cannot be found, or shall have refused the same, or to pay the postage thereof; nor to the opening or detaining or delaying of a post letter in obedience to an express warrant in writing under the hand (in Great Britain) of one of the principal secretaries of state, and in Ireland under the hand and seal of the lord lieutenant of Ireland.

Officers of the Post Office stealing or embezzling Letters, &c.—Every person employed under the Post Office who shall steal, or shall for any purpose whatever embezzle, secrete, or destroy a post letter, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall, at the discretion of the court, either be transported beyond the seas for the term of seven years or be imprisoned for any term not exceeding three years; and if any such post letter so stolen or embezzled, secreted or destroyed, shall contain

therein any chattel or money whatsoever, or any valuable security, every such offender shall be transported beyond the seas for life.

Stealing Money &c. out of Letters.—Every person who shall steal from or out of a post letter any chattel or money or valuable security shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for life.

Stealing Letter-Bags or Letters.—Every person who shall steal a post-letter bag, or a post-letter from a post-letter bag, or shall steal a post letter from a post office, or from an officer of the Post Office, or from a mail, or shall stop a mail with intent to rob or search the same, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for life.

And every person who shall steal or unlawfully take away a post-letter bag sent by a post-office packet, or who shall steal or unlawfully take a letter out of any such bag, or shall unlawfully open any such bag, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for any term not exceeding fourteen years.

Receiving Letters &c. stolen or embezzled.—Every person who shall receive any post letter or letter bag, or any chattel or money or valuable security, the stealing or taking or embezzling or secreting whereof shall amount to a felony under the Post Office Acts, knowing the same to have been feloniously stolen, taken, embezzled, or secreted, and to have been sent or to have been intended to be sent by the post, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony, and in the latter cases whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice: and every such receiver, howsoever convicted, shall be liable to be transported beyond the seas for life.

Fraudulently retaining or secreting Letters &c.—And every person who shall fraudulently retain, or shall wilfully secrete or keep or detain, or being required to deliver up by an officer of the Post Office, shall neglect or refuse to deliver up a post letter which ought to have been delivered to any other person, or a post-letter bag or post letter which shall have been sent, whether the same shall have been found by the person secreting, keeping, or detaining, or neglecting or refusing to deliver up the same, or by any other person, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable to be punished by fine and imprisonment.

Stealing Newspapers, Votes of Parliament, &c.—Every person employed in the Post Office who shall steal, or shall for any purpose embezzle, secrete, or destroy, or shall wilfully detain or delay in course of conveyance or delivery thereof by the post, any printed votes or proceedings in parliament, or any printed newspaper, or any other printed paper whatever sent by the post without covers, or in covers open at the sides, shall in England and Ireland be guilty of a misdemeanor,

and in Scotland of a crime and offence, and being convicted thereof shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet.

Forging the Handwriting of the Receiver-General.—Every person who shall knowingly or wilfully forge or counterfeit, or cause or procure to be forged or counterfeited, the name or handwriting of the receiver-general for the time being of the General Post Office in England or Ireland, or of any person employed by or under him, to any draft, instrument, or writing whatsoever, for or in order to the receiving or obtaining of any money in the Bank of England or Ireland on account of the receiver-general of the Post Office, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any draft, warrant, or order of such receiver-general, or of any person employed by or under him, for money or for payment of money, with intent to defraud any person whomsoever, shall be guilty of felony, and being convicted thereof shall be transported beyond the seas for life.

Forging Stamps, Dies, or Envelopes.—In order to carry out the principle of the uniform Penny Postage, it has become necessary to prepare dies for the stamps, and to manufacture a peculiar paper for the envelopes. With respect to the first, it is provided by the 3 & 4 Vict. c. 96, that every person forging or fraudulently making the dies or plates, or knowingly and without lawful excuse (proof whereof shall lie on the party accused) having in his possession any false dies, paper, &c., or falsely making any paper with such dies, shall, on conviction thereof, be guilty of felony, and be liable to transportation for seven years or imprisonment for any term not exceeding four and not less than two years. Similar precautions have been enacted with regard to the forging &c. of the paper for the stamped envelopes, by the 39th section of the same act; while by the 23d it is enacted, that if any person shall get off or remove the stamps from a letter &c. with intent to use the same on any other letter, or shall so use any such stamps so removed &c., or commit any other fraudulent act, contrivance, or device whatever, with intent to deprive her majesty of any of the postage rates, he shall forfeit the sum of 20*l*.

Recovery of Penalties.—All penalties imposed by the Post Office acts may be recovered, with costs, by any informer in the courts of the United Kingdom, either by action of bill, plaint, or information. And any justice of the peace having jurisdiction where the offence was committed may, within one year after the commission of such offence, hear and determine any offence against the Post Office Acts which subjects the offender to a penalty not exceeding 20*l*.; and, upon conviction of the offender, such justice shall issue his warrant for the penalty adjudged by him, together with costs, to be levied on the goods of the offender. In default of goods sufficient to meet the penalty and costs, the offender may be committed to prison until the same be paid. There is, however, a power of mitigating the full penalty, provided all reasonable costs be paid; and an appeal lies to the quarter sessions from the judgment of such justice. One moiety of the penalties so recovered goes to the crown, and the other to the informer, with full costs.

Accessories, &c.—In the case of every felony punishable under the Post Office Acts, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree; and every accessory after the fact (except only a receiver of any property or thing stolen, taken, embezzled, or secreted) shall, on conviction, be liable to be imprisoned for any term not exceeding two years. And every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under the Post Office Acts shall be liable to be indicted and punished as a principal offender. So also as to offences punishable on summary conviction.

And every person who shall solicit or endeavour to procure any other person to commit a felony or misdemeanor punishable by the Post Office Acts shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being thereof convicted shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years.

It may here be observed, that the Post Office is not liable for any property lost or stolen from a letter, and no action will lie against the postmaster-general on account thereof. He does not come under the denomination of a carrier; for he enters into no contract, and has no hire; the postage of letters being an article of revenue, and not a mere reward for the conveyance. And though the 3 & 4 Vict. c. 96 contains a clause (sect. 39) by which it is provided that in case the postmaster general shall at any time deem it expedient that any post letter should be *registered* by the Post Office, and that he may charge for each letter so registered such rate of postage, in addition to any other rates payable under the Post Office Acts, as he shall (with the consent of the Lords of the Treasury) direct, yet it is expressly declared that such registration shall not render the postmaster-general or the Post Office revenue in any manner liable for the loss of any such post letters or the contents thereof. For security it is recommended by the secretary of the Post Office to cut bank notes, drafts, &c., and send one half at a time, waiting till the receipt of one half is acknowledged before the other is sent, as the Bank would never pay the holder of that half which had been fraudulently obtained. When money, rings, lockets, &c. inclosed in a letter by the post are sent from London, care should be taken to deliver the same to the clerk at the window of the General Post Office; and when any such letter is sent from the country, it should be delivered into the hands of the postmaster. With respect to the sending of money by the post, however, the department styled the Money Office, by which parties may send sums of money under 5*l.* to any part of the kingdom without risk, on paying a per-centage, may be resorted to with perfect safety.

To prevent the possibility of letters being surreptitiously obtained from the offices when put in, office-keepers are strictly forbid returning to any persons whatever letters that may be applied for, under whatever circumstances the recovery may be urged. This is, moreover, forbid by the established principle, that the instant a letter is committed to the post it is no longer the property of the sender.

CUSTOMS.

CUSTOMS are duties payable upon commodities on their being imported into or exported from a country. They seem to have existed in England before the conquest ; but the king's claim to them was first established by the stat. 3 Edw. I. These duties were, at first, principally laid on wool, woolfels (sheep skins), and leather, when exported. There were also extraordinary duties paid by aliens, which were denominated *parva costuma*, to distinguish them from the former, or *magna costuma*. The duties of *tonnage* and *poundage*, of which such frequent mention is made in English history, were customs duties ; the former being a duty paid on wine by the tun, and the latter an *ad valorem* duty of so much in the pound on all other merchandise.

The various customs duties were for the first time collected in a Book of Rates in the reign of Charles II. A new book of rates was again published in the reign of George II. But as fresh duties were imposed from time to time, sometimes by adding a per-centage to former duties, and at others by charging the commodity according to a new standard of measure, weight, or value, without reference to former imposts, great confusion and inconvenience arose, which was still further increased by the special appropriation of certain of the duties requiring a separate calculation for each. To obviate these inconveniences, Mr. Pitt, in 1787, introduced a Customs Consolidation Act, abolishing the existing duties, and substituting a single duty on each article. Several similar consolidations have since been made. In 1825 the enactments relating to the customs had again accumulated to such an extent, that the statutes and parts of statutes which were repealed for the purpose of a fresh consolidation amounted to about 450. The whole law was then compressed into a few acts, of moderate size, and expressed with great perspicuity. Another consolidation took place in 1833 by the statutes 3 & 4 Wm. IV. cc. 50 to 60. Numerous alterations, however, having been made by subsequent acts, including, among others, an addition of 5 per cent to all the duties by the 3 & 4 Vic. c. 17, the introduction of a new and reduced tariff by the 5 & 6 Vic. c. 47, and the entire abolition of many of the duties, with a still further reduction of others, by the 8 & 9 Vic. c. 12, the whole of that series, with all the amending acts, has been repealed by the 8 & 9 Vic. c. 84, and a fresh consolidation once more effected by the ten subsequent acts of that session (8 & 9 Vic. cc. 85 to 94), which, with a few brief amendments by the 9 & 10 Vic. c. 102, form the present law on the subject.

I. MANAGEMENT OF THE CUSTOMS.

The 8 & 9 Vict. c. 85 empowers her majesty to appoint a Board of Commissioners (not exceeding thirteen) for the management of the customs of the United Kingdom and the British possessions abroad, under the direction of the Lords of the Treasury.

The officers employed in the execution of the various duties connected with the management and collection of the customs, under the commissioners, are very numerous. Their appointment, salaries and allowances, the securities required of them, hours of attendance, &c. are regulated by the lords of the Treasury, or by the commissioners of customs under their authority.

Every officer of customs on his appointment makes a declaration as prescribed by the act.

No commissioner or other officer of customs is liable to serve as a mayor or sheriff, or in any corporate or parochial or other public office or employment, or on any jury or inquest, or in the militia.

The *collector* at the port of London pays all duties received by him to the *receiver-general* daily; who pays the same into the Bank of England, retaining 1000*l.* at the close of each day. All debentures, certificates, &c., at the port of London, are paid by the receiver-general; and at other ports by the collector, the comptroller being duly apprised thereof. Forging the name or hand-writing of the receiver-general or controller-general to any instrument for the payment of money, or uttering such, is felony, punishable by transportation for life.

Any officer or person in the customs taking any fee, gratuity, or reward, except as allowed by the Treasury, is to be dismissed from his office; and any person offering or promising such is liable to a forfeiture of 100*l.*

The holidays in the customs are Christmas-day, Good Friday, general fast and thanksgiving days, and her majesty's birth-day; which days are to be kept as holidays by all the dock companies in the United Kingdom.

Where lands or buildings are required for the purposes of the customs, a sale may be compelled at a compensation to be fixed by a jury summoned for that purpose; but the owner may appeal to the Court of Exchequer in England or Ireland, and to the Court of Session in Scotland. It is expressly provided, however, that gardens and pleasure-grounds, and land immediately contiguous to and used as the curtilage, or court-yard, or homestead of any dwelling-house, are exempt from such compulsory sale. Contrary to the common-law right of the landlord as to fixtures, where lands have been leased to the customs, and are re-delivered to the lessor, the buildings erected thereon for the public-service may be removed by the commissioners, on making a compensation to the landlord, unless an agreement were originally made to the contrary.

II. CUSTOMS REGULATIONS.

The act for consolidating the law on this subject is the 8 & 9 Vic. c. 86, which contains a succinct series of regulations touching the importation and exportation of goods, so as to secure the payment of the duties.

INWARDS.—No goods are to be unladen from any ship arriving from beyond seas in the United Kingdom or the Isle of Man, nor bulk broken after arrival within four leagues of the coast, before due report of such ship and entry of the goods have been made, and warrant granted, as hereafter shown, or the goods are forfeited, and

if bulk be broken, the master forfeits 100*l*. If, after arrival within such distance, any alteration be made in the stowage of the cargo, so as to facilitate the unlading, or if any part be staved, destroyed, or thrown overboard, or any package opened, it is deemed breaking bulk. But diamonds and bullion,—fresh fish of British taking and imported in British ships,—and lobsters fresh, however taken or imported, may be landed without report, entry, or warrant.—§ 2.

Manifest.—No goods are to be imported in a British ship, unless the master have on board a manifest, made out and dated and signed by him at the places where the goods were taken on board, and authenticated in manner hereafter shown. Such manifest must set forth the name and tonnage of the ship, the name of the master, the place to which the ship belongs, the places where the goods were taken on board, and the places of their destination respectively; and must contain a particular account and description of all the packages on board, with the marks and numbers thereon, and of the sorts of goods and different kinds of each sort contained therein, to the best of his knowledge, and the general denomination of the contents of every package containing cambrics or lawns, leather gloves, manufactures of silk, tobacco, cigars, or snuff, and the particulars of such goods as are stowed loose, and the names of the respective shippers and consignees, as far as the same are known to the master; and to such particular account must be subjoined a general account or recapitulation of the total number of the packages of each sort, describing the same by their usual names, or by such description as they are best known by, and the different goods therein, and also the total quantities of the different goods stowed loose. And all cambrics or lawns, leather gloves, manufactures of silk, tobacco, cigars, or snuff not so manifested, shall be forfeited.—§ 3.

For goods imported from a British possession abroad, the manifest must have been produced to and certified by the customs officer there.

If goods be imported without a manifest, or if any goods contained in the manifest be not on board, the master forfeits 100*l*.—§ 5.

The manifest must be produced to any officer coming on board after arrival within four leagues of the coast, and a copy thereof delivered, under penalty of 100*l*.—§ 6.

Master's Report.—Within twenty-four hours after arrival, and before breaking bulk, the master must make due report of the ship, and subscribe a declaration to the truth of the same, before the collector or comptroller. Such report must contain full particulars of the ship and cargo as in the manifest, and of the places where the goods were taken on board, the burthen of the ship, the country where built, or, if British, the port of registry, the country of the owners, the name and country of the master, the number of seamen &c., stating how many are subjects of the country to which the ship belongs, and how many of any other country; whether and in what cases the ship has broken bulk in the course of her voyage; what part of the cargo (if any) is intended for importation at such port, what part (if any) is intended for importation at another port, what part (if any) is prohibited to be imported except to be warehoused for exportation only, what part (if any) is intended for exportation in

such ship to parts beyond the seas, what surplus stores or stock remain on board, and, if a British ship, what foreign-made sails or cordage (not being standing or running rigging) are in use on board, under penalty of 100*l*. Masters of vessels from the coast of Africa must report how many natives they have taken on board there, under penalty of 100*l*.; and the master or owner, at the time of making report, must, under penalty of 200*l*., enter into a bond of 100*l*. to maintain or send back such natives, so as to save harmless any parish.—§§ 7, 8.

Any package intended for exportation in the same ship, and reported "contents unknown," may be opened and examined by the officers of customs; and if prohibited goods are found therein, they are forfeited.—§ 9.

The master, at the time of making his report, must deliver the manifest to the collector or comptroller of customs, and (if required) produce the bill of lading, or a copy thereof, for every part of the cargo, and answer all questions relating to the ship and cargo, crew, and voyage, truly, under 100*l*. penalty.—§ 10.

If any part of the cargo is reported for importation at another British port, the collector and comptroller are to notify such delivery on the manifest, and return the same to the master.—§ 11.

The ship must come quickly up to the proper place of mooring or unlading, without touching at any other place; and must bring to at stations appointed by the commissioners of customs, and not remove after arrival, except directly to some other proper place, and with the knowledge of the proper officer, under penalty of 100*l*. by the master. The commissioners may appoint places for mooring or unlading ships importing tobacco, where only they shall be moored or unladen; and where the place is not within a dock surrounded with walls, if the ship after having been discharged remain there, or if a ship not importing tobacco be moored at such place, the master shall forfeit 20*l*.—§ 12.

Goods unshipped from the importing vessel contrary to the regulations of the commissioners are declared to be forfeited, together with the craft or other means of conveyance; and a penalty of 100*l*. is imposed upon all persons concerned, or treble value of the goods, at the election of the commissioners.—§ 13.

Officers may board ships, and have free access to all parts, and may seal or secure goods; and any officer superior to a tidesman or waterman may open locks. If any goods are concealed, they become forfeited. If the seal &c. placed by the officer be broken, the master forfeits 100*l*. Provision is also made for ships in her majesty's commission, or of a foreign state, and their liability to search.—§§ 14, 15.

Entry of Goods.—The importer of goods must, within fourteen days after the ship's arrival, make perfect entry inwards of such goods, or entry by bill of sight, and within such time land the same; and in default thereof the officers of the customs may convey the goods to the queen's warehouse. When the cargo is discharged, with the exception only of a small quantity of goods, the officers may convey those remaining, and at any time may convey any small packages, to the queen's warehouse, although the fourteen days have not expired, to wait the due entry thereof during the remainder of the time. If the duties upon goods so conveyed be

not paid within three months after such time, together with all charges of removal and warehouse rent, they may be sold, and the produce applied, first to the payment of freight and charges, next of duties, and the overplus to the proprietor.—§ 16.

Where goods remain on board a vessel beyond the time allowed by law, the vessel and goods may be detained until the expenses of guarding the goods have been paid, and if not paid within one month after demand in writing, the same may be sold, and the produce applied first in payment of the freight and charges, next of the duties, next of the expenses of the officer and of the charges of sale, and the overplus (if any) to the proprietor—§ 17.

The person entering goods must deliver to the collector or controller a *bill of entry*, fairly written in words at length, expressing the name of the ship and of the master, the place from whence they were brought, the description and situation of the warehouse (if they are to be warehoused), the person in whose name the goods are to be entered, the quantity and description of the goods, the number and denomination or description of the respective packages, with the marks and numbers, and pay down any duties payable. He must also deliver at the same time two or more duplicates of such bill, in which sums and numbers may be expressed in figures, and arranged in such form as the collector and comptroller may require; and such bill, being duly signed by the collector and controller, and transmitted to the landing waiter, is the *warrant* to him for the landing or delivering of such goods.—§ 18.

Unauthorized persons making entries forfeit 100l.—§ 19.

No entry, or warrant for landing goods, or taking goods out of warehouse, is valid, unless it agree with the manifest, report, and other documents, and unless the goods are properly described therein; and any goods taken or delivered out or demanded by virtue of any warrant not properly describing them, are to be deemed goods landed without due entry, and become forfeited.—§ 20.

If the goods pay duty by number, measure, or weight, the number, measure, or weight must be stated; and in the entry of goods *ad valorem*, a declaration of the value must be made, in a form prescribed by the act; so if it is optional how they are to be charged. Persons not authorized making such declaration forfeit 100l.—§ 21.

If goods are undervalued, officers may detain them for the use of the crown; and if a different rate of duty is charged upon goods according as their value is above or below any particular price, and the goods are valued in the entry so as to be liable to the lower rate of duty, and it appears to the officers that such goods are properly liable to the higher rate, the officers may in like manner take such goods for the use of the crown. The commissioners must thereupon, in any of such cases, cause the amount of the valuation, together with an addition of 10l. per cent, and also the duties paid upon entry, to be paid to the importer or proprietor in full satisfaction for the same, and dispose of the goods for the benefit of the crown. If the produce of the sale exceed the sums so paid and all charges, one moiety of the overplus is to be given to the officer who detained the goods, and the remainder carried to account as duties of customs.—§ 22.

In order that correct accounts may continue to be taken of the value of the imports of certain goods hitherto charged with duty according to their value, but the duties on which have been repealed, the value of such goods is to be stated in the entry, and affirmed by the declaration of the importer or his agent written upon the entry, and attested by his signature; and if false, the person signing forfeits not exceeding 20*l.*—§ 23.

Entry by Bill of Sight.—If the importer or his agent make and subscribe a declaration that he cannot make a full or perfect entry, the collector and comptroller may receive an entry by bill of sight for any packages of goods by the best description which can be given, and may grant a warrant thereupon, in order that the same may be provisionally landed, and examined by such importer in presence of the proper officer; and within three days after they have been landed, the importer must make a full and perfect entry, and either pay down all duties, or duly warehouse the goods according to the purport of the perfect entry. If when full or perfect entry is made for any goods provisionally landed by bill of sight, such entry be not made in manner before required, they are to be deemed landed without due entry, and become subject to forfeiture.—§ 24.

In default of perfect entry within such three days, the goods are to be taken to the queen's warehouse; and if the importer do not, within one month after landing, make perfect entry, and pay the duties on such parts as can be entered for home use, together with the charges of removal and warehouse rent, the goods are to be sold for the payment of such duties (or for exportation, if they be such as cannot be entered for home use, or be not worth the duties and charges) and of such charges, and the overplus paid to the importer or proprietor.—§ 25.

Where goods are entered by bill of sight, a deposit equal in amount to the duties must be made by the importer or his agent, who must make and subscribe a declaration that the deposit is sufficient to cover the duties.—§ 26.

If the deposit be not equal to the amount of duty upon all the goods in any single package, no part shall be delivered until perfect entry be made of the whole of the goods in such package.—§ 27.

Before any goods in respect of which a bill of sight has been granted shall be delivered by the officer, the importer or his agent shall indorse upon the bill of sight a particular account thereof, affixing his signature and place of abode, with the date of such indorsement; and such indorsement shall, upon being signed by the collector and comptroller, become the perfect entry. But this is not to affect any other of the regulations as to bills of entry.—§ 28.

If in any package or parcel landed by bill of sight, any goods or other things be found concealed in any way, or packed with intent to deceive the officers of customs, as well all such goods as the package or parcel and all other things contained therein are forfeited.—§ 29.

Abatement of Duty on account of Damage.—If goods rated to pay duty according to number, measure, or weight, (except certain goods hereafter mentioned) receive damage during the voyage, an abatement of duties is allowed in proportion; provided proof be made that the damage was received after the goods were shipped and before they

were landed, and provided claim be made at the time of the first examination. § 30. The officers of customs are to examine such goods, and state the proportion of damage; but if the importer is not satisfied with the abatement made, the collector and comptroller are to choose two indifferent merchants, who shall examine the goods, and declare in what proportion they are lessened in value, and the officers may make an abatement accordingly. § 31. But no abatement of duties is to be made for any damage received by any of the following goods:—

Cantharides	Currants	Jalap	Oranges	Sarsaparilla	Tea
Cocon	Figs	Lemons	Pepper	Senna	Tobacco
Coculus Indicus	Guinea Grains	Nux Vomica	Raisins	Sugar	Wine.
Coffee	Ipecacuanha	Opium	Rhubarb		

Goods re-imported.—Any goods (except as hereafter excepted) may be re-imported from any place in a ship of any country, which have been legally exported from the United Kingdom, and may be entered by *bill of store*, referring to the entry outwards and exportation thereof, provided the property continue in the person by whom they were exported, and such re-importation be within six years. If the goods so returned be foreign goods which had before been legally imported, the same duties are payable as would at the time of re-importation be payable on the like goods under the same circumstances of importation as those under which they had been originally imported; or such goods may be warehoused as upon a first importation. The following goods, however, may not be re-imported for home use upon the ground that they had been legally exported, but are to be deemed foreign, whether originally such or not, and as if imported for the first time:—

CORN, GRAIN, MEAL, FLOUR, and MALT. HOPS. TEA.

Goods for which any bounty or any drawback of excise had been received on exportation, unless by special permission of the Commissioners of Customs, and on repayment of such bounty or such drawback.

All Goods for which Bill of Store cannot be issued in manner hereinafter directed; except small remnants of British goods by special permission of the Commissioners, upon proof to their satisfaction that the same are British, and had not been sold.

And tobacco re-imported by bill of store is subject to all the restrictions imposed upon tobacco imported.—§ 33.

The person in whose name the goods so re-imported were entered for exportation must deliver to the searcher an exact account of the particulars of such goods, referring to the entry and clearance outwards and to the return inwards, with the marks and numbers of the packages both inwards and outwards; and thereupon the searcher grants a *bill of store* for the same. If the person in whose name the goods were entered for exportation was not the proprietor, but his agent, he shall declare upon oath on such bill of store the name of the person by whom he was employed; and if the person to whom such returned goods are consigned be not proprietor and exporter, he shall subscribe a declaration on such bill of store of the name of the person for whose use such goods have been consigned to him; and the real proprietor must make and subscribe a declaration upon such bill of store to the identity of the goods, and that he was at the time of exportation and of re-importation the proprietor, and that the same had not during such time been disposed of to any other person. Such declaration must be made before the collectors or controllers at the ports of exportation and of importation respectively; and thereupon the collector or comptroller

shall admit such goods to entry by bill of store, and grant a warrant accordingly.—§ 34.

Surplus stores are subject to the same duties and regulations as the like goods when imported by way of merchandize ; but if it appear to the collector and comptroller that the quantity or description be not excessive, they may permit them to be entered for the private use of the master, purser, or owner, or of any passenger to whom they belong, on payment of the duties, or to be warehoused for the use of the ship, although they could not be legally imported by way of merchandize.—§ 35.

Goods from British Possessions, &c.—No goods can be entered as being of or from any British possession abroad, if any benefit attach to such distinction, (except the territories belonging to Fort William in Bengal, Fort St. George, and Bombay) unless the master deliver a *certificate*, under the hand of the proper officer of the place where such goods were taken on board, *of the due clearance of the ship* from thence, containing an account of such goods.—§ 36.

And the Treasury may make orders, that a *certificate of production* shall be required upon the exportation of any goods from any British possession abroad, or upon the importation of such goods into the United Kingdom ; and all goods imported without such certificate when required shall be deemed foreign goods.—§ 37.

Before any *sugar, coffee, cocoa, or spirits* can be entered as the produce of any British possession in America or of the island of Mauritius, the master must deliver a certificate, under the hand of the proper officer of the place abroad, testifying that proof had been made that such goods are of such produce, stating the name of the place where they were produced, their quantity and quality, the number and denomination of the packages, and the name of the ship and of the master, and also subscribe a declaration that such certificate was received by him at the place where such goods were taken on board, and that the goods are the same as are mentioned therein.—§ 38.

A like certificate and declaration are necessary on the importation of sugar from the East Indies, and of wines from the Cape of Good Hope.—§§ 39, 40, 41.

Goods the produce or manufacture of Guernsey, Jersey, Alderney, Sark, or Man, may be imported thence without payment of any duty, except such as may fairly countervail any duties of excise, or any coast duty, payable on the like goods the produce of the part of the United Kingdom into which they are imported ; with a similar provision as to certificate and declaration. But such exemption from duty does not extend to any manufactures made from materials the produce of any foreign country, except manufactures of linen and cotton made in and imported from the Isle of Man.—§§ 42, 43.

The Treasury is empowered to permit goods the produce of the British possessions or fisheries in North America, which have been legally imported into the islands of Guernsey or Jersey direct, to be imported from those islands.—§ 44.

Vessels arriving from Guernsey, Jersey, Alderney, Sark, or Man, wholly laden with stone the production thereof, need not be piloted by pilots licensed by the Trinity House.—§ 45.

Fish.—Fresh fish of every kind, of British taking and imported in British ships; fresh lobsters, however taken or imported; and cured fish of every kind, of British taking and curing, imported in British ships, are free of all duties. But before any cured fish can be entered free of duty, the master must make and subscribe a declaration that such fish was actually caught and taken in British ships, and cured by the crews or by her majesty's subjects.—§ 46.

A similar declaration is required on the importation of blubber, train oil, spermaceti oil, head matter, or whale fins, and if from a British possession, a certificate from the proper officer there.—§§ 47, 48.

No goods are to be deemed imported from any particular place unless they are imported direct from such place, and have been there laden on board the importing ship, either as the first shipment of such goods, or after they have been actually landed at such place.—§ 49.

Goods the property of the crown are liable, in case of sale after their importation, to the same customs duties as others.—§ 50.

Wrecked Goods.—All foreign goods derelict, jetsam, flotsam, and wreck, and all droits of admiralty, are subject to the same duties as goods of the like kind imported. But the commissioners, or officers of customs acting under their directions, may inquire into the extent of damage, and make abatement of duties accordingly, except on cantharides, cocoa, coffee, coculus Indicus, currants, figs, Guinea grains, ipecacuanha, jalap, lemons, nux vomica, opium, oranges, pepper, raisins, rhubarb, sarsaparilla, senna, spirits, sugar, tea, tobacco, and wine; on which articles no abatement of duty is to be made. If any question arise as to their origin, they are to be deemed of the growth of such place as the commissioners shall determine.—§§ 51, 52. (1)

Exciseable Goods.—No goods subject to regulations of excise are to be delivered out of the charge of the officers of customs (although duly entered, and the full duties paid) until they have also been entered with the officers of excise, and permit granted, nor unless the permit correspond in all particulars with the warrant of the officers of customs. And such entry is not to be received by the officers of excise, nor permit granted, until a certificate is produced of the particulars of the goods and of the warrant under the hand of the officers of customs. And if it appear necessary, the officers of excise may attend the delivery of such goods by the officers of customs, and require that they be delivered only in their presence; and may count, measure, gauge, or weigh such goods, and fully examine the same, and proceed in all respects as they are authorized by any act in force relating to the excise.—§ 55.

To distinguish foreign from British articles subject to duties of excise, the commissioners of customs, after such goods have been entered at the custom-house, and before they are delivered to the importer or his agent, may mark or stamp them in such manner as they may deem

¹ By sec. 53, persons having such goods in their possession without giving notice were liable to 100*l.* penalty. And by sec. 54, when such goods were reported to the officers of customs, notice was to be given to the receiver-general of droits of admiralty and the goods placed at his disposal, and if not claimed within twelve months, might be sold without any process from the Court of

Admiralty. But by the 9 & 10 Vic. c. 99, so much of this act as relates to goods derelict, jetsam, flotsam, or wreck, and to the disposal of such goods, was repealed, for the purpose of consolidating the laws relating to wreck and salvage. Provisions however, nearly to the same effect, are enacted by that act.

proper. Orders for so marking or stamping goods to be published in the London and Dublin Gazettes. A penalty of 200*l.* attaches on forging such stamps.—§§ 56, 57.

Times and Places for landing Goods.—No goods (except diamonds, bullion, fresh fish of British taking and imported in British ships, and lobsters) may be unshipped from any ship arriving from beyond seas or put on shore on Sundays or holidays, and on other days only in the day-time (that is, from the 1st September to the last day of March between sun-rising and sun-setting, and from the last day of March to the 1st of September between seven o'clock in the morning and four in the afternoon), nor unless in the presence or with the authority of the proper officer of customs. And all such goods must be landed at one of the legal quays, or at some wharf &c. appointed by the commissioners for the landing of goods by sufferance. And no goods, after having been unshipped, are to be transhipped, or, after having been put into any boat to be landed, can be removed into any other boat previously to their being duly landed, without the permission of the proper officer.—§ 59.

If goods imported from foreign parts are removed from any vessel, quay, wharf, or other place previous to their examination by the proper officer, except by his order or authority in writing, and for the purpose therein expressed, every person concerned or assisting in such removal, or who shall knowingly harbour, keep, or conceal, or shall knowingly permit or suffer to be harboured, kept, or concealed any such goods, or into whose hands and possession they shall come, shall forfeit, either treble the value thereof or the penalty of 100*l.*, at the election of the commissioners of customs.—9 & 10 Vic. c. 102, § 6.

The unshipping, landing, and weighing of goods to be at the expence of the importer.—8 & 9 Vic. c. 86, § 60.

Foreign fish to be landed and entered under the regulations of the commissioners, under penalty of forfeiture. § 61.

Timber or wood to be piled at the expence of the importer, so as to enable the officer of customs to measure it; and when measured in bulk, the measurement is to be taken to the full extent of the pile, without any allowance for the interstices. But battens, boards, deals, and planks exceeding 21 feet in length, may be measured by the piece, and the account taken separately.—§ 62.

Prohibitions and Restrictions Inwards—All goods imported or brought into the United Kingdom contrary to the prohibitions or restrictions in the following Table become forfeited. § 63. And all goods subject to restrictions as to package upon importation are subject to the same restrictions when brought into the United Kingdom for exportation in the same ship, on pain of forfeiture.—9 & 10 Vic. c. 102, § 5.

A TABLE OF PROHIBITIONS AND RESTRICTIONS INWARDS.

A List of Goods absolutely prohibited to be imported.

ARMS, AMMUNITION, and UTENSILS OF WAR, by way of merchandize, except by licence from her majesty, for furnishing her majesty's public stores only.

ARTICLES OF FOREIGN MANUFACTURE, and any packages of such articles, bearing any names, brands, or marks purporting to be the names, brands, or marks of manufacturers resident in the United Kingdom.

Books, wherein the copyright shall be subsisting, first composed or written or printed in the United Kingdom, and printed or reprinted in any other country, as to which the proprietor of such copyright or his agent shall have given to the commissioners of customs a notice in writing that such copyright subsists, such notice also stating when such copyright will expire.

PAPER printed on in the English language.

INDECENT or OBSCENE PRINTS, Paintings, Books, Cards, Lithographic or other Engravings, or any other Indecent or Obscene Articles.—9 & 10 Vic. c. 102, § 19.

CLOCKS and WATCHES of any metal, impressed with any mark or stamp appearing to be or to represent any legal British assay mark or stamp, or purporting by any mark or appearance to be of the manufacture of the United Kingdom, or not having the name and place of abode of some foreign maker abroad visible and permanently marked or engraved on the frame and also on the face, or not being in a complete state, with all the parts properly fixed in the case.

COIN, viz.

— False Money, or Counterfeit Sterling.

— Silver, of the realm, or any money purporting to be such, not being of the established standard in weight or fineness.

GOODS FROM THE ISLE OF MAN, except such as be of the growth, produce, or manufacture thereof or of the United Kingdom, and except Corn, Grain, Meal, or Flour.

GUNPOWDER, except by licence from her majesty; such licence to be granted for furnishing her majesty's stores only.

MALT.

SNUFF-WORK.

SPIRITS FROM THE ISLE OF MAN.

TOBACCO-STALKS stripped from the leaf, whether manufactured or not.

TOBACCO-STALK FLOUR.

List of Goods subject to certain Restrictions on Importation.

FISH of foreign taking, and all Train Oil, Blubber, Spermaceti Oil, Head Matter, Skins, Bones, and Fins, the produce of fish or creatures living in the sea, (except Anchovies, Eels, Turbots, and Lobsters), unless in vessels which shall have been cleared out regularly with such fish on board from some foreign port.

GOODS of places within the limits of the East India Company's charter, unless into ports approved of by the Lords of the Treasury, and declared by order in council to be fit and proper for such importation.

GLOVES OF LEATHER, unless in ships of 60 tons burden or upwards, and in packages each containing 100 dozen pairs of such gloves at least.

HIDES, SKINS, HORNS, or HOOFS, or any other part of Cattle or Beast, her majesty may by order in council prohibit, in order to prevent any contagious distemper.

PARTS OF ARTICLES viz., Any distinct or separate part of any article not accompanied by the other part or all the other parts of such article, so as to be complete and perfect, if such article be subject to duty according to the value thereof.

SILK viz., Manufactures of Silk being the manufactures of Europe, unless into the ports of London, Liverpool, Hull, or Southampton, or ports appointed by the Commissioners of Her Majesty's Treasury, or into the port of Dublin direct from Bourdeaux, or into the port of Dublin direct from Calais or Boulogne; and unless in ships of 60 tons burden or upwards.

SPIRITS (not being Perfumed or Medicinal Spirits), unless in ships of 60 tons burden at least;

— also unless in casks or other vessels capable of containing liquids, each of such casks or other vessels being of the size or content of 20 gallons at the least, or in glass bottles or stone bottles not exceeding the size of quart bottles [or, if Geneva, in glass bottles containing not more than three pints each, 9 & 10 Vic. c. 102], and being really part of the cargo of the ship in which the same are imported, and included in the manifest or other papers enumerating or descriptive of the cargo thereof.

TEA, unless from the Cape of Good Hope or from places eastward of the same to the Straits of Magellan.

TOBACCO and SNUFF viz.

— unless in ships of 120 tons burden or upwards;

— also unless in hogsheads, casks, chests, or cases containing 300 lbs. weight of Tobacco or Snuff each at least, not being separated or divided in any manner within the cask or package; except that Tobacco of the dominions of the Turkish empire may be packed in inward bags or packages, or separated or divided in any manner, provided the outward package be a hogshead, cask, chest, or case, containing at least 300 lbs. net weight of tobacco;

— Tobacco and Snuff from the East Indies, unless in hogsheads, casks, chests, or cases, each of which shall contain at least 100 lbs. net weight of Tobacco or Snuff;

— Cigars, unless in packages containing 100 lbs. weight of cigars at least;

- Tobacco the produce of the island of Porto Rico, and Tobacco the produce of Trinidad, or of Mexico, or of South America, or of the islands of Saint Domingo or Cuba, or any Tobacco which can be legally imported from Malta for home consumption, unless in packages each containing at least 80 lbs. net weight of such Tobacco. (8 & 9 Vic. c. 6, as amended by 9 & 10 Vic. c. 102, sec. 2.)
- Negrohead Tobacco the produce of and imported from the United States of America, unless in packages each containing at least 150 lbs. net weight of such tobacco ;
- and unless into the ports of London, Liverpool, Bristol, Lancaster, Cowes, Falmouth, Whitehaven, Hull, Port Glasgow, Greenock, Glasgow, Aberdeen, Leith, Newcastle-upon-Tyne, Plymouth, Belfast, Cork, Drogheda, Dublin, Galway, Limerick, Londonderry, Newry, Sligo, Waterford, and Wexford ;
- or into some other port or ports which may hereafter be appointed for such purpose by the Commissioners of Her Majesty's Treasury, such appointments in Great Britain being published in the London Gazette, and in Ireland in the Dublin Gazette ;
- But any ship wholly laden with Tobacco may come into the ports of Cowes or Falmouth to wait for orders, and there remain fourteen days, provided due report of such ship be made by the master with the collector or comptroller of such port.

But goods of any sort may be imported to be warehoused, although prohibited to be imported for home use, except the following :—

Goods prohibited on account of the package in which they are contained, or the tonnage of the ship in which they are laden.

ARMS, AMMUNITION, or UTENSILS OF WAR.

GUNPOWDER.

INFECTED HIDES, HORNS, HOOFs, SKINS, or any other part of any cattle or beast.

COUNTERFEIT COINS or TOKENS.

BOOKS wherein the copyright shall be subsisting, first composed or written or printed in the United Kingdom, and printed or reprinted in any other country, as to which the proprietor of such copyright or his agent shall have given to the Commissioners of Her Majesty's Customs a notice in writing that such copyright subsists, such notice also stating when such copyright will expire.

COPIES of PRINTS first engraved, etched, drawn, or designed in the United Kingdom.

COPIES or CASTS of SCULPTURES or MODELS first made in the United Kingdom.

CLOCKS or WATCHES, being such as are prohibited to be imported for home use.—8 & 9 Vic. c. 86, § 64.

ARTICLES of FOREIGN MANUFACTURE, and any packages of such articles, bearing any names, brands, or marks purporting to be the names, brands, or marks of manufacturers resident in the United Kingdom.—9 & 10 Vic. c. 102, § 8.

If goods be such or so imported that they may not be used in the United Kingdom, they shall not be entered except to be warehoused, and it must be declared upon the entry that they are entered to be warehoused for exportation only.—8 & 9 Vic. c. 86, § 65.

OUTWARDS.—No goods are to be shipped for exportation beyond seas, before due entries of the ship and of the goods outwards have been made, and cocket granted, and the goods have been duly cleared for shipment; and no stores are to be shipped for the use of the ship, except such as are borne upon the victualling bill, on pain of forfeiture. § 66. And no ship, on board of which any goods or stores have been shipped, shall depart until the ship has been duly cleared outwards, under forfeiture of 100*l.* by the master. § 67. A victualling bill for the shipment of stores may be obtained by the master on application to the searcher.—§ 68.

Entry of Ship outwards.—Before any goods are taken on board, the master must deliver a certificate of the clearance inwards or coastwise of the last voyage, specifying what goods were reported inwards for exportation; also an account, signed by himself or his agent, of the entry outwards, setting forth the name and tonnage of the ship, the name of the place to which she belongs if a British ship, or of the country if a foreign ship, of the master, of the place where she is

bound if any goods are to be shipped for the same, and of the place in such port at which she is to take in her lading; and if the ship have commenced her lading at some other port, the master must state the name of the port at which any goods have been laden, and produce a certificate from the searcher that the cockets for such goods have been delivered. If any goods be taken on board before such entry, the master forfeits 100*l.*; but if it be necessary to lade any heavy goods before the whole of the inward cargo is discharged, a *stiffening order* is issued for the purpose.—§ 69.

Entry of Goods outwards.—The person entering outwards any goods for exportation must deliver to the collector or comptroller a bill of the entry thereof, and pay down the duties; whereupon the collector and comptroller cause a *cocket* to be written, certifying that the goods have been so entered.—§ 70.

If any drawback or bounty be allowable, or any duty payable, or any exemption from duty claimed, or if the goods be exportable only according to some particular regulation, they must be entered and cleared as such.—§ 71.

The person intending to enter outwards any foreign goods for drawback, or any foreign goods to be exported from the warehouse, or any foreign goods upon which the duties inwards are required to be paid before exportation, must first deliver to the collector or controller of the port where the goods were imported or are warehoused, two or more bills (as the case may require) of the particulars of the importation and of the entry outwards intended to be made; and the collector and comptroller finding such bills to agree with the entry inwards, write off such goods, and issue a certificate of such entry for warehousing or payment of duties, as the case may be, with such particulars as are necessary for the computation of the drawback, or for the delivery from the warehouse, setting forth in such certificate the destination of the goods, the person in whose name they are to be entered for exportation, and the ship in which they are to be exported, if they are to be exported from the port where such certificate is issued, but if from another port then only the name of such other port; and such certificate, together with the bills, being delivered to the collector or comptroller of the port from which the goods are to be exported, is the entry outwards of such goods, and a *cocket* is delivered of such goods as before directed.—§ 72.

No drawback shall be allowed on any tobacco which is not wholly manufactured from tobacco on which the full duty on importation has been paid, nor on any tobacco mixed with dirt or rubbish or other ingredients. And every person who shall enter or ship, or cause to be entered or shipped, or produce or cause to be produced to any officer of customs to be shipped, for exportation or for stores, any tobacco not entitled to drawback, with intent unduly to obtain any drawback thereon, or any greater drawback than he would otherwise be entitled to, shall, over and above all other penalties, forfeit treble the amount of drawback sought to be obtained, or 200*l.*, at the election of the commissioners; and all such tobacco shall be forfeited, and may be seized by any officer of customs or excise.—§ 73.

No drawback shall be allowed upon the exportation of any goods

entered for drawback, or as stores, which shall be of less value than the amount of drawback claimed ; and all such goods so entered shall be forfeited, and the person who caused them to be entered shall forfeit the sum of 200*l.*, or treble the amount of drawback claimed, at the election of the commissioners.—§ 74.

Upon the entry outwards of any goods, except wine, upon which a drawback is allowed, and before cocket is granted, the person in whose name they are entered shall give bond in double the value of the goods, with one surety, that such goods shall be duly shipped and exported, and landed at the place for which they are entered outwards, or otherwise accounted for to the satisfaction of the commissioners of customs, within a reasonable time, to be fixed by the commissioners with reference to the place of exportation. Such bonds to prevent the re-landing of plate are subject only to the same stamp duty as other customs bonds.—§§ 75, 76.

No cocket can be granted for the exportation of coals to any British possession in a foreign ship, until the exporter give bond in double the amount of duty, that they shall be landed there, and to produce certificate of such landing. Bonds not liable to stamp duty.—§ 77.

Clearance of Goods.—Before any part of the goods for which a cocket is granted can be shipped, they must be duly cleared with the searcher ; and before they can be so cleared, the particulars must be indorsed on the cocket, together with the number and denomination or description of the respective packages, with the respective marks and numbers delineated in the margin, and subjoined to each, in words at length, an account of the total quantities of each sort of goods, and the total number of each sort of packages, distinguishing such as are to be cleared for any bounty or drawback, such as are subject to any duty on exportation or entitled to any exemption, and such as can only be exported under any particular restriction. All goods shipped, or waterborne to be shipped, not duly cleared, become forfeited. The cocket so indorsed being produced to the searcher, together with a shipping bill, or copy of such indorsement, he orders the shipment of the goods.—§§ 78, 79.

Coals brought coastwise, or any part of them, may be entered outwards for parts beyond sea without being first landed, provided the customs officers are satisfied that the quantity left on board does not exceed the quantity so entered outwards.—§ 80.

*Upon the clearance of goods the produce or manufacture of the United Kingdom, and also upon the clearance of foreign goods formerly charged with duty according to value, but the duties on which have been repealed, an account, containing an accurate specification of their quantity, quality, and value, with a declaration to the truth of the same, signed by the exporter or his known agent, must be delivered to the searcher ; and if such declaration be false, the person signing it forfeits 20*l.* And the searcher may call for the invoice, and such other documents as he may think necessary for ascertaining their true value. If the exporter or his agent make a declaration that the value of the goods cannot be ascertained in time for the shipment, a further time of three months may be allowed for the delivery of such separate shipping bill ; on failure whereof such exporter or agent shall forfeit 20*l.*—§ 81.*

No drawback of excise can be allowed unless a proper document under the hand of the officer of excise, containing the necessary description of the goods, is produced to the searcher at the time of clearing.—§ 82.

The excise officer, if he see fit, may attend the examination, and mark or seal the packages, and keep joint charge of them with the searcher, until finally delivered to be shipped and exported.—§ 83.

If goods subject to any duty or restriction in respect of exportation, or goods which are to be shipped for any drawback or bounty, be brought to any wharf &c. to be shipped, and they do not agree with the indorsement on the cocket, or with the shipping bill, they are forfeited; and if any goods prohibited to be exported be found in any package so brought, such package and every thing contained therein are forfeited. The searcher may open any package; but if correct, he must repack at his own charge.—§§ 84, 85.

Clearance of Ship.—Before any ship can be cleared outwards for parts beyond the seas with goods on board, the master must deliver a *content* to the searcher, containing the particulars of ship and cargo; and the cockets of the goods shipped must be finally delivered by the respective shippers. The searcher then files the cockets, attaching a label thereto to show the number, compares the particulars of the goods in the cockets with the content, and attests the correctness by his signature on the label to the file of cockets, and on the content. The master must also declare to the truth of the content, and answer all questions relating to the ship and cargo, before the collector or comptroller, who thereupon clears the ship, notifying such clearance and the date thereof upon the content, upon the label to the file of cockets, and also in the book of ships' entries outwards. The content, cockets, and victualling bill being then transmitted to the searcher, he delivers the file of cockets and the victualling bill to the master as his authority for departing from the port with the several goods and stores on board agreeing therewith.—§§ 86, 87.

The master of a ship departing in ballast, having no goods except the stores borne upon the victualling bill, or any goods reported inwards for exportation, must, before departure, answer all questions touching her departure and destination, and the collector or comptroller notifies the clearance on the victualling bill, which is kept by the master as the clearance of the ship. Slate or slates and chalk to be deemed ballast.—§§ 88, 89.

If there be on board any goods of the inward cargo which were reported for exportation, the master must, before clearance outwards, deliver to the searcher a copy of such report certified by the collector or comptroller; which, being found to correspond with the goods on board, is the authority to the searcher to pass the ship, and, being signed by the searcher and filed with the cockets, is the clearance of the ship for those goods.—§ 90.

If there be any passengers on board, the master may enter their baggage in his own name; and if there be no other goods except baggage only, such ship shall be deemed to be in ballast.—§ 91.

If the master and crew of a foreign ship departing in ballast are desirous to take on board chalk rubbish by way of ballast, or to take with

them for their private use any small quantities of goods of British manufacture, it shall be lawful for the master, without entering such ship outwards, to pass an entry in his name, and receive a cocket free of any export duty for all such goods under the general denomination of British manufactures not prohibited to be exported, being for the use of the master and crew, and not being of greater value than 20*l.* for the master, 10*l.* for the mate, and 5*l.* for each of the crew, and stating that the ship is in ballast.—§ 92.

Officers may board ships after clearance, and goods not found on cockets are forfeited; and for goods on cockets not on board, the master forfeits 20*l.*, and for cockets falsified, 100*l.* § 93.

Ships departing must bring to at appointed stations.—§ 94.

Debenture Goods.—No drawback or bounty shall be allowed upon exportation, unless the goods have been entered in the name of the real owner at the time of entry and shipping, or of the person who had actually purchased and shipped the same in his own name and at his own liability and risk on commission. The owner must make oath on the debenture, that the goods are actually exported; and if he has not purchased the right to the drawback, must declare the person entitled to it. Owners resident twenty miles from the port of shipment may appoint an agent to act for them; and any joint stock company may do the same. The property of persons residing abroad, and consigned to an agent in the United Kingdom, may be exported by him on account of the owners, and he may receive the drawback.—§ 98.

No drawback to be allowed unless the goods are shipped within three years after payment of the duties inwards; and no debenture to be paid after the expiration of two years from the date of the shipment.—§ 99.

For the purpose of computing and paying the drawback or bounty, a debenture is prepared by the collector and comptroller, certifying the entry outwards of the goods; and after they have been duly exported, and a notice thereof, containing particulars of the goods, has been delivered by the exporter to the searcher, the shipment and exportation are certified upon the debenture by the searcher; whereupon the debenture is computed and passed, and delivered to the person entitled to it.

Licensed lightermen only to ship debenture or warehoused goods.

If warehoused or debenture goods which have been cleared to be exported be not duly exported, or be relanded, or carried to Guernsey, Jersey, &c., without due entry for such places, they are forfeited, together with the ship; and any person concerned therein forfeits three times the value of the goods.—§ 103.

A drawback of the duties is allowed on wine shipped on board her majesty's ships of war for the use of the officers, if shipped at certain ports, and not exceeding the following quantities in any one year:—For an admiral, 1260 gallons; for a vice-admiral, 1050; for a rear-admiral, 840; for a captain of the first and second rate, 680; for a captain of the third, fourth, or fifth rate, 420; for a captain of an inferior rate, 210; for every lieutenant and other commanding officer, for every marine officer, (and for every master, surgeon, and purser, 9 & 10 Vic. c. 102, § 12) 105 gallons. Persons entering such wine and claim for drawback must state in the entry, and declare on the debenture, the name of the officer, and of the ship in which he serves.

On officers leaving the service or ship, such wine may be transferred, or re-landed and warehoused for future re-shipment, or, the duties being paid back, delivered for home use.—§§ 104—106.

Pursers of her majesty's ships of war may ship tobacco for the use of the crew free of duty, on giving bond that no part shall be re-landed. If the purser be removed from one ship to another, he may tranship such tobacco, with permission of the collector. But no greater quantity can be allowed to any ship than will serve for six months, at the rate of two pounds per month for each of the crew.—§§ 107—109.

If goods liable to forfeiture for being shipped for exportation be exported without discovery by the officers of customs, the person having caused such goods to be exported forfeits double the value.—§ 111.

Prohibitions and Restrictions Outwards.—The goods enumerated in the following Table are either absolutely prohibited to be exported, or can be exported only under the restrictions therein mentioned, on pain of forfeiture.

TABLE OF PROHIBITIONS AND RESTRICTIONS OUTWARDS.

CLOCKS and WATCHES, *viz.*

Any outward or inward Box, Case, or Dial Plate, of any metal, without the Movement in or with every such Box, Case, or Dial Plate, made up fit for use, with the Clock or Watchmaker's name engraved thereon.

LACE, *viz.*

Any Metal inferior to Silver, which shall be spun, mixed, wrought, or set upon Silk, or which shall be gilt, or drawn into wire, or flattened into plate, and spun or woven, or wrought into or upon, or mixed with Lace, Fringe, Cord, Embroidery, Tambour-work, or Buttons, made in the Gold or Silver Manufactory, or set upon Silk, or made into Bullion Spangles, or Pearl, or any other Materials made in the Gold or Silver Lace Manufactory, or which shall imitate or be meant to imitate such Lace, Fringe, Cord, Embroidery, Tambour-work, or Buttons; nor shall any person export any Copper, Brass, or other Metal, which shall be silvered, or drawn into wire, or flattened into plate, or made into Bullion Spangles, or Pearl, or any other Materials used in the Gold or Silver Lace Manufactory, or in imitation of such Lace, Fringe, Cord, Embroidery, Tambour-work, or Buttons, or of any of the Materials used in making the same, and which shall hold more or bear a greater proportion than three pennyweights of fine Silver to the pound avoirdupois of such Copper, Brass, or other Metal.

Any Metal inferior to Silver, whether gilt, silvered, stained, or coloured, or otherwise, which shall be worked up or mixed with Gold or Silver in any Manufacture of Lace, Fringe, Cord, Embroidery, Tambour-work, or Buttons.

A List of Goods which may be Prohibited to be Exported by Proclamation or Order in Council.

ARMS, AMMUNITION, and GUNPOWDER.

ASHES, Pot and Pearl.

MILITARY STORES, and NAVAL STORES, and any Articles (except Copper) which Her Majesty shall judge capable of being converted into, or made useful in increasing the quantity of Military or Naval Stores.

PROVISIONS, or any sort of Victual which may be used as food by man.

COASTING TRADE.—All trade by sea from one part of the United Kingdom to another, or from one part of the Isle of Man to another, is called coastwise, and no part is deemed beyond the seas. The lords of the Treasury may regulate what shall be deemed a trading *by sea* under this act.—§§ 113, 114.

No goods are to be laden in any ship to be carried coastwise until all goods brought in such ship from beyond seas have been unladen. And if any goods be taken into or put out of any coasting ship at sea or over the sea, or if any coasting ship touch at any place over the sea, or deviate from her voyage, unless forced by unavoidable circumstances, or if having so touched at any place over the seas, the mas-

ter do not declare the same in writing to the collector or comptroller, he forfeits 200*l.*—§ 115.

Before lading or unlading any coasting vessel, a *notice* must be given to the collector or controller, signed by the master, owner, wharfinger, or agent, stating the name and tonnage of the ship, the name of the master, the port to which she belongs, the port to which she is bound or from which she has arrived, and the wharf &c. where she is to be laden or discharged; which notice is entered in a book kept by the collector for the information of all parties interested. Such notice for unlading must be delivered within twenty-four hours after arrival, under penalty of 20*l.* on the master. A notice for lading must always state the last voyage of the ship; and if from beyond seas, a certificate must be produced from the proper officer of the discharge of all goods and of her due clearance inwards.—§§ 116, 117.

On the arrival of a coasting ship in Great Britain from Ireland, or in Ireland from Great Britain, the master must, within twenty-four hours, attend and deliver the notice, signed by him, to the collector; and if there be on board goods subject to any duty of excise, or goods which have been imported from beyond seas, the particulars thereof with the marks and numbers of the packages, are to be set forth in the notice; and if there be no such goods on board, the notice must state that fact; and the master must answer all questions relating to the voyage by the collector or controller, under 100*l.* penalty.—§ 118.

After notice given of lading, the collector is to grant a *general sufferance*, which is sufficient authority for lading any sort of goods at the wharf or place expressed in such sufferance, except such (if any) as are expressly excepted therein. But before a sufferance can be granted for goods prohibited to be exported, or subject to any export other than an *ad valorem* duty, the master, owner, or shipper must give bond with one surety in treble value for the due landing of such goods.—§ 119.

The master of every coasting vessel must keep a *cargo book*, stating the name of the ship and master, the port to which she belongs, and the port to which she is bound on each voyage; and in which shall be entered at the port of lading an account of all goods taken on board, and the names of their respective shippers and consignees, and at the port of discharge the days on which goods are delivered out, and also the times of departure and arrival. Such book must be produced to the coast-waiter or other proper officer whenever demanded, who may make any remarks therein. If the master do not keep such book correctly, or produce it when required, or if any goods be found on board not entered therein, or if goods entered therein as laden and not delivered out be not on board, he forfeits 50*l.*; and if any package be entered as containing foreign goods which are not therein, or if any package contain foreign goods which are not entered, the same are forfeited.—§ 120.

Before leaving the port of lading, an account, with a duplicate thereof, signed by the master, must be delivered to the collector, of all foreign goods, and of all goods subject to any export other than an *ad valorem* duty, and of all corn, grain, meal, flour, or malt laden on board, and generally whether any or no other British goods be on board, or whether such ship be wholly laden with other sorts of British goods; one of

which duplicates the collector shall retain, and the other, signed by him, shall be the *clearance* of the ship for the voyage, and the *transire* for all goods expressed therein. If any such account be false, or do not correspond with the cargo book, the master forfeits 50*l.*—§ 121.

The *transire* is to be delivered to the collector at the port of discharge before unloading; and if there be any goods subject to duty, the master, owner, wharfinger, agent, or consignee must deliver a bill of entry of the particulars thereof in words at length, with a copy in which sums and numbers may be expressed in figures, and pay down all duties, or produce a permit in respect of duties of excise; and thereupon the collector grants an order for the landing thereof in the presence of a coast-waiter.—§ 122.

Collectors may grant a *general transire*, to continue in force for not exceeding a year, for coasting vessels regularly trading between places in the river Severn eastward of the Holmes; or between places in the river Humber; or between places in the Firth of Forth; or between places to be named in the *transire*, and carrying only manure, lime, chalk, stone, gravel, sand, or any earth not being fullers earth. And the commissioners may grant *general transires*, under such regulations and for such time as they may see fit, for the lading of any goods, and for clearing the ship, and for unloading at the place of discharge; the same to be written in the cargo-book.—§ 123.

Coast-waiters, landing-waiters, or searchers, may go on board and examine coasting ships, and demand all necessary documents.—§ 124.

Similar regulations as to the times and places of landing and shipping goods are made for coasting vessels, as for outward-bound ships. The island of Malta and its dependencies to be deemed in Europe.—§ 125—8.

General Regulations.—Duties &c. to be reckoned in British currency, and according to imperial weights and measures.—§ 129.

All bonds (except for securing the due exportation of goods, or for payment of duty upon goods warehoused) to be taken by the collector and comptroller for the use of her majesty, and after three years from their date, or the time limited therein, to be void, if no prosecution has been commenced.—§ 130.

For ascertaining the strength of spirits imported, the same instruments, tables and scales of graduation, and rules, are to be used as are directed by law to be used by the excise.—§ 132.

Vinegar or acetous acid above proof to pay duty according to the quantity it would make if reduced to proof, that is, such strength that 100 parts by weight will saturate or neutralize $14\frac{1}{2}$ parts of crystallized sub-carbonate of soda.—§ 133.

Spirits or strong waters mixed with any ingredient, and though thereby coming under some other denomination, shall nevertheless be deemed spirits, and subject to duty as such.—§ 134.

Officers may take samples of goods for ascertaining the duty.—§ 135.

If it be necessary to determine the *precise* time at which any importation or exportation took place, that of *importation* shall be the time at which the ship actually came within the limits of the port, and that of *exportation* the time at which the goods were actually shipped on board. A ship's *arrival* to be deemed the time at which

what warehouses are to be deemed of special security, and in what cases security by bond is to be given in respect of any warehouse. Warehouses of special security to be so stated on their appointment; and warehouses connected with wharfs and within walls to be deemed warehouses of special security without any appointment or order. Commissioners to provide warehouses for tobacco at the ports into which tobacco may be legally imported; the rent to be fixed by the Treasury. Treasury commissioners have power to revoke warrants or orders. All such orders of the commissioners to be published in the London Gazette.—§§ 2—7.

The proprietor or occupier of any warehouse for which security is required may give general security by bond, with two sureties, for payment of the duties on all goods to be warehoused therein, or for their due exportation; but if he be not willing to give such general security, the different importers must give security on each importation.—§ 8.

If goods lodged in a warehouse are the property of the occupier, and are *bonâ fide* sold by him, and upon such sale there is a written agreement signed by the parties, or a written contract of sale made by a broker or other person legally authorized, and the amount of the price has been actually paid or secured to be paid, such sale is valid, although the goods remain in the warehouse, provided the transfer has been entered in a book kept for that purpose by the officer of customs having charge of the warehouse.—§ 9.

The occupier of any warehouse is liable to a forfeiture of 5*l.* if the goods are not stowed so that easy access can be had to every package or parcel; and if any goods are taken out without due entry with the proper officers, he is liable to the payment of the duties. Occupiers of warehouses are to produce on demand all goods deposited therein to the officer of the customs, or forfeit 5*l.* Goods fraudulently concealed in or removed from the warehouse are forfeited; and any importer or proprietor, or person in his employ, opening the warehouse or gaining access to the goods, except in the presence of the proper officer, forfeits 500*l.*—§§ 10—12.

Persons assisting in the removal of goods entered for the warehouse and not deposited in a warehouse according to the entry, and all persons to whose possession such goods shall knowingly come, shall forfeit treble the value thereof, or a penalty of 100*l.*, at the election of the commissioners.—§ 13.

Within one month after tobacco has been warehoused, and upon the entry and landing of any other goods to be warehoused, the officer of customs is to take a particular account of the same, and mark the contents on each package, and the word *Prohibited* on packages containing goods prohibited to be imported for home use; and no alteration is to be made in the packing of any goods, except as herein-after provided.—§ 14.

The goods must be carried to the warehouse under care of the proper officer, and as he shall direct, on pain of forfeiture.—§ 15.

All warehoused goods must be duly cleared, either for exportation or home use within three years, and all surplus stores of ships within one year, from the day of the first entry; and goods not so cleared may be sold by the commissioners, and the produce applied to the

payment of warehouse-rent and other charges, and the overplus to the proprietor. Such goods, when sold, are subject to all the conditions to which they were subject previous to such sale, except that a further time of three months is allowed to the purchaser for clearing them from the warehouse; and if not duly cleared within that time, they become forfeited.—§ 16.

If any goods entered to be warehoused, or entered to be delivered from the warehouse, be lost or destroyed by any unavoidable accident, either on shipboard, or in the landing or shipping, or in the receiving into or delivering from the warehouse, the commissioners may remit or return the duties on the quantity so lost or destroyed.—§ 17.

And they may remit the duties on the whole or any portion of goods lost or destroyed by any unavoidable accident in the warehouse. And the duties payable upon the following articles deposited in warehouses of *special security*, viz. *wines, currants, raisins, figs, hams, and cheese*, when taken out of the warehouse for home use, shall be charged only upon the quantities actually delivered.—§ 18.

No goods can be delivered from the warehouse except upon due entry and under care of the proper officers for exportation, or upon due entry and payment of the duties for home use; except goods delivered to the searcher to be shipped as stores, which may be so shipped without entry or payment of duty for any ship of 60 tons burthen, bound upon a voyage to foreign parts, the probable duration of which, out and home, will be not less than forty days, provided such stores be duly borne upon the victualling bill. Rum of the British plantations may be so delivered to be shipped as stores for any ship; as may also the surplus stores of a ship, to be re-shipped as stores for the same ship, or for the same master in another ship; such rum or surplus stores being duly borne upon the victualling bill. If the ship be broken up or sold, such stores may be delivered for the use of any other ship belonging to the same owners, or may be entered for payment of duty and delivered for the private use of the owners, or of the master or purser.—§ 20.

Upon the entry of goods to be cleared from the warehouse, if for home use, the person entering must deliver a bill of the entry, and a duplicate thereof, as directed in the case of goods entered to be landed, and at the same time pay down the full duties without any abatement on account of deficiency, except as hereafter provided; and if the entry be for exportation, or for removal to any other warehouse, and any of the packages or parcels be deficient in quantity, a like entry inwards must also be passed in respect of the quantities deficient, and the full duties paid on the amount thereof, before such packages or parcels are delivered for exportation or removal, except as by this act is otherwise provided. If goods so deficient be such as are charged to pay duty according to value, the value is to be estimated at the price for which the like sorts of goods of the best quality were last sold.—§ 21.

The duties upon *tobacco, spirits, and sugar*, are to be charged only on the quantities actually delivered; except that no further abatement is to be made for deficiency in any *sugar* warehoused in a warehouse *not of special security*, than after the rate of three per cent for the first three months, and one per cent for every month after

and for *spirits* (other than British plantation rum) in a warehouse not of *special security*, no greater abatement than at the following rates:—

SPIRITS:—For every hundred gallons, hydrometer proof, *viz.*

For any time not exceeding six months	-	-	One gallon.
— exceeding six, and not exceeding eighteen months	-	-	Three gallons.
— exceeding eighteen months, and not exceeding two years	-	-	Five gallons.
— exceeding two years and not exceeding two years and a half	-	-	Six gallons.
— exceeding two years and a half and not exceeding three years	-	-	Seven gallons.
And for every additional year	-	-	Two gallons.

But no abatement is to be made in respect of any deficiency occasioned by leakage, and not by natural evaporation, in whatever warehouse, except as by this act is otherwise specially provided.—§ 22.

And in respect of *wheat, barley, rye, or oats*, the following allowances to be made for natural waste:—

WHEAT, BARLEY, and RYE , (except as hereafter provided) which has been in warehouse			
One month and less than three months, there shall be allowed	-	-	1½ per cent.
Three months and less than six months	-	-	2 per cent.
Six months and less than twelve months	-	-	2½ per cent.
Twelve months and upwards	-	-	3 per cent.
OATS (except as hereafter provided) which have been in warehouse—			
One month and less than three months, there shall be allowed	-	-	2½ per cent.
Three months and less than six months	-	-	3 per cent.
Six months and less than twelve months	-	-	4½ per cent.
Twelve months and upwards	-	-	5 per cent.

But only half the above allowances shall be made upon Spanish wheat, barley, and oats, and upon wheat and barley kiln-dried abroad; and no allowance on kiln-dried rye. And no allowance shall be made unless there be an actual deficiency in the quantity of wheat, rye, barley, and oats originally warehoused.—§ 23.

The importer may enter goods for home use or for exportation, although not actually warehoused.—§ 24.

Removal of Goods for the purpose of being re-warehoused.—Goods may be removed to other ports to be re-warehoused; but twelve hours notice in writing must be given to the warehouse officer, specifying the particular goods, the marks, numbers, and description of the packages, in what ship imported, when and by whom entered inwards, and if subsequently re-warehoused, when and by whom re-warehoused, and to what port the same are to be removed. Tobacco the produce of the British possessions in America or of the United States of America, and purchased for the use of her majesty's navy, may be removed by the purser of any ship of war in actual service to the ports of Rochester, Portsmouth, or Plymouth, to be there re-warehoused in the name of such purser, in a warehouse approved by the commissioners.—§ 25.

Before removal of the goods due *entry* must be made, and a proper bill of such entry, with duplicates, delivered to the collector or comptroller, containing the before-mentioned particulars and an exact account of the quantities of the different sorts of goods; and such bill, signed by the collector and comptroller, is the *warrant* for the removal. The person removing the goods must, at the time of entering the same, give bond, with one sufficient surety, for the due arrival and re-warehousing of the goods within a reasonable time, which may be taken by the collector and comptroller either of the port of removal or the port of destination. If taken at the port of destination, a certificate thereof

under the hands of the collector or comptroller must, at the time of entering, be produced to the collector or comptroller of the port of removal. Such bond is not discharged, unless the goods are duly re-warehoused at the port of destination within the time allowed, or otherwise accounted for, nor until the full duties due upon any deficiency have been paid; nor until fresh security has been given as hereinafter provided, unless the goods are lodged in some warehouse in respect of which general security is given by the proprietor or occupier, or in some warehouse in respect of which no security is required. Goods when so re-warehoused may be entered and shipped for exportation, or entered and delivered for home use, as the like goods may be when first warehoused upon importation; and the time when such goods shall be allowed to remain re-warehoused at such port shall be reckoned from the day when they were first entered to be warehoused. If, upon arrival of the goods at the port of destination, the parties are desirous forthwith to export the same, or to pay duty thereon for home use, without actually lodging the same in the warehouse, the officers, after the formalities of entering and examining have been duly performed, may consider the goods constructively re-warehoused, and permit them to be entered and shipped for exportation, or to be entered and delivered for home use upon payment of the duties.—§§ 26—30.

Goods warehoused in the port of London may, with permission of the commissioners, be removed to any other warehouse in the same port in which the like goods may be warehoused; and in other ports a similar privilege is allowed with permission of the collector and comptroller.

Goods removed from one warehouse to another, and the proprietors, continue subject in all respects to the same conditions as if they had remained in the original warehouse.—§ 32.

When goods in warehouse are sold, the new owner may give bond, and release the original bonder.—§ 33.

If the person removing goods from one port to another, and who has given bond in respect thereof, continue interested in them after they have been duly re-warehoused, and such goods have been re-warehoused in some warehouse in respect of which security is required, and the proprietor or occupier whereof has not given general security, the bond for re-warehousing continues in force until a fresh bond is given by some new proprietor or other person. § 34.

Goods in warehouse may be sorted, separated, packed, or repacked, and such lawful alterations made, as are necessary either for their preservation, or to the sale, shipment, or legal disposal of the same; provided they are repacked in the same packages in which they were imported, or in packages of entire quantity equal thereto, or in such other packages as the commissioners may permit (not being less in any case, if the goods are to be exported or to be removed to another warehouse, than may be required by law for the importation). It shall be lawful also to draw off any wine, or any rum of the British plantations, into reputed quart or pint bottles, for the purpose only of being exported; and to draw off any such rum into casks containing not less than twenty gallons each, for the purpose of being disposed of as stores for ships; and also to draw off any other spirits into reputed quart bottles for the purpose only of being exported; and also to draw off and mix

with such wine, any brandy secured in the same warehouse, not exceeding ten gallons of brandy to one hundred gallons of wine; and also to fill up any casks of wine or spirits from other casks of the same secured in the same warehouse; and also, in any warehouse of special security, to rack off any wine from the lees, and to mix any wines of the same sort, crasing from the casks all import brands; and also to take such moderate samples of goods as may be allowed by the commissioners, without entry or payment of duty, except as the same may eventually become payable on a deficiency.—§ 35.

But no such alterations can be made in goods or packages, nor wine, rum, or spirits bottled &c., nor samples of goods taken, except according to the regulations of the commissioners.—§ 36.

After goods have been repacked, the commissioners may, at the request of the proprietor, permit any refuse, damaged, or surplus goods to be destroyed; or, if they are such as may be delivered for home use, on the duties being immediately paid upon such surplus, they may be delivered for home use accordingly; but if they are such as may not be so delivered, such surplus is to be disposed of for the purpose of exportation as the commissioners direct; and thereupon the quantity contained in each of the proper packages is to be marked upon the same, and the deficiency ascertained by a comparison with the total quantity first warehoused; and the proportion which such deficiency may bear to the quantity in each package is also to be marked on the same, and added to such quantity, and the total shall be deemed the imported contents of such package, for which it is to be held subject to the full duties, except as otherwise provided by this act. But the commissioners may accept the abandonment for the duties of any quantity of tobacco, coffee, cocoa, pepper, or lees of wine, and also of any whole packages of other goods, and permit the same to be destroyed, and deduct such quantity in computing the amount of the deficiency.—§ 37.

No foreign casks, bottles, corks, packages, &c., are to be used in repacking, &c., except such wherewith some goods have been imported and warehoused, or whereon the duties have been paid.—§ 38.

Commissioners may permit goods to be taken out of warehouse without payment of duty, for any purpose they may think expedient, under security by bond for their return within the time appointed.

No warehoused goods which were imported in bulk can be delivered except in the whole quantity of each parcel, or in a quantity not less than one ton weight, unless by special leave of the officers. And no warehoused goods can be delivered unless the same, or the packages containing them, have been marked as the commissioners deem necessary.—§§ 40, 41.

Commissioners may approve of premises, in the ports of London, Liverpool, Bristol, Hull, Greenock, or Glasgow, or any other port approved of by the Lords of the Treasury, as bonded sugar houses for the refining of sugar for exportation only.—§ 42.

And on approval of such premises, officers of customs may deliver without duty any quantity of foreign sugar, or sugar the produce of any British possession, for the purpose of being there refined under the locks of the crown for exportation only. The order of approval may be revoked.—§ 43.

Bond to be given by the refiner, in a penalty of double the amount of the duties upon a like quantity of sugar of the British plantations, that the sugar shall be refined upon the premises within four months from its date.—§ 44.

The lords of the Treasury may direct what abatement of duty shall be made for deficiencies upon the exportation of goods liable to waste from natural decrease. If such goods, however, are lodged in warehouses of *special security*, no duty is chargeable for any deficiency on the exportation thereof, except it be suspected that part has been clandestinely conveyed away; nor are such goods (unless wine or spirits) to be measured, counted, weighed, or gauged, for exportation, except in cases of suspicion. § 45. But for wine, spirits, coffee, cocoa nuts, or pepper, lodged in warehouses *not of special security*, the following allowances for natural waste are to be made upon the exportation; viz.

WINE, upon every cask, viz. for any time not exceeding one year	-	One gallon.
— exceeding one and not exceeding two years	-	Two gallons.
— exceeding two years	-	Three gallons.
SPIRITS, upon every hundred gallons hydrometer proof, viz.		
For any time not exceeding six months	-	One gallon.
— exceeding six and not exceeding twelve months	-	Two gallons.
— exceeding twelve and not exceeding eighteen months	-	Three gallons.
— exceeding eighteen months and not exceeding two years	-	Four gallons.
— exceeding two years	-	Five gallons.
COFFEE, COCOA NUTS, PEPPER, for every 100 lb.	-	Two pounds.

If any embezzlement, waste, spoil, or destruction be made in any warehoused goods through the misconduct of any officer of customs or excise, it is a misdemeanor; and if he be prosecuted to conviction by the importer, consignee, or proprietor, no duty shall be payable or forfeiture incurred in respect of any deficiency caused thereby, and the damage shall be made good by the commissioners of excise or customs. But this is not to extend to any loss or damage by fire.—§ 47.

Upon the entry outwards of any goods to be exported from the warehouse to parts beyond the seas, and before a cocket is granted, the person entering must give security by bond in double the value, with one sufficient surety, that they shall be duly landed at the place for which they are entered outwards.—§ 48.

All goods removed from warehouse for shipment are to be under the direction of the proper officer. Not to be exported in ships under 60 tons burthen.—§§ 49, 50.

Goods landed in docks, and lodged in the custody of the proprietors of such docks under the provisions of this act, (except goods forfeited) are subject to claims for freightage as before landing; and, upon due notice given, are to be detained until such freightage be paid, together with the rates and charges to which they are subject, or until a deposit to the amount be made by the owners or consignees of the goods.—§ 51.

IV. SMUGGLING.

The laws for the prevention of smuggling are consolidated by the act 8 & 9 Vic. c. 87, the substance of which is as follows:—

Vessels and Boats.—If any vessel not being square-rigged, or any boat, either belonging in the whole or in part to her majesty's subjects, or having half the persons on board subjects of her majesty, shall be

found or discovered to have been within 100 leagues of the coast of the United Kingdom ; or if any vessel either belonging in the whole or in part to her majesty's subjects, or having half the persons on board subjects of her majesty, or if any foreign vessel not being square-rigged, or any foreign boat, in which there shall be one or more subjects of her majesty, shall be found or discovered to have been within four leagues of that part of the coast which is between the North Foreland and Beachy Head, or within eight leagues of any other part of the coast ; or if any foreign vessel or boat shall be found to have been within one league of the coast of the United Kingdom ; or if any vessel or boat shall be found to have been within one league of either of the Channel Islands, or within any bay, harbour, river, or creek of such islands ; any such vessel or boat so found or discovered having or having had on board or in any manner attached thereto, or conveying or having conveyed in any manner, any *spirits* not being in a cask or other vessel capable of containing at least 20 gallons, or any *tea* exceeding 6 lb. weight in the whole, or any *tobacco* or *snuff* not being in a cask or package containing 300 lb., or being separated or divided in any manner within any cask or package, or any *tobacco stalks*, or any *cordage* or other articles adapted and prepared for slinging or sinking small casks, or any casks or other vessels whatever of less size or content than 20 gallons, of the description used for smuggling spirits, all such spirits, tea, tobacco, or snuff, and tobacco-stalks, casks, packages, cordage, and other articles, and also the vessel or boat, shall be forfeited.—§ 2.

And any vessel or boat arriving or found to have been within any port of the United Kingdom or of the Isle of Man, not being driven by stress of weather or other unavoidable accident, having or having had on board or attached thereto, or conveying or having conveyed in any manner within any such port, any spirits, tobacco, or snuff, in improper packages &c. (as described in the preceding section), or any tobacco stalks, the same, together with the vessel or boat, become forfeited. Provided, that if it be made appear that the same were on board without the knowledge of the owner or master, the commissioners may deliver up the vessel or boat.—§ 3.

But the act does not extend to render any vessel of 100 tons or upwards liable to forfeiture on account of any tobacco or snuff coming direct from the East Indies, and being in packages containing 100 lbs. weight at least, or on account of cigars being in packages of 100 lbs. weight at least, or on account of any tobacco the produce of Mexico, Columbia, the continent of South America, St. Domingo, or Cuba, coming direct from those places, or from any British possession in America, in packages of 80 lbs. each at least, or of Negrohead tobacco from the United States of America in packages of 150 lbs. weight, or on account of any tobacco of the dominions of the Turkish empire which may be separated or divided in any manner within the outward package, such outward package being a hogshead, cask, chest, or case containing 300 lbs. weight at least ; nor to render any vessel of 60 tons liable to forfeiture on account of tea or spirits in glass or stone bottles not exceeding the size of quart bottles, all such goods being really part of the cargo, and included in the manifest ;

nor to render any vessel liable to forfeiture on account of any spirits, tea, or tobacco really intended for the consumption of the seamen and passengers during their voyage, and not being more than is necessary for that purpose; nor to render any vessel liable to forfeiture if really bound from one foreign port to another, and pursuing such voyage, wind and weather permitting.—§ 4.

British vessels or boats within 100 leagues of the coast not bringing to upon signal from any vessel or boat in her majesty's or in the revenue service, and during chase throwing overboard or destroying any part of the lading, are likewise forfeited. Persons escaping therefrom during the chase to be deemed British subjects, unless proved to the contrary.—§ 5.

Every vessel not being square-rigged, and every boat, belonging in whole or in part to her majesty's subjects, or having one or more such on board, found within four leagues of the coast between the North Foreland and Beachy Head, or within eight leagues at any other part, from which any part of the lading shall have been thrown overboard, or destroyed on board, become forfeited.—§ 6.

Vessels liable to examination or seizure not bringing to after proper signal from a revenue boat may be fired into; and if death ensue, the revenue officers &c. are indemnified.—§ 7.

Vessels having been in port with a cargo on board, and afterwards found light or in ballast, and the master unable to give a due account of the cargo, become forfeited.—§ 8.

British vessels or boats sailing from Guernsey, Jersey, Alderney, or Sark without a clearance paper, or, having a clearance, if found light, or with part of the cargo discharged, are forfeited.—§ 9.

To prevent any mistake as to signals, all vessels and boats are prohibited from using, without the queen's warrant &c., the union jack, pendant, or any flags used in the navy, under penalty of 500*l.* and forfeiture of such flags, which the officers may seize.

All vessels and boats made use of in the removal or conveyance of any goods liable to forfeiture are themselves forfeited.

All boats belonging to British vessels are to have the name of the vessel and of the port to which she belongs painted on the outside of the stern, and the master's name withinside the transom, in white or yellow paint on a black ground, in Roman letters not less than two inches in length, on pain of forfeiture. Boats not belonging to any vessel are to have the name of the owner and the port painted thereon in like form. Vessels and boats used in piloting or fishing are to be painted black, and not like the Preventive boats, on pain of forfeiture, unless the commissioners of customs allow it to be otherwise. Vessels and boats with double sides or bottoms, or with secret places for concealing goods, are forfeited; so are all goods concealed in any boat or vessel.

Vessels under certain dimensions are not to carry arms for resistance above a certain quantity, without licence from the commissioners of customs, § 16; and § 17 fixes the numbers of the crews of different sized vessels. Every licence to contain a description of the vessel, name of the owner, his place of abode, the manner and limits in which it is to be employed, and, if armed, the numbers and description of

the arms and ammunition. Owner to give bond not to employ the vessel for smuggling purposes. Bond not to exceed 1000*l.* penalty. Bonds given by minors valid. Vessels not to be used in any other manner than mentioned in the licence, which must be produced on demand. But nothing herein as to licences is to extend to any vessel, boat, or lugger belonging to the royal family, the navy, victualling, ordnance, customs, excise, or post-office, whale or fishery-boats, boats belonging to a square-rigged vessel in the merchant-service, life-boats, tow-boats belonging to licensed pilots, and boats used solely in inland navigation. Forging a licence is 500*l.* penalty, &c.

Goods forfeited.—If goods liable to duty are unshipped without the duties being paid or secured, or prohibited goods imported, or warehoused goods illegally removed, they become forfeited, together with all horses, carriages &c. used in their removal.

If goods subject to duty, or to any restriction in respect of importation, are concealed on board any vessel or boat, they are forfeited, with all goods packed therewith.

Spirits and tobacco found removing without a permit, when a permit is required by law, to be deemed goods liable to and unshipped without payment of duty, unless the party in whose possession they are found prove to the contrary. So all goods the importation of which is restricted, for the purpose of proceeding for penalties or forfeiture.

If goods prohibited to be exported are shipped, or waterborne with such intent, they become forfeited, with all goods packed therewith.

Powers of Seizure.—All vessels and boats, and all goods whatsoever, liable to forfeiture, may be seized in any place, either upon land or water, by any officer of the army, navy, or marines, duly employed for the prevention of smuggling and on full pay, or by any officer of customs or excise, or by any person having authority to seize from the commissioners of customs or excise.

The powers given to officers of excise by 1 & 2 Wm. IV. c. 25, as to the seizure of private stills, are extended to officers of customs. Any officer making a collusive seizure, or taking a bribe, forfeits 500*l.*, and the person offering the same forfeits 200*l.*

Officers may board vessels within the limits of a port, and search for prohibited or uncustomed goods; they may also search any persons on board, or who have landed therefrom, if they have reason to suppose such persons have uncustomed or prohibited goods about them; and any obstruction incurs a forfeiture of 100*l.* But if such persons desire it, they may, before being searched, be taken before a justice of the peace, collector, comptroller, or other superior officer, who may direct the search to proceed or discharge them. Females are to be searched only by a female duly authorized by the commissioners. On the officer's neglect to comply with the above desire, or causing a search without sufficient grounds, he forfeits 10*l.* If passengers on board vessels &c. have forfeited goods in their possession, and deny the fact to officers on inquiry, they forfeit the goods and treble the value thereof.

Officers may, with writs of assistance from the Court of Exchequer, take a constable &c. of the place with them, and enter houses and search for forfeitable goods, and in case of resistance may break open doors,

chests, &c. ; such writs to remain in force during the whole reign in which they are issued, and six months after. Police officers finding such goods are to take them to the custom-house warehouse ; and the goods so seized may be detained till trial.

Officers of customs or excise may upon reasonable suspicion stop carts and conveyances, and search for smuggled goods. Drivers refusing to stop, to forfeit 100*l*. Police officers and persons seizing goods subject to forfeiture are to carry them to the custom-house warehouse within 48 hours after seizure. Goods taken by a police officer on suspicion of being stolen, to be taken to the police office, there to remain until the trial of the offender. The officer is to give notice to the commissioners of customs of his having so detained them, and, after trial of the offenders, goods to be taken to the custom-house, or the officer to forfeit 20*l*. Commissioners of treasury or customs may restore seizures, and mitigate or remit punishments and penalties.

Penalties.—Persons unshipping or assisting to unship goods prohibited, or for which the duties have not been paid or secured, or knowingly harbouring or concealing such goods, or any goods illegally removed from the warehouse, and every person into whose hands such prohibited or uncustomed goods shall knowingly come, shall forfeit either treble value or 100*l*. at the election of the commissioners.

Every person insuring the delivery of goods without payment of the duties, or prohibited goods ; and every person delivering or causing the same to be delivered ; and every person agreeing to pay for such insurance, forfeit 500*l*. besides any other penalty.

Offering goods for sale under pretence that they are run or prohibited (whether they are such or not) incurs a penalty of 100*l*. or treble value at the election of the commissioners, and the goods become forfeited.

Persons found or having been on board vessels liable to forfeiture for being within certain distances of the coast (as previously described, § 2) shall, upon conviction before two justices, be imprisoned and kept to hard labour. And any officer in the army, navy, or marines, employed for the prevention of smuggling and on full pay, or any officer of customs or excise, may detain such persons for the purpose of being taken before a justice of peace. But any such person proving to the satisfaction of the justice that he was only a passenger, and had no interest in the vessel or cargo, shall be forthwith discharged.

Persons unshipping, carrying, or concealing any spirits or tobacco liable to forfeiture, or assisting therein forfeit 100*l*., and may be detained in like manner.

Persons unshipping, carrying, or concealing tea, or assisting therein, forfeit treble value, and are liable to be detained in like manner, but may be admitted to bail on giving security in treble the amount of the goods seized.

Persons being or having been on board vessels liable to forfeiture for having been within the limits of a port with contraband articles &c. (as previously described, § 3) not having been driven by stress of weather, forfeit 100*l*. and may be detained in like manner. But such persons are not liable to any penalty or detention unless there are reasonable grounds to believe that they are the owners of the goods,

or were concerned in the bringing in or concealing them, nor on account of any spirits or tobacco being stores, or being in vessels or packages permitted by law.

Persons assembled to the number of three or more for the purpose of unshipping, carrying, or concealing spirits or tobacco, or any tea or silk to the value of 20*l.* liable to forfeiture; and every person hiring or procuring others to assemble for the purpose of landing, carrying, or concealing prohibited or uncustomed goods; and persons obstructing officers in the seizing of goods liable to forfeiture, or rescuing any goods seized, or destroying goods to prevent their seizure, shall upon conviction before two justices, be adjudged to be imprisoned and kept to hard labour for not less than six nor more than nine months for a first offence, for not less than nine nor more than twelve months for a second offence, and for twelve months for a third or any subsequent offence.

Justices may proceed summarily to the conviction of smugglers without information or an order from the Board of Customs in certain cases (as where the spirits do not exceed a gallon, or the tobacco six pounds, for which they are detained), and adjudge them to forfeit 5*l.* or in default commit them to gaol for not exceeding one month.

When persons are brought before a justice of peace for offences against the customs law, he may order them to be detained for a reasonable time, to be afterwards brought before two justices.

If a person liable to be detained for any offence be not detained at the time, or if being detained he make his escape, he may afterwards be arrested and taken before a justice.

Persons making signals to smuggling vessels at sea may be detained, and on conviction are liable to forfeit 100*l.*, or, at the discretion of the court, may be committed to the common gaol, and kept to hard labour for one year. The burden of proof of such signal not being made with intent and for the purpose of smuggling, is upon the defendant. Any person may lawfully prevent such signals, and enter upon any lands for the purpose.

Felonies.—Three or more armed persons assembled to assist in the illegal landing of any goods, or in the rescuing of goods seized, shall, upon conviction, be adjudged guilty of felony, and be transported for life or not less than fifteen years, or be imprisoned for not exceeding three years. Persons shooting at any boat belonging to the navy, or in the service of the revenue, are also guilty of felony, punishable in the same manner.

Any person, in company with more than four others, having goods liable to forfeiture, or with one person within five miles of the sea-coast, or of any navigable river leading therefrom, and carrying arms, or being disguised, to be deemed guilty of felony, and subject to transportation for seven years.

Persons assaulting officers in the execution of their duties, to be transported for seven years, or imprisoned and kept to hard labour for not exceeding three years.

The remainder of the act relates to the rewards to be given to officers &c. in cases of seizure, and to proceedings for the recovery of penalties and forfeitures for breach of the customs laws.

EXCISE.

Excise duties were first projected during the reign of Charles I., but never assessed in a regular way till after his death. The long parliament, in 1643, laid a duty on the makers and venders of ale, beer, cider, and perry, though under an express protestation that it should be discontinued when the public peace was restored. Experience, however, proved it to be too valuable a source of revenue to be relinquished; and when the nation had been accustomed to it for a few years, the parliament declared, in 1649, that it was "the most easy and indifferent levy that could be laid upon the people." At the Restoration it was placed on a new footing; and, notwithstanding Blackstone says, that "from its first original its very name has been odious to the people of England," it has continued progressively to gain ground, and is at this moment imposed on a variety of most important articles, and furnishes a very considerable proportion of the entire public revenue of the kingdom. The prejudice in the public mind, to which Blackstone alludes, seems to attach more to the regulations connected with these duties, than to the amount to which they have been carried. The frauds that might be committed upon the revenue unless a very strict watch were kept, have led to the enactment of many severe regulations. The officers are empowered to enter and search the houses of such individuals as deal in excisable commodities at any time of the day, and in most instances also of the night; and the proceedings in case of transgression are such that persons may be convicted in a few days time in very heavy penalties by the summary judgment of three commissioners of excise, or two justices of the peace, without the intervention of a jury.

I. EXCISE LAWS IN GENERAL.

These were consolidated by the 7 & 8 Geo. IV. c. 53, which repealed all previous acts inconsistent therewith, but has since been amended by the 4 & 5 Wm. IV. c. 51, and 4 & 5 Vic. c. 20.

Commissioners of excise, not exceeding thirteen, are appointed by her majesty, three¹ of whom may sit as a board for the management of the revenue of excise throughout the United Kingdom, besides four assistant commissioners for Scotland and Ireland. They cannot be members of parliament; and they and all other officers of excise are incapacitated, under 500*l.* penalty, from voting or interfering at elections, from holding any other office, and from dealing in excisable articles; they are also exempt from serving as mayor or sheriff, or in any corporate or parochial or other public office, or on any inquest or jury, or in the militia.² A penalty of 500*l.* and future incapacity to hold office under the crown are imposed on officers taking money or

¹ 4 & 5 Wm. IV. c. 51, § 2.

² The keeper of an excise office is not, as such, an officer of excise within the mean-

ing of the act, and therefore not subject to the restrictions, or entitled to the privileges of such.—4 & 5 Vic. c. 20, § 4.

reward, or entering into any collusive agreement, contrary to their duty; and 500*l.* penalty on any person offering or suggesting the same; but either party first giving information is indemnified.

The commissioners sit at the head office of excise in London, which includes under its immediate jurisdiction all the parishes within the bills of mortality, with those of St. Marylebone and St. Pancras. There are also chief offices at Edinburgh and Dublin, with one or more commissioners and assistant commissioners at each. Persons are appointed by the commissioners to hold offices of excise at every market-town in the United Kingdom. The chief offices are open from eight in the morning till three in the afternoon, and the other offices from eight till two. No holidays are kept, except Christmas-day, Good Friday, general fast or thanksgiving days, the restoration of Charles II., and the coronation-day and birthday of her majesty.

England and Wales (exclusive of the bills of mortality) are divided into upwards of 50 collections, each having an officer called a *collector*. Every collection is again divided into districts, having a *supervisor*; and each district into outrides and footwalks, in each of which is a *gauger* or *exciseman*. Excisemen are chosen from persons regularly instructed in the duties of the office by experienced officers, with whom they attend and make surveys; and when the instructor certifies that they are competent, they are called *expectants*, having to wait till a vacancy happens.

The *supervisor's* duty is continually to survey the houses &c. of all persons within his district liable to excise duties, and to see that the excisemen do their duty and make proper entries; to keep diaries of all matters, and transmit them to the commissioners; and especially to make entries as to the conduct of the inferior officers, who are reprimanded or punished by the commissioners, if need be.

The business of a *collector* is to go his rounds once every six weeks, and in the mean time to assist in prosecuting offenders. He is also to peruse the supervisor's diaries, and to investigate the conduct of inferior officers who have been complained of, &c.

Acts required to be done by a surveyor of excise may, within the limits of the chief office, be done by a collector or supervisor.

For neglect of duty or other misbehaviour, officers are reduced a grade lower. If discharged, they are sometimes restored; but twice discharged, they are never restored again.

The salaries and superannuation allowances of commissioners or officers of excise are not assignable or transferable in any manner whatsoever, nor subject to any attachment, execution, or other proceeding, before they are paid.

Licences.—For the carrying on of any manufacture, or dealing in any article connected with the revenue of the excise, a licence is necessary, renewable annually. The duty on these licences varies according to the particular business or dealing for which they are required, as will be more particularly shown when we treat of the laws relating to particular articles and traders.

The licences are granted, within the limits of the chief office, by the commissioners, or persons employed by them; and elsewhere, by the collectors and supervisors.

The licence only permits the party to carry on the trade in one place, except auctioneers, maltsters subject to the lowest rate of duty, and licensed beer-dealers, the latter being allowed to retail beer &c. at fairs or races.

Partners (except auctioneers) need not take out more than one licence.

An excise licence need not be taken out in order to sell excisable commodities in bond in an import warehouse, provided that not less than one entire cask or package is sold.

Licences to brewers, distillers, and publicans expire on the 10th October, and all other excise licences on the 5th July yearly; and every person intending to renew his licence must give twenty-one days notice to the collector or supervisor previous to such expiration. Persons commencing business, on taking out a licence at any other time of the year, pay a proportional part of the duty, including always the whole of the current quarter; except persons who have previously had a licence for the same trade or business, on the same or any other premises, who are not entitled to such deduction unless two years have elapsed from the expiration of their former licence.

In case of death or removal, the licence may be transferred, on indorsement by commissioners &c., to the executors, wife, or child, or to an assignee who has purchased the business, who may carry it on for the residue of the term, provided a fresh entry of the premises be made in the name of such person.

Persons licensed under the excise laws, and required to make entry of their premises, must cause to be painted, in letters at least one inch long, their names at full length (or, where there are partners, the name of the firm or partnership), and the word *Licensed*, with words necessary to express the purpose for which the licence is granted, in some conspicuous place on the outside of the front of the premises, over the principal outward door or gate, and not more than three feet from the top, and renew the same as often as necessary, on pain of forfeiting 20*l*. Any person not licensed putting up such words forfeits 20*l*.

Any licensed person not producing his licence when demanded by an officer of excise, is liable to a penalty of 30*l*.

Entries.—Every person required to make entry of any building, place, vessel, or utensil, must deliver such entry, with his signature thereto, to the officer of excise in whose survey the building &c. is situate, who copies the same in the General Entry Book.

No entry is legal unless by and in the name of a person who has attained the age of twenty-one, and who is the real owner of the trade or business;¹ but any person acting as visible owner, or having the principal management of the business, is, notwithstanding his minority, liable to all forfeitures. The entry must distinguish and describe every building, vessel, and utensil by a particular letter or number; which must be painted in a large and distinct character upon a conspicuous part of the wall or door of every such building, and on

¹ In the case of joint stock companies or corporations, entry must be made by the managers or directors, or, if the number exceeds four, by four of them at least, who shall be jointly and severally liable to all forfeitures and penalties. — 4 & 5 Vic. c. 20, § 6.

A married woman, whose husband has become insane or idiot, or otherwise incapable, or whose husband is separated from her or out of the kingdom, may, with consent of the commissioners, make entry; and bonds entered into by her are effectual, notwithstanding her coverture.—Ib. § 7.

every such vessel or utensil; and where any fixed pipes are employed in any such entered place, they must be painted with a distinct oil colour, and a drawing or description thereof delivered, stating the course, direction, and use of such pipes and of every branch thereof, and of every cock therein, together with every place, vessel, and utensil from or to or with which they lead or communicate; and all pipes used for the same purpose must be painted of the same colour. An omission of any of these particulars incurs a penalty of 100*l*.

Specimen books may be left by officers upon entered premises, for recording minutes of the state of the manufactory and of the survey thereof, to which they shall always have free access, with liberty to take away the same. Persons removing, concealing, or withholding such book, or altering or obliterating any entry therein, forfeit 200*l*.

Persons found employed in or about any private or unentered place, where goods liable to excise duties are being manufactured, or where there are materials in preparation for such manufacturing, are severally liable for the first offence to a penalty of 30*l*., or on nonpayment to three months imprisonment; and for the second offence to a penalty of 60*l*. or six months imprisonment.

All stills, backs, vats, coppers, presses, machines, and vessels and utensils, of which entry is by any law of excise required to be made, and which shall not be duly entered, and all goods and commodities found therein, or in any house, warehouse, storehouse, room, or place required to be entered, and not duly entered, are forfeited.—4 & 5 Vic. c. 20, § 5.

Payment of Duties.—Persons carrying on any trade or business subject to the excise must clear off the duties charged when called upon to do so, or in default thereof they forfeit double the value. And justices of peace, on information for the recovery thereof, have no power of mitigation, but must convict in the full penalty of double the value of the duties neglected to be paid. (4 & 5 Wm. IV. c. 51, § 20.) But no person carrying on trade or business in a market-town is compelled to go out of such town for the purpose of paying any duty, or of making an entry (other than the entry of any building, &c.); and persons carrying on business out of a market-town are not required to go farther for such purposes than the nearest market-town.¹

In case of any overcharge or overpayment of duties, complaint may be made within twelve months to the commissioners, or to two justices, within their respective jurisdictions. Before any complaint can be heard by the commissioners, it must be entered in a book kept for that purpose by the solicitor of excise for the summary jurisdiction at the chief office, stating the particulars, with the name and residence of the complainant; upon which a notice is given him of the time and place of hearing, when if he do not appear the complaint is dismissed. And before any such complaint can be heard before justices of peace, eight days notice of the time appointed for hearing is to be given to the collector or supervisor. Payment of the duties, or any proceeding for their recovery, is not to be delayed by reason of such complaint being depending.

¹ But no place is to be deemed a market-town for such purpose unless it were such at the time of the passing of the act 7 & 8 Geo. IV.—4 & 5 Vic. c. 20, § 1.

But the 3 & 4 Vic. c. 40 enacts, that no such complaint shall be made to the commissioners or justices where the subject matter is a question whether any goods or commodities are such as are liable to duty, or are liable to a higher or lower rate of duty, or as to the mode or manner of charging the duty. But if the person charged shall, within six days after the return of the officer, give notice to the commissioners, or to the collector or supervisor, of his objections, and the grounds thereof, he shall not be concluded by the charge of the officer, but shall be at liberty, upon proceedings taken against him, to dispute the same, and his liability to the payment thereof.

All goods subject to excise duty, and all materials, vessels, and utensils for making thereof, are liable for arrears of duties owing, and for all forfeitures incurred by the owner while they are in his custody, or in the custody of any other person for his use, and continue so liable, into whose hands soever they may afterwards come, or by what conveyance or title soever they may be claimed.

Goods fraudulently removed or secreted in order to evade the duty are forfeited, together with all casks, vessels, and packages, and every boat, cart, carriage, or other conveyance, and all horses and other cattle and things used in the removal, or for the deposit or concealment thereof; and every person assisting in such removal, deposit, or concealment forfeits treble the value, or 100*l.*, at the election of the commissioners or persons suing for the same.

PERMITS.—For the removal of some excisable articles, a permit, or licence from the officers of excise, is necessary. The regulations relating to permits were consolidated by the 3 Wm. IV. c. 16, which came into force on the 5th April, 1832.

The commissioners are empowered to provide moulds and frames for making paper for permits, having the words "*Excise Office*" in the substance thereof, and plates and types for printing the same. The counterfeiting or imitating, or having in possession without lawful excuse, any such moulds, frames, plates, types, or paper, is felony, punishable by transportation for seven years, or imprisonment for not less than two years. And the counterfeiting or forging, or making use of or knowingly receiving any forged permit, is a misdemeanor, punishable by transportation for seven years, or fine and imprisonment at the discretion of the court.

No permit is to be granted by any officer until a *request note* is delivered by the person requiring it; and every permit granted without a request note is void, and will not protect the goods mentioned therein.

The request note must contain the date, the name of the place from and to which the commodities are to be carried, and the mode of conveyance, likewise the christian and surname and place of abode of the persons sending them, and to whom they are to be sent, and, in case of a company or copartnerhip, the name of the firm, together with such other particulars as the commissioners shall from time to time direct, or as shall be required by any acts relating to the commodities in respect of which the permit is required; and every such note must be signed by the person requiring the permit, or by his known clerk or servant. No permit is to be granted on any request

note which is not so signed, and does not contain the several particulars aforesaid. The request note is not liable to any stamp duty.

Permits are to be made out in conformity with the request note, and in such form as the commissioners of excise direct. Every permit must express as well the time during which it is to be in force for removing the goods from the stock of the person taking it out, as also the time within which they are to be delivered and actually received into the stock of the person to whom they are *permitted* to be sent. Permits not actually used must be returned within the time limited. If any permit be not so returned, and there shall not be a sufficient decrease in the person's stock out of which the goods were to be removed to answer such removal, such person shall forfeit the like quantity of goods, and the same may be seized by any officer of excise; and in case the goods specified in any permit are removed, and shall not within the time limited be actually delivered and received into the stock of the person to whom they are to be sent, such goods shall be deemed to be removed without permit, and be forfeited and seized accordingly. But in case the goods are prevented from being delivered in time by any unavoidable accident or necessity, the court or jurisdiction where an information is brought may direct them to be restored.

Removing goods for which a permit is required without a permit, or having obtained a permit and not removing the goods accordingly or returning the permit within the time, or receiving goods without a permit, subjects to a forfeiture of 200*l.* and of the goods so removed; and any carrier, master of a vessel, boatman, or other person assisting in the removal of commodities for which a permit is required without a proper permit, forfeits 200*l.*

In any action or suit on any bond, bill, note, or other security, or contract or agreement, where any part of the consideration is for goods which have been removed without a permit, the defendant may plead that such goods were so removed, and the jury shall find a verdict for defendant; and if the money has been paid for goods removed without a permit, the purchaser may recover back the same within twelve months from the seller by action of debt or on the case in any court of record.

Forging request notes, fraudulently procuring or altering permits, or knowingly receiving such with any commodities, or using permits for any other than the purpose for which they were granted, subjects the party to a penalty of 500*l.* and forfeiture of the goods.

Whenever any commodities are forfeited for breach of any of the regulations relating to permits, all packages, horses, carts, vessels, boats, &c. employed in their removal, are also forfeited.

If a private person have occasion to remove commodities for the removal of which a permit is necessary, he must make a declaration that the duties have been fully paid, and, if the goods be intended to be delivered to any other than the person requiring the permit, that they have not been sold or disposed of to such person; when, upon a request note being delivered to the officer authorized to grant permits, a permit will be granted for their removal. If the declaration be untrue in any particular, the person making it forfeits 100*l.*

Powers of Officers, Seizures, &c.—Any officer of excise, with his assistants, may enter any building or other place used for carrying

on any trade or business subject to the excise, either by day or by night (but if between eleven at night and five in the morning, then upon request, and in the presence of a constable), and remain as long as he may think fit, and inspect such building, &c.

Upon an officer making oath that he has cause to suspect that goods forfeited under the excise acts are deposited in any private house or place, two commissioners of excise or one justice of peace may grant a warrant to the officer to enter such house or place (if in the night time, in the presence of a constable) to search for and seize such forfeited goods; and any person opposing, molesting, &c. any officer of excise in the execution of his duty forfeits 200*l*.

Officers of excise and customs have like powers of seizing foreign goods, or British spirits, forfeited under the laws of excise.

All justices, mayors, bailiffs, constables, &c. are required to assist the officers of excise in the execution of their duty; and any constable declining to go with an excise officer forfeits 20*l*. A constable having begun to assist an excise officer in any place where he has jurisdiction, and being required to continue his assistance in any other place, shall have jurisdiction accordingly.

All persons molesting, obstructing, or hindering any officer of excise in the search, examination, seizure, detention, or removal of any goods &c. forfeited, or in the due execution of his duty, forfeit 200*l*. Officers assaulted or resisted may oppose force to force; and if any person so assaulting or resisting be wounded, maimed, or killed, the officer may plead the general issue, and give this act and the special matter in evidence. Any person convicted of such violent assault or resistance may be imprisoned with hard labour for three years.

Officers making any seizure of exciseable goods are to give notice at the next office of excise, or to the supervisor or other superior officer, who shall take a particular account thereof; and the same are not to be removed without a permit (when a permit is in ordinary cases necessary for the removal of such goods) on pain of forfeiture.

Goods prohibited, or subject to excise duty, which are stopped by any police or peace officer or other person within the limits of the chief office are to be lodged at such chief office, and elsewhere at the nearest office of excise. But if they are stopped on suspicion of having been stolen, they may be conveyed to the nearest police office, or other convenient place directed by a justice of the peace, and notice thereof is to be given at the chief or other excise office respectively; and when the person charged with stealing the same shall have been tried, the goods are to be conveyed to the chief or other excise office, that proceedings may be taken for their condemnation, or that they may be restored upon payment of duty, or as the commissioners may think fit. If they be not so conveyed, they become forfeited; and the person in whose possession they may be, refusing to convey them, forfeits 20*l*.

When a seizure is made of goods exceeding 15*l*. in value, and no person applies to claim them, the officer making the seizure, if within the limits of the chief office, must cause a notice in writing, signed by the solicitor for the summary jurisdiction, to be affixed on a conspicuous part of the outside of the chief office of excise, signifying the day when the commissioners will hear the matter of such seizure;

and if in any other part, a notice, issued by a justice of the peace within whose jurisdiction the seizure was made, is to be affixed on the outside of the nearest excise office during the next or some subsequent market-day after the expiration of six days from the seizure, specifying the day when the justices will proceed to the hearing of such matter.

But where the goods seized do not exceed 15*l.* in value, if not claimed within a month, they become absolutely forfeited, as if condemned by the Exchequer; but if claimed within that time, proceedings may be taken as in other cases—4 & 5 Vic. c. 20, § 32.

When horses or other cattle, or any goods of a perishable nature, are seized, the commissioners may order them to be delivered up to the claimant, upon his entering into a bond of double the value thereof, to be void upon payment of their appraised value on condemnation.

If no claimant appear, or if he refuse to enter into such bond, the commissioners, at any time after fourteen days from the seizure, may order them to be sold by public auction. But if such horses, cattle, or goods are afterwards ordered to be restored, or if the decision be in favour of the claimant, the appraised value, or the proceeds of the sale, at his election, shall be paid to him, together with such further sum by way of compensation as the commissioners may deem fit.

For the *protection of officers* and others acting in their aid in execution of the excise laws, no writ, summons, or process is to be sued out, nor any action brought against them, until one month after notice has been given, setting forth the cause of action, the time when and the place where it arose, the name and place of abode of the person intending to bring it, and of his attorney or agent; and for the preparing and serving of such notice a fee of 20*s.* is allowed. The defendant may, at any time within the month, tender amends, or after issue joined may pay money into court. The action must be commenced within three months, and in the proper court, and the plaintiff shall not be allowed to give evidence of any cause of action except such as was contained in the notice, nor recover a verdict unless it be proved that such notice was given; and the defendant may plead the general issue, and give this act and the special matter in evidence; and if the jury find that sufficient amends were tendered, or the plaintiff otherwise fail in his action, the defendant shall have treble costs.

If, on the trial of any information, a verdict be given for the claimant, and the judge certify that there was a probable cause of seizure, the officer or other person assisting shall not be liable to any action; and if an action be brought, and a verdict be given against the defendant, if the court certify in like manner that there was probable cause of seizure, the plaintiff, besides the goods seized or the value thereof, shall not be entitled to more than twopence damages, nor to any costs, and the defendant shall not be imprisoned, nor fined more than one shilling.

Prosecutions.—All penalties may be sued for, and all goods seized as forfeited may be returned for condemnation, in the Courts of Exchequer at Westminster, Edinburgh, and Dublin respectively, within three years after the commission of the offence. But no action, bill, plaint, or information can be commenced or exhibited, or any writ of appraisement for condemnation of goods seized can be issued, except

by order of the commissioners of excise and customs, and in the name and at the suit of an officer of excise or customs, or by and in the name and at the suit of the attorney or solicitor general, or of the lord advocate or solicitor general in Scotland. But this does not extend to any summary proceeding at the instance of an officer of excise or customs for the conviction or immediate arrest of any person under any act relating to the excise or customs.

No claim can be entered in the Court of Exchequer to any goods seized, but within the time limited by the practice of the court, and in the real name of the proprietor, describing his residence, business, and profession; and oath must be made that such goods were really and truly the *bonâ fide* property of such person, and a bond of 100*l.* given with two sureties to pay the costs occasioned by such claim.

There is, however, a more summary way of proceeding for penalties and forfeitures under the excise laws, namely, before three commissioners of excise in London, if the offence was committed, or the offender found, or the goods were seized within the limits of the chief office; and if elsewhere, before two justices of the peace. The information in such cases must be exhibited within four months, and a notice given to the party within one week afterwards. The commissioners or justices are to summon the party against whom the information is exhibited, or any person who may claim the goods, to appear and plead; which summons must be served fourteen days before the time appointed, except where the information is for the recovery of double the value of any duty, when it is sufficient if within twenty-four hours of the time appointed.

Two or more justices of the peace are to meet once in every three months to receive and determine all matters brought before them relating to the revenue of excise. But no assistant commissioner or officer of excise can act as such justice of peace; nor can any trader subject to the excise laws act as a justice of peace in any case which relates to his particular trade or business.

Witnesses summoned, and having their reasonable expences tendered, neglecting to appear, or refusing to give evidence, forfeit 50*l.* Any officer of excise is a competent witness, although he may be entitled to a share of the penalty.

The commissioners of excise may mitigate or entirely remit penalties; but justices of peace have no power of mitigation, except it be specially given them by the act imposing the penalty. 4 & 5 Wm. IV. c. 51, § 20.

No writ of *certiorari*, or other writ or process, is to be issued, at the suit of any defendant, out of any court, to supersede, stay, remove, or in anywise affect any information or judicial proceeding before the commissioners of excise or a justice of the peace.

Appeals.—Formerly, under the 7 & 8 Geo. IV. c. 53, commissioners of appeal were appointed by the Treasury, three of whom constituted a court, to which parties dissatisfied with the judgment of the commissioners of excise might appeal. But this part of the act has been repealed by the 4 & 5 Vic. c. 20; which, in lieu thereof, enacts, that in case any officer of excise who has exhibited an information, or any person against whom an information has been exhibited, or who claims any goods &c. alleged to be forfeited, shall feel aggrieved by

the judgment of the commissioners of excise, he may appeal to the barons of the Exchequer; and all the provisions of the said acts relating to appeals shall apply to appeals before the said barons. The registrar of excise to be the registrar to the barons as such judges of appeal; to and with whom all notices are delivered or lodged, and by whom summonses are issued for the attendance of witnesses. Witnesses refusing to attend or give evidence forfeit 50*l*.

When the information has been exhibited before justices of peace, appeal may be made to the next general quarter sessions.

But no appeal can be allowed unless the party give notice, immediately after judgment, to the commissioners of excise or to the justices, and also to the adverse party, and lodge such notice at the office of the registrar, or with the clerk of the peace, respectively; and seven clear days notice in writing must be given on the part of the appellant to the respondent, of the time and place when and where the appeal is to be heard.

When the judgment appealed against is a conviction in any penalty, the party must within three days deposit in the hands of the commissioners, or of the collector or supervisor, the amount of the penalty; and when it is either for or against the condemnation of goods, the goods must be left with the commissioners, or with the collector or supervisor.

If judgment be given for the condemnation of the goods, the commissioners of excise or justices may apply the penalty deposited as above; and, if not sufficient, may grant a warrant for the sale of the goods; and if for any penalty, may grant a warrant to an officer of excise to levy the same upon the goods and chattels of the party, which may either be detained in the place where found, or removed to the nearest office of excise. When there are not sufficient goods whereon to levy a distress, a warrant may be issued to an officer of excise to arrest the person of the party, and convey him to gaol, there to remain until the judgment be satisfied, or until he be ordered by the commissioners to be liberated. And if any goods belonging to such person be afterwards found, a fresh warrant may be granted for the levying so much of any penalty, charges, and expences as remain unpaid.

All goods condemned are to be sold by public auction. But no goods upon which the duty has not been paid are to be sold for less than the amount of duty. Goods for which a price cannot be obtained equal to the duty, and all condemned goods the importation whereof is prohibited, are to be destroyed, or sold for exportation, or disposed of for the public service, as the Treasury may direct.

All penalties and forfeitures, after deduction of expences, are to be distributed one moiety to her majesty and the other to the officer or other person informing or suing for the same, unless there has been any collusion or negligence on the part of the officer &c., in which case the whole goes to the crown.

If a *capias* or other writ for the arrest of any person for any offence against the excise laws be sued out of the Court of Exchequer, and indorsed by a solicitor of excise, the sheriff &c. to whom it is directed shall grant a special warrant to the persons named in such indorsement for the apprehension of the party, and shall be indemnified against any escape between the apprehension and committal to prison.

For the necessary subsistence of any poor person imprisoned by virtue of any exchequer process, or warrant, or writ of extent, the commissioners of excise may cause an allowance to be made, not exceeding 8*d.* per day.

If in any case it appears that any penalty or forfeiture has been incurred without any intention of fraud, the attorney-general or lord advocate, after prosecution commenced, may stop proceedings by entering a *noli prosequi*. And the commissioners of excise may, in any such case, forbear to order any prosecution, upon such terms as they may direct, and restore the article seized; or they may, at any time before judgment is entered up, compromise such prosecution by the acceptance of any sum they may deem reasonable. And the commissioners of the Treasury may direct the seizure or any part thereof to be restored, whether condemned or not, and may mitigate or remit any penalty, either before or after judgment, upon such terms as may appear reasonable. But no person accepting such terms shall be entitled to maintain any action or suit for recompence or damages on account of such seizure.

II. LAWS RELATING TO PARTICULAR ARTICLES AND TRADERS.

Auctioneers.

The excise duties on sales by auction were wholly repealed by the 8 & 9 Vic. c. 15 from the passing of that act (8th May, 1845); and all bonds and regulations relating thereto are abolished.

By the same act, instead of the former duty of 5*l.*, an increased duty of 10*l.* is imposed upon auctioneers' *licences*, dispensing with the necessity for taking out, as formerly, any additional licence for selling certain articles, as wine, spirits, plate, patent medicines, &c. All former duties and every act of excise, previously in force, relating to auctions or to auctioneers, are repealed, save only the 6 Geo. IV. c. 81 (Excise Licences Act), so far as not altered by this act.

The licence must be taken out by every person carrying on the business of an auctioneer in any part of the United Kingdom, and renewed annually ten days at least before its expiration on the 5th of July, under a penalty of 100*l.*

Certain exceptions, however, as to the necessity of a licence are made by sec. 5, which provides, that it shall not be necessary for any person selling goods or chattels by auction in any of the cases hereinafter mentioned to take out the licence by this act required; namely, Any person selling goods or chattels by auction under distress for nonpayment of rent or tithes to less amount than twenty pounds; or under authority of the 6 Geo. IV. c. 18 (for the recovery of small debts in Scotland), or of the acts 6 & 7 Wm. IV. c. 57, and 7 Wm. IV. & 1 Vic. c. 43 (for the recovery of small debts by civil bill in Ireland), or of the act 7 Wm. IV. & 1 Vic. c. 41 (for the recovery of small debts in the sheriff courts in Scotland), or of any other act now in force in which the like exemption is given to the proper officer of court executing the process of such court to sell the effects seized by him by auction without taking out a licence as an auctioneer, provided the sum for which such process is enforced is under twenty pounds.

Sec. 6 repeals so much of the act 6 Geo. IV. c. 81 as required every auctioneer, over and above the licence to him granted as an auctioneer, to take out such licence as is required by law to sell any goods or commodities for the dealing in or retailing, or vending, trading in, or selling of which an excise licence is specially required, before he should sell such goods or commodities by auction, and so much of any other act or acts by which it was required that a separate and distinct licence should be taken out by an auctioneer selling by auction gold or silver plate or patent medicines, or any other articles. And any auctioneer having at the time in force a licence under this act may sell by auction any such property, goods, or commodities, without taking out any other licence in such respect.

By sec. 7, every auctioneer, before beginning an auction, shall affix or suspend, or cause to be suspended, a ticket or board containing his true and full christian and surname and residence, painted, printed, or written in large letters publicly visible and legible, in some conspicuous part of the room or place where the auction is held, so that all persons may easily read the same, and shall also keep such ticket or board so affixed or suspended during the whole time of such auction, under a penalty of 20*l*.

And by sec. 8, if any person acting as an auctioneer, and by this act required to take out a licence, does not, at the time of any sale by auction, on demand of any officer of excise or customs, or any officer of stamps and taxes, produce and show to such officer a proper licence to him granted under this act, and then in force, or does not immediately deposit with such officer the sum of ten pounds, every such person may be arrested and detained by any officer of the peace as hereinafter mentioned. And every officer of the peace shall, at the request of any such officer as first aforesaid, at the termination of such sale, or sooner if convenient, arrest and convey such person before some one of her majesty's justices of the peace for the county or place where such sale has been held; and such justice shall examine into the fact or facts charged, and upon proof, either by confession of the party offending or by the oath of one or more credible witnesses, that the person so brought before him did act as an auctioneer, and did not produce such licence, or deposit such sum of money as aforesaid, shall commit such offender to the common gaol or house of correction for any time not exceeding one calendar month. No such imprisonment, nor the deposit of such sum of money, shall in any manner prejudice or affect any proceedings afterwards instituted for recovery of the penalty incurred for acting as an auctioneer without a licence. But if any person having so deposited such sum of money, at any time before the expiration of one week from the date of such sale, produces to the officer with whom he deposited the same a proper licence to him granted and in force as an auctioneer before and at such sale, such officer shall immediately thereupon repay to such person the full sum so deposited; if otherwise, such officer shall, at the expiration of the said week, account for all such money to the commissioners of excise, or such person as they may appoint to receive the same.

By the 6 Ann. c. 16, brokers in the city of London are obliged to

take out a particular licence, and be admitted as such by the court of aldermen, under a penalty of 25*l.*; but it has been held, that the selling of goods by auction there by an auctioneer who has paid the auction licence duty, does not subject him to that penalty, although he is not licensed as such broker.

Licensed auctioneers acting as appraisers are also exempt from the Stamp Office licence duty payable yearly by all other persons acting as such, which, by 8 & 9 Vic. c. 76, is now 2*l.*

Brewers and Retailers of Beer, Ale, Cider, &c.

There are at present no excise duties on beer, ale or cider; having been taken off by the 1 Wm. IV. c. 51, from the 10th October, 1830. The hereditary duties of excise on beer and ale, granted to Charles II. and his successors, are not repealed by that act, but merely suspended.

The cautionary survey on brewers was abandoned from the 15th October, 1835, with a reservation of the right of inspection when deemed requisite, to check the use of other than legal ingredients, and to assess the rate of the annual licence.

On the exportation of ale or beer to foreign parts, a drawback of 5*s.* is allowed for every barrel of 36 gallons. Before any debenture can be paid, the exporter or his principal clerk or manager must make oath that such beer or ale was put on board the exporting ship as merchandise to be sent beyond the seas, and no part thereof for the ship's use; that the same has been brewed wholly from malt, for which the full duty has been paid, specifying when and where and by whom brewed; and that the quantity of malt used was not less than two bushels for every 36 barrels of such beer or ale. Persons making false statements forfeit 200*l.*, and the debenture is void. 1 Wm. IV. c. 51, § 11.

The licences required to be taken out by brewers and by retailers of beer, under the 6 Geo. IV. c. 81, are as follows; to which is to be added the additional 5 per cent by 3 & 4 Vict. c. 17:—

	£.	s.	d.
Every Brewer of Table Beer only for sale, if the quantity of beer brewed within the year ending the 10th October previous to taking out such licence, shall not exceed 20 barrels	0	10	0
Exceeding 20 and not exceeding 50 barrels	1	0	0
50 — — 100 —	1	10	0
100 barrels	2	0	0
Every Brewer of Beer other than Table Beer, for sale, if the quantity brewed within the year ending the 10th October shall not exceed 20 barrels	0	10	0
Exceeding 20 and not exceeding 50 barrels	1	0	0
50 — — 100 —	1	10	0
100 — — 1000 —	2	0	0
1000 — — 2000 —	3	0	0
2000 — — 5000 —	7	10	0
5000 — — 7500 —	11	5	0
7500 — — 10,000 —	15	0	0
10,000 — — 20,000 —	30	0	0
20,000 — — 30,000 —	45	0	0
30,000 — — 40,000 —	60	0	0
40,000 barrels	75	0	0

Every person who shall first become a Brewer of Beer for sale, on taking out a licence for that purpose, shall pay the sum of 10*s.*, and within ten days after the 10th October next, pay such further sum as with the said sum of 10*s.* shall amount to the duty herein mentioned, according to the number of barrels of beer brewed within the preceding year or period for which such licence was granted.

As, when the duties on beer were removed, the account of beer brewed ceased to be taken by the officers of excise, the 1 Wm. IV. c. 51 enacts, that, for the purpose of determining the rate of duty, every Brewer is to be deemed to have brewed *one* barrel of beer for every *two* bushels of malt used by him.

Every Brewer of Beer for sale, who shall retail such beer to be consumed elsewhere than on his or her premises	5	5	0
Every person, not being a Brewer, who shall sell Strong Beer only in casks containing not less than 4½ gallons imperial standard gallon measure, or in not less than two dozen reputed quart bottles at one time, to be drank or consumed elsewhere than on his or her premises	3	3	0
Every person who shall be duly licensed to keep a common inn, alehouse, or victualling-house, and who shall sell Beer, Cider, or Perry, by retail, to be drank or consumed in his or her premises, if the dwelling-house, at the time of taking out such licence, shall not, together with the offices, courts, yards, and gardens, be rated at a rent of 20 <i>l.</i> per annum or upwards, or shall not be rented or valued at such rent or annual value	1	1	0
If rated at 20 <i>l.</i> per annum or upwards	3	3	0
Licences to sell beer by retail, by 1 Wm. IV. c. 64 and 4 & 5 Wm. IV. c. 89—			
If to be drank on the premises	3	3	0
If not to be drank on the premises	1	1	0

Brewers are not now required, as formerly, to give bond on taking out a licence.

The regulations for the making of ale and beer are, since the abolition of the duties, very few and simple. They consist chiefly in taking out a licence, entering the premises, and abstaining from the use of any article other than malt.

By 1 Wm. IV. c. 51, every brewer must make entry at the nearest excise office of every store, building, room, and place intended to be used for brewing or keeping of worts or beer, specifying therein every place in which he intends to keep the malt and hops to be used in the brewing of beer. Any brewer using any place or mash tub for brewing of beer without having made such entry, or storing or keeping any malt or hops in any place not so specified, or using any malt or hops other than such as have been stored in a place so entered, forfeits for every offence 200*l.*; and all worts and beer found in any place or mash tub not entered, with the casks, and all malt and hops found in any place entered for the brewing of beer which have been taken from any place other than the places so entered and specified, are forfeited, and may be seized by any officer of excise.

Obstructing officers from entering buildings or places used by brewers for the purpose of inspecting and taking an account of beer or malt therein, subjects to a forfeiture of 100*l.*

To prevent the adulteration of beer, the 56 Geo. III. c. 58 enacts, that if any brewer, or dealer in or retailer of beer, shall have in his possession or use any liquor, extract, calx, or other preparation for the purpose of darkening the colour of beer, other than brown malt, as commonly used in brewing; or shall receive or have in his possession, or put into any worts or beer, any molasses, honey, liquorice, vitriol, quassia, coculus indicus, grains of paradise, guinea pepper, or opium, or any extract or preparation of those articles, or any article or preparation whatever as a substitute for malt or hops, he shall forfeit 200*l.* and all such articles, and the worts and beer, with all casks, &c.

And any druggist or chemist, or other person, selling or delivering to any licensed brewer, or dealer in or retailer of beer, or to any other person for his use, any such improper ingredients, forfeits 500*l.*

And, by 1 Wm. IV. c. 51, no brewer is to have any raw or unmalted-corn or grain upon his premises, under 200*l.* penalty, and forfeiture thereof.

Retailers of Beer.—Previous to the year 1830, the retail sale of beer was principally confined to persons having a magistrates' licence

to "keep a common inn, alehouse, or victualling house," who, in addition to such licence, were, and are still, required to take out an excise licence. But in that year the 1 Wm. IV. c. 64 was passed (since amended by 4 & 5 Wm. IV. c. 85, and 3 & 4 Vict. c. 61), by which the trade in beer has been thrown open; and any person may now sell beer by retail, on obtaining an annual licence from the excise, which if for the sale of beer to be drank on the premises costs *three guineas*, but if not to be drank on the premises only *one guinea*. The following are the chief provisions of these acts.

By 1 Wm. IV. c. 64, any householder (except sheriff's officers, persons executing the process of any court of justice, or persons not being assessed to the poor of the parish) may apply for and obtain an excise licence for selling beer, ale, and porter by retail. Every such application must specify the christian and surname of the person applying, a description of the house, together with the names, occupation, and residence of the persons proposed as his sureties. And, by the 4 & 5 Wm. IV. c. 85, if the application be for a licence to sell beer or cider by retail *to be drunk in the house or on the premises*, it must be accompanied by a *certificate* from six inhabitants of the parish, township, or place, rated to the poor at not less than 6*l.* per annum each (none of whom shall be maltsters, common brewers, or persons licensed to sell, or owners or proprietors of a house licensed for the sale of spirituous liquors, beer, or cider by retail), stating that the person applying to be licensed is of good character; which certificate must also be signed by one of the overseers of the parish &c., certifying that such six persons are inhabitants so rated. This certificate is to be produced annually, and deposited with the person authorized to grant licences; but it is only required when the application is for a licence to retail beer or cider *to be drank or consumed in the house or on the premises*; and not in any case as to a house situate in the cities of London or Westminster, or within the bills of mortality, or within any city or town corporate, or within the distance of one mile from the polling place for the election of members of parliament where the population exceeds 5000.

The 3 & 4 Vict. c. 61, however, further enacts, that no licence to retail beer shall be granted to any person but the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed; nor shall any licence be granted in respect of any dwelling-house rated at less than 15*l.* per annum within the bills of mortality or in places containing 10,000 inhabitants; or at less than 11*l.* per annum in places containing more than 2500 inhabitants, or at less than 8*l.* per annum in all other places. And every person applying to be so licensed shall produce a certificate in writing from the overseer of the place in which he shall reside, certifying that the applicant is the real resident holder and occupier of the said house, and also the true rent or annual value at which the same is rated; which certificate must be left with the proper officer of excise, as well as a duplicate thereof with the clerk of the peace for the county &c. In extra-parochial places such certificate may be signed by two inhabitant householders. Any overseer wrongfully refusing such certificate, or certifying falsely, is liable to forfeit 20*l.* Any person forging such a certificate shall forfeit 50*l.*, and be disqualified from obtaining a

licence. Every person convicted of felony, or of selling spirits without a licence, is also disqualified from obtaining or holding a licence under these acts.

The licence is granted, within the limits of the chief office of excise in London, under the hands and seals of two commissioners of excise, or persons authorized by them, and elsewhere under the hands and seals of the collectors and supervisors of excise of the district. At the time of receiving it, the party enters into a bond (not subject to stamp duty) with one surety in the penalty of 20*l.*, or two sureties of 10*l.* each; but no person is competent to be such surety, who is licensed to sell beer under the provisions of this act, or who is not a householder assessed to and paying poor's rates within the parish. The licence is dated on the day it is granted, and expires at the end of twelve calendar months after.

Persons licensed to sell beer or cider under these acts must make entry with the officers of excise of every house, cellar, room, and place for storing, keeping, or retailing beer or cider, as required by 7 & 8 Geo. IV. c. 53, and 4 & 5 Wm. IV. c. 51, on penalty of 200*l.*, and forfeiture of all the beer and cider found in any unentered place. And every such licensed person must have painted, in letters three inches at least in length, in white upon a black ground, or in black upon a white ground, publicly visible, upon a board to be placed over the door of the house in which he is licensed to sell beer by retail, his christian and surname at full length, with the words "*Licensed to sell Beer by retail*," adding the words, "*To be drunk on the Premises*," or "*Not to be drunk on the Premises*," as the case may be.

Persons in partnership need not take out more than one licence for the same house or premises.

If any person not duly licensed shall sell beer or cider either to be consumed upon the premises or off the premises where sold, or if any person shall sell beer or cider to be consumed upon the premises where sold without being licensed so to do, every such person shall, in addition to any excise penalty to which he may become subject, forfeit 5*l.* The sale of any quantity less than 4½ gallons is a selling by retail. And if any person licensed to sell beer not to be drunk on the premises shall carry, or permit any person to carry, any beer or cider from his premises for the purpose of being sold on his account, or for his benefit or profit drank in any other house, or in any tent, shed, or other building of any kind belonging to him, the same shall be deemed to be drunk on the premises.

Every person licensed to sell beer by retail shall sell (except in quantities less than a half pint) by the gallon, quart, pint, or half-pint measure, sized according to the standard; or, in default, shall forfeit the illegal measure, and pay not exceeding 40*s.*, together with the costs of the conviction, to be recovered within thirty days before two justices; and such penalty is over and above all penalties to which the offender may be liable under any other act.

Every seller of beer by retail under this act, who shall permit drunkenness or disorderly conduct in his house shall for the first offence forfeit not less than 40*s.* nor more than 5*l.*, for the second offence not less than 5*l.* nor more than 10*l.*, and for the third offence not less than

20*l.* nor more than 50*l.*; and the justices before whom any conviction for the third offence shall take place may adjudge that such offender shall be disqualified from selling beer by retail for two years, and also that no beer shall be sold by retail by any person in the house of such offender.

And if any person so licensed shall knowingly sell any beer made otherwise than from malt and hops, or shall mix any drugs or other pernicious ingredient with beer, or shall fraudulently dilute or in any way adulterate it, he shall for the first offence forfeit not less than 10*l.* nor more than 20*l.*, and for the second shall be adjudged to be disqualified from selling beer for two years, or forfeit not less than 20*l.* nor more than 50*l.*; and if any offender convicted of such offence shall during two years sell any beer, either in the house or premises mentioned in the licence of such offender or in any other place, he shall forfeit not less than 25*l.* nor more than 50*l.*; and if any person shall at any time, during any term in which it shall not be lawful for beer to be sold by retail on the premises of any offender, sell any beer by retail on such premises, knowing that it was not lawful to be sold, he shall forfeit not less than 10*l.* nor more than 20*l.*

The hours during which houses licensed under these acts are to be kept open used to be regulated once a year by the justices of peace in petty sessions; but by the 3 & 4 Vict. c. 61, § 15, it is enacted, that no person licensed under that or the former acts shall keep open his house for the sale of beer or cider, or shall sell beer or cider, or suffer the same to be drank in his house, at any time before five o'clock in the morning or after twelve at night, in the cities of London and Westminster, or the boroughs of Marylebone, Finsbury, the Tower Hamlets, Lambeth, and Southwark, nor after eleven o'clock in any place within the bills of mortality, or in any place where the population shall exceed 2500, or within one mile from a polling place of any parliamentary borough of the like population, nor after ten o'clock in any other place; nor before one o'clock in the afternoon, or at any time during which the houses of licensed victuallers shall be closed, on any Good Friday, Christmas day, or day of public fast or thanksgiving. A breach of these regulations entails a penalty of 40*s.* and every sale is deemed a separate offence.

Constables and police officers may enter into any house licensed to sell beer or spirituous liquors to be consumed on the premises, whenever they think proper; and any licensed person, or his servant or other person by his direction, refusing to admit them, shall for the first offence forfeit not exceeding 5*l.* with the costs of the conviction, to be recovered within twenty days before one justice, and for a second offence may be adjudged by two justices to be disqualified to sell beer &c. by retail for two years.

In case of complaint against any licensed person, two justices of peace may require the production of his licence; and on refusal or neglect to produce it, he shall forfeit not exceeding 5*l.* The summons or order of a justice of peace under these acts must be served by a constable, special constable, or police or other peace officer.

One justice acting for a county or place where any riot or tumult has taken place, or two or more justices where any riot or tumult

may be expected to happen, may order every such licensed person within their jurisdiction, in or near the place of such riot, to close his house.

The provisions of the Mutiny act as to billeting soldiers extend only to persons licensed to sell beer or cider to be drunk on the premises.

Licences to sell *cider* only by retail are granted under the same regulations, on the payment of 1*l.* 1*s.* duty; but persons licensed to retail beer may also retail *cider* without any other licence.

A person licensed under these acts is not thereby authorized to sell wine, spirits, sweets or made wines, or mead or metheglin; and if he suffer any such to be brought into his entered premises, he forfeits 50*l.* over and above any excise penalty. And any officer of excise may enter the premises not only of persons licensed under these acts, but also of persons selling table beer at 1*½**d.* or any less rate per quart, and make search for and seize all wines, spirits, and sweets therein, and also all beer on the premises of the latter which by law they are not entitled to sell.

The provisions of the 56 Geo. III. against using or having in possession ingredients for the adulteration of beer, apply to all dealers in beer as well as to brewers.

Bricks and Tiles.

The excise regulations for the manufacture of *bricks* are contained in the 2 & 3 Vict. c. 24. The *duties* by that act are as follows; adding the 5 per cent by 3 & 4 Vict. c. 17:—

	£.	s.	d.
For every 1000 bricks, not exceeding 150 cubic inches each brick, made in Great Britain, or brought from Ireland into Great Britain	-	-	0 5 10
— exceeding the above dimensions	-	-	0 10 0

The whole of which duties are drawn back upon exportation to foreign parts or to Ireland.

Brick-makers must make entry with the excise of their brick-fields, sheds, work-houses, &c., on penalty of 100*l.*; and officers may enter and examine every place, kiln, stove, or clamp thereon, under a like penalty on the maker, if hindered or obstructed.

Bricks are to be charged with duty whilst in the operation of drying or hardening, and before being removed to the kilns or clamps for burning; and in charging the duties the officer is to allow 10 out of every 100 for waste. A penalty of 50*l.* is imposed on the maker if the officer is obstructed in examining or taking account of them, or if they are not placed in such form that the officer may readily take such account, or if they are removed to the kiln &c. for burning before the account is taken, unless the officer have failed to attend after three days notice, in which case the maker shall deliver an account of the number and sizes of the bricks removed to the officer on his next visit.

Bricks not charged are to be kept separate from charged bricks, on penalty of 20*l.* And makers fraudulently concealing or conveying away bricks with a view to evade the duties forfeit 100*l.*

The officer is to deliver an account, at the end of every six weeks, of all the bricks made during that time, and of the duty payable, which must be paid within six weeks, or in default the maker is liable to forfeit double the amount.

A pattern mould is to be kept by every maker, adapted for forming a brick ten inches long, three inches thick, and five inches wide, and

stamped with the word "Excise;" by which, in case of dispute, is to be ascertained whether any bricks are to be subject to the higher or lower rate of duty, by the officer taking indifferently three of them, and if the clay be, in two cases out of three, more than sufficient to fill the mould, the whole of such bricks shall be charged with the higher duty.

All bricks, of whatever form or in whatever manner soever made, are to be deemed bricks within the meaning of this act, and chargeable with duty.

But any person may make bricks for the sole purpose of draining wet and marshy land without being charged with duty, provided they have the word "Drain" distinctly stamped or moulded in the centre thereof; but any person selling or using such bricks for any other purpose incurs a penalty of 50*l.*

The duties on *tiles* were repealed by the 3 & 4 Wm. IV. c. 11, from the 20th May, 1833; but, to prevent evasion of the duties by bricks being denominated tiles, nothing shall be deemed a tile which when turned out of the mould shall not be a perfect square (except tiles for covering houses or draining lands), or which shall be in any part more than 1 $\frac{7}{10}$ inch thick if under 8 inches square, or more than 2 $\frac{1}{2}$ inches thick above that size, or which shall have any incisions therein so as to allow of being easily divided.

Candles.

The duties on candles, and on the licences required to be taken out by the makers thereof, were repealed by the 1 & 2 Wm. IV. c. 19, from the 1st January, 1832.

Coffee, Tea, Cocoa Nuts, Chocolate, and Pepper.

Every person trading in coffee, tea, cocoa nuts, chocolate, or pepper, must take out an annual excise licence, the duty on which is 1*l.*

Every druggist, grocer, Chandler, or coffee-house keeper, chocolate-house keeper, and other persons dealing in coffee, tea, or cocoa nuts, or making or selling chocolate, must have his storehouse and manufactories entered with the Excise, under penalty of 200*l.* and forfeiture of the goods; and the premises of *roasters of coffee* must be entered in like manner, under a penalty of 50*l.*

Every person keeping a public house, shop, cellar, or other warehouse for selling brandy or other spirituous liquors, who shall have in his custody, for his use, any coffee, tea, chocolate, or cocoa nuts, above 6*lb.* weight of any kind, shall be deemed a dealer in such commodities.

Manufacturing any thing in imitation of tea subjects the offender to 5*l.* penalty, or from six to twelve months imprisonment; and leaves &c. in the possession of any person for such purpose may be seized and destroyed.

Roasted beans and rye reduced to powder have frequently been used to adulterate ground coffee; and the possession of such substitutes for coffee was formerly an offence punishable by the forfeiture of the articles and a penalty of 100*l.* But by the 3 Geo. IV. c. 53, persons who are *not dealers in coffee* may take out a licence for roasting and selling corns, peas, beans, and parsnips, labelling the parcels with their names, and conforming to the various regulations in the act.

By the 3 & 4 Wm. IV. c. 101, the excise duties on tea ceased from the 22d April, 1834, customs duties being imposed in lieu thereof; and the Treasury were empowered to discontinue the practice of requiring and issuing permits for the removal of tea, and establish any other regulations, either of customs or excise, as should appear necessary for the security of the revenue. Tea permits, and the survey of the excise, were accordingly abolished under Treasury authority, dated March, 1836.

Glass.

All the duties on glass, and on the licences in respect of any glass-maker or glass-house, were repealed by the 8 & 9 Vic. c. 6, from the 5th April, 1845.

Hops.

An excise duty of 2*d.* per lb. is imposed on all hops produced in Great Britain,¹ to which is added an additional 5 per cent by 3 & 4 Vict. c. 17. By 1 & 2 Wm. IV. c. 53, one moiety of the duty is payable on the 1st March next after it is charged, and the other on the 1st October in each year; and defaulters in payment forfeit double the sum due. The whole duty is drawn back upon exportation.²

By the 9 Ann. c. 12, hop planters are required to give notice to the excise office at the next market town, on or before the 1st August in each year, of the number of acres they have in cultivation, on penalty of 40*s.* per acre; and the officer is to make entry of the same within five days, on penalty of 2*l.* No oasthouse, storehouse, or other place, or kiln, is to be used without notice, under 50*l.* penalty; and hops are to be brought to such oast, storehouse, &c. in six weeks after gathering, on pain of forfeiting 5*s.* per pound. The usual powers are given to the officers to enter such places.

By the 6 Geo. I. c. 21, and 39 & 40 Geo. III. c. 81, hop-planters are to give twenty-four hours notice previous to bagging and weighing, and the time for doing so must be between four o'clock in the morning and five in the afternoon; and, by 9 Anne, the officer is properly to mark the bags.

The planter or owner of the hops is to keep scales for weighing them for the officer's use, and assist in the weighing, under penalty of 50*l.*

By the 39 & 40 Geo. III. c. 81, owners are to mark bags with their names and places of abode before packing the hops, under 20*l.* penalty, (and with no other name &c., by 54 Geo. III. c. 123); and the bags must not weigh more than 10 lb. to every 112 lb. gross weight of bags and hops, under a similar penalty. The officer is also to mark the gross weight, with the year of the growth, and the progressive number, according to the number of bags charged to each owner for that season. The counterfeiting such marks incurs 100*l.* penalty; and defacing them, 20*l.* If hop-owners &c. pack different qualities &c. of hops in the same bag, they are liable to a penalty of 10*l.* per bag.

Hops are not to be removed from the weighing place before twelve hours, unless weighed by the supervisor, on penalty of 50*l.*

¹ 42 Geo. III. c. 69; 45 Geo. III. c. 94.

² 1 & 2 Geo. IV. c. 100.

Pickers of hops carrying off hops forfeit 5s. per pound, or may be sent to hard labour; and a similar consequence ensues for obstructing officers in their duty.

The mixing with hops any drug or other ingredient, to colour or alter the scent, subjects the party to 5*l.* penalty for every cwt. so altered.

The malicious cutting or destroying hop plantations is felony, punishable by transportation for life or seven years, or imprisonment and hard labour in a common gaol for not exceeding seven years.

Leather, &c.

The duties on hides and skins tanned, tawed, or dressed in oil, and on vellum and parchment, were repealed by the 11 Geo. IV. & 1 Wm. IV. c. 16, from the 5th July, 1830. But so much of the 48 Geo. III. c. 60, as prohibited tanners &c. from carrying on the business of a shoemaker, currier, &c. was left unrepealed.

Maltsters and Malt.

The duty on the licence required to be taken out by maltsters under the 6 Geo. IV. is according to the following scale, with the additional 5 per cent by 3 & 4 Vict. c. 17:—

	£.	s.	d.		£.	s.	d.
If the Malt made within the year ending 5th July shall not exceed 50 quarters	0	7	6	Not exceeding 300 quarters . . .	2	5	0
Not exceeding 100 quarters	0	15	0	" " 400 —	2	12	6
" " 150 —	1	2	6	" " 450 —	3	7	6
" " 200 —	1	10	0	" " 500 —	3	15	6
" " 250 —	1	17	6	" " 550 —	4	3	6
				If exceeding 550 —	4	10	0

Every person who shall first become a Maltster, on taking out such licence, must pay the sum of 7*s.* 6*d.*, and, within ten days after 5th July next, pay such further sum as with the 7*s.* 6*d.* shall amount to the duty hereinbefore mentioned, according to the quantity of Malt made within the preceding year.

The principal act now in force regarding this extensive branch of trade is the 7 & 8 Geo. IV. c. 52, since explained and amended by the 11 Geo. IV. c. 17, and the 1 Vict. c. 49. The first of these acts provides for the entry of premises with the excise in the usual manner, under 100*l.* penalty and forfeiture of all malt made in places unentered; and the 11 Geo. IV., referring to the first section of that act, provides that the same room may be used for keeping malt and other grain, provided the malt be separated therefrom; and also that any grain not intended for making into malt may be dried on a kiln entered as for making malt, if twenty-four hours notice be given in writing to the officer. The form and construction of cisterns and couch frames are regulated by the 7 & 8 Geo. IV.; and maltsters are required to obtain a certificate from the supervisors of excise of the due construction of cisterns, upon pain that wetting or steeping any grain in a cistern not so certified is to be deemed a wetting and steeping without notice, and subject to a penalty accordingly. The usual power is given to officers to enter at any time into the premises, to take account of malt and grain, and leave a specimen book, the removal or obliteration of which subjects the maltster to 200*l.* penalty. Obstructing officers in the execution of their duty is 300*l.* penalty.

Twenty-four hours notice is to be given of wetting corn to be made into malt; and wetting or steeping corn without such notice subjects

to 100*l.* penalty. If the maltster does not proceed pursuant to notice within three hours of the time mentioned, the notice is void; and he must not begin to wet at any other time than between eight in the morning and two in the afternoon, under 100*l.* penalty. The grain is to be kept in the cistern covered with water for at least forty hours, under 100*l.* penalty: but the water may be once drained off during the steeping, on due notice being given to the officer, provided the grain be again covered with water within an hour's time. After an account is taken, no grain can be added to that in steep, under 200*l.* penalty. Corn is to be emptied from the cistern between seven in the morning and four in the afternoon, under 100*l.* penalty. All cisterns in the same house are to be emptied at the same time, or in three hours from the commencement of emptying, under 200*l.* penalty; and after the last emptying of any cistern, 200*l.* penalty attaches for taking corn out of any cistern under the same roof within 96 hours afterwards, unless on the day on which such 96 hours would expire, and after seven in the morning. The penalty on so conveying corn from the cistern that it cannot be gauged is 200*l.* Maltsters are to empty all grain from the cisterns into the couch frames, and to level the same therein, not above 30 inches in depth. Corn may be emptied from the couch frame at the expiration of 27 hours, but, for the purpose of gauging, it is to be deemed in couch for 30 hours. A penalty of 100*l.* attaches on treading or forcing together corn in the cistern or couch frame; and the officer, on suspicion thereof, may turn it over, and level and re-gauge it; and if the increase amounts to 5 bushels in 100 when the corn or grain has not been emptied 8 hours from the cistern, or to 6 bushels in 100 if emptied 8 hours and not 16, or to 7 bushels in 100 if emptied 16 hours or upwards, it shall be deemed conclusive evidence of the corn or grain having been trodden or forced together. The maltster is to assist the officer in re-measuring, if required, under 100*l.* penalty. Grain that has been steeped 50 hours, if there be no other grain on the premises which has been steeped for a less time, may be sprinkled at the expiration of six days, or 144 hours, after it has been emptied from the cistern, on giving twenty-four hours notice to the officer. Maltsters are not to have more than six floors, including the couch frame and kiln, from one cistern, or not more than one cistern emptied into the same couch frame, under 200*l.* penalty. But floors may be divided for working grain separately. The floors must be so placed and constructed, that the officer may with convenience be able to gauge the grain thereon. The penalty for mixing grain of different steepings is 200*l.*; for dampening malt after it is taken from the kiln, 100*l.*; and for fraudulently concealing or carrying away or receiving malt before an account is taken by the officer, 200*l.*

The officers are to make a return of the duties charged on the maltster every six weeks; and the amount is to be paid by the maltster in six days afterwards, on pain of forfeiting double the amount, unless security is given by bond in double value for the due payment of all duties at the end of every eighteen weeks.

Servants or workmen beginning to wet corn or empty cisterns at illegal hours &c., with intent to injure their masters, are liable to imprisonment from three to twelve months, with hard labour; and the

masters are spared the penalties, provided they prosecute the parties to conviction within a month, and obtain a certificate thereof.

Paper, Pasteboard, Scaleboard, Millboard, &c.

There were formerly two classes of paper in the eye of the excise laws. All writing, coloured, and wrapping paper, cardboards, and pasteboards, came under the denomination of *first class* paper, and paid 3*d.* per lb. duty, unless manufactured wholly of tarred ropes, without the tar being previously extracted, in which case the paper was denominated *second class*, and paid 1½*d.* per lb.; and millboards and scaleboards made of the same materials as second class paper, paid 2½*d.* per lb., or 2*l.* the cwt. But by the 6 & 7 Wm. IV. c. 52, since superseded by 2 & 3 Vict. c. 23, the duty was reduced to 1½*d.* per lb. on all paper, glazed paper, sheathing paper, button paper, and on all button-board, millboard, pasteboard, and scaleboard, of whatever kind or description, made in the United Kingdom, without reference to the kind of materials employed in the manufacture thereof; to which is added the additional duty of 5 per cent by 3 & 4 Vict. c. 17.

A drawback of the whole duty is allowed on the exportation of paper, and of printed books, and account books, whether bound or unbound; also of 2*d.* for every dozen square yards of paper printed, painted, or stained in the United Kingdom.

Also, in favour of the universities of Oxford and Cambridge, of those of Scotland, of Trinity College, Dublin, and of the queen's printers in England, Scotland, and Ireland, an allowance is made of the whole duty on all paper used in printing Bibles, Testaments, Psalms Books, Common Prayer Books, or works in the Latin, Greek, Oriental, or Northern languages. A drawback of the duty is also allowed on all glazed boards or other press papers used by clothiers and hot-pressers in the pressing woollen cloths and stuffs.

Every maker of paper &c. is required, on penalty of 100*l.*, to take out a licence, renewable annually, for which the duty is 4*l.*

The commissioners of excise are bound to prepare and deliver to all makers requiring the same, through the supervisors, labels to be used by the makers in tying up paper and boards. These labels are marked with the number or letter of each mill for which they are supplied, and the makers are bound to deliver them on demand to the supervisor. A refusal to comply with such demand, or any destruction or sale of the labels, or the use of them for any other purpose than that of tying up paper &c., subjects the maker to a penalty of 10*l.* in respect of each label.

Every maker is required to make up all paper and boards into reams, half reams, or parcels; each of which must be inclosed in a wrapper, on which is to be affixed, by paste or otherwise, a label, so that the same shall be on the top thereof. Every ream &c. is then to be secured by string, and the contents, denomination, and weight thereof are to be written or printed on such wrapper. A neglect of any of these requisites entails a penalty of 10*l.* in each case, as well as the forfeiture of the paper &c. Each ream of paper (other than glazed, sheathing, or button paper) must consist of twenty quires, and each quire of twenty-four sheets, except printing paper, which may consist

of any number of sheets short of 516 sheets per ream. A parcel of glazed paper, sheathing paper, button paper, button board, mill-board, paste-board, and scaleboard, must consist of even dozens of sheets, not less than twenty-four nor more than seventy-two. All paper and parcels which are not made up in these quantities are liable to forfeiture. If, however the maker is desirous of making up any paper, other than glazed, sheathing, or button paper, in less quantities than a ream or half ream, he may do so, if he specify the exact number of sheets on the label, and provided that the packets so made up shall not weigh less than twenty pounds. The edges of paper &c. may be cut before it is tied up; and paper may be made into quires without being folded up, if the quires are separated by slips of coloured paper.

If the mill is in a city or market town, twenty-four hours notice of weighing must be given by the maker to the excise; elsewhere forty-eight hours notice is required. All the paper and boards intended to be charged must be then produced, made up and tied, and with the particulars above stated; and the maker shall, on each ream, half ream, or parcel, which is weighed, write the progressive number thereof, and the quarter and year, according to the number made at the mill during the current quarter, to be computed from the 5th of January, the 5th of April, the 5th of July, and the 10th of October in each year. After this, the officer shall write upon each lot the day of the month and year, and sign the same with his christian and surname, and stamp the same in various places with a stamp to be provided for that purpose by the commissioners of excise. All paper so weighed is to be kept separate, and may not be removed for twenty-four hours, under a penalty of 50*l.*, in order that the supervisor may have an opportunity of re-weighing the same; and if any extra weight be found, the duty shall be paid upon the result of the re-weighing. No weight is to be used below 1 lb. and the turn of the scale is to be given to the crown; but in consideration thereof 2 per cent is allowed to the maker.

The maker is prohibited altering the label affixed to any paper or parcel of boards after the same has been charged; neither may he open them, or take anything therefrom, or in any respect make any alteration therein, on pain of forfeiting 20*l.* in each case, as well as the paper or parcel itself.

Paper may be tied up, charged with duty, and sent out, in single sheets on the rollers, without cutting and making it up into reams, if the true weight of such rollers be written in legible letters on the end thereof. The paper is to be tied up in wrappers and labelled as in other cases; and when weighed and charged, the officer may deduct the weight of the roller from the gross weight, provided the end of the roller whereon the weight thereof purports to be shall be distinctly visible.

Makers of paper are to enter daily in a book an account of all paper &c. delivered from their mills, and the progressive number, quarter and year, of every ream, half-ream, and parcel respectively, as well as the date of the delivery, and the place and conveyance to and by which the same was sent. This book is to be open to the inspection of the officers; and any maker neglecting to comply with these particulars, or in any way obliterating the entries in the said book, incurs a penalty of

200l. Any maker sending out paper &c. without the proper labels forfeits 20l. and the paper &c. so sent. Every ream or parcel differing from the marked weight is liable to forfeiture; and if any be sent out before the duty is charged thereon, the maker incurs a penalty of 300l. Any papermaker or other person forging any stamp or label &c. directed to be used by the 2 & 3 Vict. c. 23, or knowingly having any such in his possession, or selling any ream &c. with such forged stamp &c. thereon, shall forfeit 1000l. for every such forged stamp &c., and 500l. for every such ream &c. as well as the paper itself.

Paper may be removed, before it is charged with duty, from one mill to another to be finished, on 48 hours notice to the officer of excise, who, after taking an account of the quantity &c., shall grant a certificate thereof, and of the mills from and to which it is to be removed. Every maker who shall receive into his possession paper &c. which has been charged with duty elsewhere, or has been returned to him from a customer, must mark the same with the particulars of such previous charge, or with the word "Returned," as the case may be, and shall keep the same separate from all other paper, and give notice thereof to the officer at the next survey; and before the same shall be sent out again, he must mark thereon the number of his own mill, on pain of forfeiting 50l. in each case.

Makers of pasteboard, not being makers of paper, are prohibited from using any paper not duty charged in their manufacture of pasteboard, on pain of forfeiting the implements of their trade and 100l; and they must produce all the paper before it is so used, in order to have an account taken thereof, under a similar penalty.

Every officer of excise is required to make a return of duty within his district to the collector of excise every six weeks, and also to leave a copy thereof with the maker, who is bound to pay the same within six days, or he will forfeit double the amount.

No person is allowed to carry on the trade of a stationer or dealer in paper &c. at any mill; nor can any maker carry on or be concerned in any such trade in any premises within one mile of his mill by the nearest road, on pain of forfeiting 200l.

The usual entry of the mill &c. is to be made with the excise, under a penalty of 200l.; and where two or more mills belonging to one person are not more than one mile apart, and the paper is removed from one to the other to be finished, they may be worked as one mill.

Persons desirous of receiving the drawback on exporting paper must give a twelve hours packing notice to the excise, specifying the time, place, and owner; and they must produce all the paper intended to be exported to the officer, who shall weigh and mark the same after having destroyed the labels thereon, and make returns to the office. There is a penalty of 200l. for any fraudulent increase of weight, as well as the forfeiture of the paper.

Exporters must give a shipping notice six hours before the intended shipment; and a declaration must be made, that the packages produced are the same as have been previously weighed and packed as above. The exporter must also give bond in double the amount of drawback, conditioned for the speedy exportation of such packages, which shall afterwards be shipped in the presence of an officer.

All persons detected in fraudulently obtaining drawbacks, forfeit 200*l.* over and above all other penalties to which they are liable in respect of the transaction, as well as the paper &c.

Upon proof on oath, before justices, of the loss or damage of paper by fire or wreck, the owner may recover the amount of duty paid by him on account of paper so lost or damaged.

All persons, on opening reams of paper, are required to write upon the label the word "*Opened*," or cross it with ink, or otherwise permanently cancel and deface the same, so as to prevent it from being again made use of, under a penalty of 10*l.* for every label found in his possession not so written upon, crossed, or defaced.

No stationer &c. is to receive paper into his possession from any mill in less quantities than a ream, half-ream, or parcel, and inclosed in a wrapper with all the proper marks, under a penalty of 50*l.*

Printed, Painted, or Stained Paper.

The excise duties on paper printed or stained, the drawbacks on such paper exported, and the duties on licences formerly required to be taken out by the printers, painters, and stainers of paper, were repealed by 6 & 7 Wm. IV. c. 52, from the 5th July, 1836.

Printed, Painted, or Stained Calicoes, Muslins, Linen, and Stuffs.

The duties on these goods, and on the licences formerly required by the printers, painters, or stainers thereof, were repealed by the 1 Wm. IV. c. 17, from the 1st March, 1831.

Plate.

This branch of the revenue was formerly under the management of the excise, but is now transferred to the commissioners of stamps.

Persons trading in or selling articles of gold or silver plate, in which the gold exceeds 2 dwts., or the silver exceeds 5 dwts., are required to take out a licence, renewable annually on the 31st July, for which they pay as follows; namely,—Persons dealing in articles in which the gold does not exceed 2 oz., or the silver 30 oz., a duty of 2*l.* 6*s.*; those dealing in articles of greater weight, and all pawnbrokers taking in or delivering out pawns of such plate, and every refiner of gold or silver, a duty of 5*l.* 15*s.* The penalty for vending without a licence is 20*l.*, one half to the crown and the other to the informer; but the penalty may be mitigated by justices.

For dealing in gold and silver lace, gold and silver watches, or any article containing less than 2 dwts. of gold, or 5 dwts. of silver, no licence is necessary.

A single instance of selling plate by one private individual to another, has been held not to subject the seller to the necessity of taking out a licence.

The licence extends to the house and shop for which it is granted and places thereunto belonging, and to sales at fairs and markets. Partners in one house need only take out one licence.

Assay offices are established in different places; and any one selling any article previous to its having been assayed and marked forfeits 50*l.* (24 Geo. III. c. 56.) No plate is passed at the assay offices

unless it be of the fineness of the old standard of 11 oz. 2 dwts., or of the new standard of 11 oz. 10 dwts.

Gold plate (except gold watch-cases) pays a duty of 17s. per oz.; and silver plate, a duty of 1s. 6d. But silver watch-cases, chains, tip-pings, mountings, collars, bottle tickets, tea-spoons, &c. are exempted.

Counterfeiting the dies for marking, or the marks on gold or silver wares, or transposing the marks from one article to another, is felony, punishable by transportation from seven to fourteen years, or imprisonment for three years. And dealers having such articles in possession are liable to a penalty of ten pounds; unless, without having any guilty knowledge of their being counterfeit, they discover the actual manufacturer, or person from whom they bought the same.—7 & 8 Vic. c. 22.

Soap.

The duties on soap were reduced by the 3 & 4 Wm. IV. c. 16, from the 31st May, 1833, to 1½d. per lb. on all hard, and 1d. per lb. on all soft soap; to which is added an additional 5 per cent by 3 & 4 Vic. c. 17; and the same duties are continued by 3 & 4 Vic. c. 49, an act "to consolidate and amend the laws for collecting the duties of excise on soap made in Great Britain."

A drawback of the whole duties is allowed on exportation.

Allowances are also made on soap used in certain manufactures, namely,—In preparing or finishing any manufacture from flax or cotton, or in the process of throwing, printing, or dyeing silk, the whole duty is allowed; and in making cloth, serges, kerseys, baize, stockings, or other manufactures of sheep or lamb's wool only, or manufactures whereof the greatest part of the value of the materials is wool, or in the finishing the manufactures or preparing the wool, the allowances were, before the late reduction in the duties, 2½d. for all hard soap, and 1d. for all soft soap used therein, but are now reduced one-half, that is, in the same proportion with the duties.

Every soap-maker is required to take out a licence, to be renewed annually, for which he pays 4l.; and no person is permitted to make soap within the limits of the head office of excise, unless he occupies a tenement of 10l. a year and is assessed to and pays the parish rates, nor elsewhere unless he is assessed and pays the church and poor rates.

Soap-makers are required to provide sufficient wooden covers for all coppers and other utensils wherein they boil hard soap; which covers are to be locked and sealed down by the officer whenever any soap is left in the same; and the furnace door cover, and the ash-hole door, are also to be locked and sealed at all times, except when the same are at work. Regulations are also made for preventing the use of any private conveyance or pipes, empowering officers to break up the ground to search for the same, and cut them up if found; if none be found, the officers must make compensation for the injury done.

On cleansing or taking soap out of the coppers, the makers are required to give notice; and certain spaces of time are limited for completing the cleansing and taking out the soap, according to the kind of soap and the number of frames into which the same is put. Coppers and other utensils must be cleansed once in every month. The frames used in making hard soap, for cleansing and putting it into when taken

out of the vessel in which it is boiled and prepared, must be either square or oblong, with the bottom, sides, and ends thereof two inches thick, and not more than 45 inches long and 15 inches broad, and marked and numbered at the expence of the soap-maker.

Every maker of hard soap is required, as soon as the same is cleansed or taken out of the vessel in which it has been made, to add and put into the copper or vessel all the fob and skimmings taken out of the same, and also grease, in the proportion of at least 100 cwt. of grease for every ton of soap which the copper or vessel shall be by the officer computed to boil or make, and immediately remelt such grease in the presence of the officer of excise, on pain of forfeiting 100*l*.

For the purpose of calculating the weight by gauge for the charge of duty, 28 cubic inches of hard soap when hot, and 27·14 when cold, or if made in a high-pressure boiler 26·76 cubic inches when hot, and 25·91 when cold, shall be deemed a pound of hard soap made of the usual materials only; but if any silicious or earthy matter be added, then 24·04 cubic inches when hot, and 23·30 when cold, shall be deemed a pound. Formerly, in charging the duties, an allowance of one pound in ten of all hard soap was allowed for waste; but now the full quantity is charged without deduction, except on mottled soap.

Soap-makers increasing the weight of soap by adding water, lees, lye, or any liquor or matter thereto, after it has been taken an account of and charged with duty in the frames by the officer, and before it is sent out from the premises where manufactured, incur a penalty of 100*l*. and forfeiture of all the soap so increased in weight.

No lees fit for the making of soap may be manufactured for sale. Hard soap can only be removed in bars not more than 15 inches long.

Every barrel of soft soap must contain 256 lbs. avoirdupois, every half barrel 128 lbs., every firkin 64 lbs., and every half firkin 32 lbs., besides the weight and tare of the cask. Soap-makers must keep scales and weights, and assist the excise officers in the use of them, and must weigh their materials for making soap before the officer, on penalty of 100*l*.

Spirits.

The licences required by distillers, rectifiers, and retailers of spirits, are as follows, by the 6 Geo. IV. c. 81, with an additional 5 per cent by 3 & 4 Vict. c. 17:—

	£.	s.	d.
Every Distiller or Maker of Low Wines or Spirits	10	0	0
Every Rectifier or Compounder of Spirits	10	0	0
Every Dealer in Spirits, not being a Retailer thereof	10	0	0
Every Retailer of Spirits (except Retailers in Ireland after mentioned)—			
If his dwelling-house be not, together with the offices, courts, yards, and gardens, rated at a rent of 10 <i>l</i> . per annum or upwards, or be not rented or valued at such rent or annual value	2	2	0
If at £10 and under £20	4	4	0
20 — 25	6	6	0
25 — 30	7	7	0
If at £30 and under £40	8	8	0
40 — 50	9	9	0
50 per ann. or upwards	10	10	0
Every Retailer of Spirits in Ireland, being duly licensed to trade in Coffee, Tea, Cocoa Nuts, Chocolate, or Pepper, and not selling Spirits in any greater quantity at one time than two quarts, or any Spirits to be consumed in the house or premises—			
If the dwelling-house be not, together with the offices, courts, yards, and gardens, rated at a rent of 10 <i>l</i> . per annum or upwards, or be not rented or valued at such rent or annual value	9	9	0

Distillers.

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			£.	s.	d.				£.	s.	d.
If at £25 and under £30			10	10	0	If at £40 and under £50			12	12	0
30 — 40			11	11	0	50 and upwards			13	13	0
Every Maker of Stills in Scotland or Ireland									0	10	0
Every person in Scotland or Ireland (not being a Distiller, Rectifier, or Compounder of Spirits) who shall keep any Still for carrying on the trade of a Chemist or any other business requiring the use of a Still									0	10	0

By 4 & 5 Wm. IV. c. 75, additional duties were imposed on the licences of retailers of spirits, varying from one guinea to four guineas according to the rent of their premises; from which, however, those not consuming more than 30 gallons in the year were exempted by 5 & 6 Wm. IV. c. 30. But now, by 6 & 7 Wm. IV. c. 72, these additional duties are altogether repealed from the 10th October, 1836.

The principal act in force relating to the excise on the subject of spirits is the 6 Geo. IV. c. 80.

Distillers.—No person whatever is to keep a still for making spirits without a licence under 500*l.* penalty, and forfeiture of utensils, spirits, &c.; and no person can have such licence, unless he occupies a tenement of 20*l.* per annum and pays poor rates, nor unless the manufactory is situate within a quarter of a mile of a city or town containing 500 inhabited houses, unless he were so licensed before the commencement of the act (4th April, 1825), nor unless the still without the head contains 400 gallons; and unless the still without the head contains 3000 gallons, no distiller can keep more than two wash stills and two low wine stills, under 100*l.* penalty for every further still, and forfeiture thereof. Persons having any wash fit for distilling, and a still, in their custody are deemed distillers, and liable to the provisions of the act. No still may be used on a Sunday, under 50*l.* penalty.

The usual entries are to be made of the manufactories and utensils, under 200*l.* penalty, and forfeiture of those unentered. A description of the different utensils is given in §§ 15 to 25. There must not be any alteration made in the position or size of any vessel without notice, under 200*l.* penalty; and, under a similar penalty for refusal, the officer may at any time order the water to be drawn off from the worm-tub for examination of the worm and tub. The quantity that every moveable vessel is capable of holding is to be marked thereon with the name and address of the manufacturer, as also on all utensils and stores, under 50*l.* penalty. A drawing and description of the premises, showing the course of every fixed pipe, is to be given; and pipes for different purposes are to be painted with different colours, according to § 32.

Houses for rectifying or compounding spirits are not to be used within a mile of any still house, nor *vice versâ*, or of another distillery kept by the same person, under penalty of 500*l.* per week. No distiller or rectifier or compounder is to be a maker of beer, sweets, vinegar, cider, or perry, or a refiner of sugar &c., under 200*l.* penalty.

Licensed distillers &c. are to place a board over their distillery gate; expressive thereof, in manner directed by § 38, under 50*l.* penalty; and the like penalty is imposed on any unlicensed person doing so.

If an officer suspects there is a private still in any house, he may obtain a special warrant from a justice of the peace, and, if necessary, break open doors to search for and seize the same; and any person obstructing him forfeits 200*l.* Utensils found are forfeited, if not owned in ten days; and if the owner be found, he is liable to 200*l.* penalty.

Every reasonable facility and assistance are to be given to officers in the execution of their duty, under 100*l.* penalty; and 200*l.* penalty attaches on refusing them admission into a distillery. On declaring

their names and business, they may break up the ground &c. to search for private pipes &c.

A distiller is not to distil from grain and from sugar or other materials at the same time, or within less than a month, and then only on giving notice of intending to do so, under 200*l.* penalty. He is in the first instance to give notice which material he means to brew or make wort or mash from; and if afterwards he uses, or has in the distillery ready for working, the other kind, 200*l.* penalty attaches. In § 49 general directions are given as to the mode and course in which wash &c. are to be conveyed through the different utensils; and a penalty of 200*l.*, or 20*s.* for every gallon not so conveyed, is imposed on acting contrary thereto.

A distiller, under 500*l.* penalty, must brew and distil at distinct periods, allowing twelve hours to intervene; and, under 50*l.* penalty, he is to give six hours notice in writing of his intention to mash or brew, and, under 300*l.*, must keep the produce of each brewing separate; and, within six hours after finishing such brewing, is to enter the true quantity &c. of materials used, on 50*l.* penalty. Saccharometers prescribed by the commissioners of excise are to be used, and the degrees of specific gravity of wort &c. are ascertained in the mode pointed out by § 53. A true declaration is to be made of the quantity and gravity of wort when collected in the fermenting back, under 200*l.* penalty; and if any increase of the strength or gravity takes place above five per cent, the penalty is 200*l.* Regulations as to making composition for exciting fermentation are contained in § 57.

The distiller, before distilling, must declare that all wort and wash are collected in fermenting backs, under 200*l.* penalty, and must give eight hours notice before moving the wash to the wash charger, under a like penalty. The officer may, if he please, distil a sample of the wash; and if the produce exceeds the proportion of $1\frac{1}{4}$ gallon of proof spirits for every five degrees of gravity attenuated, the same penalty attaches. So also if wash is removed before the whole contents of one back are conveyed to the still. So if notice is not given for removing low wines or spirits from receiver. So if those produced from the wash are not kept separate till an account is taken.

The duties are chargeable in manner directed by §§ 67, 68, 69, on the wash or wort; and if after gauging, but before distilling, an accident happen whereby the wash is lost, the duty is still payable, though the party may be relieved by the treasury upon proper application.

Mixing any material with spirits to prevent the strength being ascertained, is 200*l.* penalty; and, under the like penalty, distillers are to make entry at the end of every distilling period, by declaring the true quantity of wash distilled and spirits made in each brewing and distilling period, and once a quarter the quantity of malt used; and they are not to receive into their stocks any spirits but those distilled at their own distillery. The usual directions are given as to keeping weights &c., assisting officers, and the powers of officers to take samples &c.

Not less than 80 gallons at a time can be removed from a distillery; and the same must be accompanied with a permit, stating the strength &c., under 200*l.* penalty.

Section 101 fixes the denomination of the different spirits, and pro-

vides that the proof that spirits removed are of the denomination mentioned in the permit shall lie upon the owner.

By the 4 & 5 Wm. IV. c. 71, sect. 10, distillers are allowed to warehouse spirits in casks containing not less than 20 gallons.

Rectifiers.—No person may carry on the business of a rectifier, who has not at least one still of 120 gallons; and a penalty of 200*l.* attaches for having conveyances to and from stills contrary to the act (§ 140), or not paying for locks and fastenings for securing the charge and discharge cocks, or for breaking or opening locks &c.; and 100*l.* penalty, if they do not charge their stills as provided by the following section, or work them off in 26 hours, or if they do not cause the heads to be taken off their stills as soon as they cease work; and 500*l.* penalty for buying spirits from unlicensed persons. The usual directions are given as to the officer's duty of entering premises, and taking an account &c. They, as well as dealers and retailers, are to mark the strength of spirits on casks, &c. They may send out spirits compounded at a strength not exceeding 17 per cent. under proof, and also *spirits of wine*, but not less than two gallons at a time. Spirits of wine are to be 43 per cent over proof at least, and are to be *permitted* and stocked accordingly, on 200*l.* penalty.

Any rectifier or compounder having in his custody wort &c., or distilling the same into low wines or spirits, or receiving spirits without a permit, is liable to 200*l.* penalty; and for a second offence he forfeits his licence, and is incapable of taking out another for three years.

Removing spirits without a permit incurs a penalty of 20*s.* per gallon and forfeiture of spirits.

Dealers in Spirits.—All persons (not being licensed distillers, rectifiers, or compounders) having more than 80 gallons of spirits in their possession are deemed dealers, and are liable to the laws affecting such dealers. Casks used by dealers or retailers of spirits are to be entered, on penalty of 100*l.* and forfeiture of casks and liquors; and they are to have the contents marked thereon, under 50*l.* penalty.

Dealers in British spirits are prohibited from selling or having in their possession any plain British spirits (except spirits of wine) of any strength exceeding the strength of 25 per cent above hydrometer proof, or of any strength below 17 per cent under hydrometer proof; or any compounded spirits (except shrub) of any greater strength than 17 per cent under hydrometer proof, upon pain of forfeiting all such spirits, with the casks &c.

But so much of the 6 Geo. IV. c. 80 as prohibited retailers of British spirits from having in their possession more than ten gallons of spirits of wine at one time is repealed by the 4 & 5 Wm. IV. c. 75, § 11.

Dealers in foreign and British spirits are to keep them separate, in cellars or places specially entered for that purpose, under a heavy penalty; and any person mixing, selling, or sending out any British spirits mixed with foreign or colonial spirits, forfeits 100*l.* for every such offence.

By 4 & 5 Wm. IV. c. 75, sect. 14, dealers in spirits, not being retailers, may keep or sell, or send out to any person not being a retailer, foreign or colonial spirits of any degree of strength.

No retailer of spirits, or any other person, licensed or unlicensed, shall sell or send out from his stock or custody any quantity of spirits

exceeding one gallon, unless the same be accompanied by a true and lawful permit, under pain of forfeiting 200*l.*; and any rectifier, compounder, or dealer in spirits receiving the same into his stock, or allowing any one else to receive it, and any carrier, boatman, or other person knowingly carrying the same, shall forfeit the sum of 200*l.*, and the boat, horses, cart, &c. used in the carriage. Not producing a permit to an officer on demand is 100*l.* penalty; and if a permit, where required, is not delivered to the buyer, the goods delivered are forfeited to the buyer, and double the price (including the duties) to the excise.

Retailers are not to be concerned in any distillery or rectifying house, under 200*l.* penalty.

No licence is to be granted for retailing spirits within gaols, houses of correction, or workhouses for parish poor; nor are spirits to be used there, except medicinally and when prescribed by a regular physician, surgeon, or apothecary. The penalty for a first offence by gaolers &c. is 100*l.*; and for a second, the forfeiture of their office.

Persons *hawking spirits* forfeit them and 100*l.*; and if the penalty be not immediately paid, they may be committed to the house of correction for three months, if not sooner paid. If an offending party inform against another, his penalty is remitted. Any person is authorized to carry the offender before a justice. Persons resisting an officer are guilty of felony, and liable to seven years transportation; and if a constable refuse to do what the act requires, he forfeits 20*l.*

Sweets or Made Wines, and Mead or Metheglin.

The excise duties on sweets or made wines, and mead or metheglin, and on the licences required by the *makers* of those articles, were repealed by 4 & 5 Wm. IV. c. 77, from the 10th of October, 1834.

But nothing therein is to affect the duty on the licences required by the *retailers* of sweets or made wines, or of mead or metheglin. And every person who shall or sell or send out any liquor made by infusion, fermentation, or otherwise from fruit or sugar, or from fruit or sugar mixed with any other materials, commonly called sweets or made wines, or any mead or metheglin, in any less quantity than a whole cask containing 15 gallons, shall be deemed a *retailer of sweets*, and take out an annual licence, the duty on which, by 6 Geo. IV. c. 81, is *one guinea*.

Starch, Hair Powder, and Stone Blue.

The excise duties on *starch*, and on the licences required by makers, were repealed by 4 & 5 Wm. IV. c. 77, from 10th October, 1834.

And all the laws and regulations of excise relating to *stone blue* and *hair powder* were repealed by the same act from 14th August, 1834.

Sugar manufactured from Beet-Root, &c.

By the 1 Vic. c. 57 an excise duty of 24*s.* per cwt. was imposed on all sugar manufactured from beet root in the United Kingdom, extended, by 3 & 4 Vic. c. 57, to all sugar manufactured in the United Kingdom, whether from potatoes, rice, or any other material. And all sweets and saccharine matter resembling or being in the form or imitation of sugar, or capable of being used as a substitute for sugar, shall be deemed sugar within the meaning of this act.

The duty is now reduced, by 8 & 9 Vic. c. 13, to 14*s.* per cwt.

Manufacturers are required to make entry of every sugar-house, warehouse, store-room or place, cylinder or mill, press, vat, copper, cistern, pan, or other vessel or utensil, distinguishing each by numbers or letters, on penalty of 100*l*. Officers of excise may enter premises by day or night; and obstructing them incurs a penalty of 200*l*.

Every syrup cistern, vat, copper, and pan, is to be gauged and labled by the proper officer before it is used, on penalty of 20*l*. a day; and any alteration afterwards in the size, position, or level, without proper notice in writing, incurs a penalty of 100*l*.

Before the manufacturer begins to rasp, grind, or mash any beet root, he must give four hours notice to the officer, on forfeiture of 100*l*. And when any juice or syrup is clarified or run into the syrup cistern, he must deliver a declaration, specifying the particular cistern, the quantity of juice or syrup, and its gravity to the officer, who must then attend and take an account thereof; and no part is to be drawn off until two hours after the delivery of such declaration, or until the officer has taken such account, on penalty of 100*l*. The officer may take samples at any time, for ascertaining the gravity.

After the officer has taken such account, or at the expiration of two hours from the delivery of the declaration, the juice or syrup is to be run off into the sugar pan; and no other juice, syrup, or sugar is to be mixed therewith, on penalty of 100*l*.

Within two days after the manufacture of the sugar is completed, the maker must give a notice in writing to the officer, signifying when it will be ready to be weighed; and if he neglect to give such notice, or if any part of the sugar be removed before it is weighed, he forfeits 200*l*.

For every gallon of juice or syrup run into the syrup cistern, the officer is to charge the proper quantity of sugar, in proportion to its gravity, according to tables prepared by the commissioners of excise. And when he shall have weighed any sugar after it is finished, he is to charge the full quantity, exclusive of waste or drainings.

At the end of every six weeks, the officer delivers to the collector of excise an account of the quantity of sugar for which the manufacturer has become liable, and in such return he is to charge according to whichever mode shall produce the highest amount of duty. A copy of such account is left with the manufacturer; who must pay the duty within six days, or in default he forfeits double the amount.

Proper scales and weights are to be kept, on penalty of 100*l*.; and keeping false scales or weights, or using any art to deceive the officer in taking a true account, subjects the manufacturer to a forfeiture of 300*l*., together with all the sugar weighed at the time. The manufacturer and his servants must assist the officer in weighing sugar, on penalty of 100*l*.

Sugar not charged with duty is to be kept separate from that which has been weighed, on penalty of 100*l*. Concealing or removing sugar, or juice or syrup, to evade the duties, incurs a forfeiture of 500*l*.

Stone Bottles.

By the 4 & 5 Wm. IV. c. 77, § 8, all the duties and drawbacks of excise on stone bottles were repealed from the 14th August, 1834.

Tobacco and Snuff.

The duties on the *licences* required to be taken out, by manufacturers of and dealers in tobacco and snuff are, by 6 Geo. IV. c. 81, as follow, with an additional 5 per cent by 3 & 4 Vict. c. 17:—

	£.	s.	d.
Every Manufacturer, if the quantity of leaf or unmanufactured tobacco received by him within the year ending the 5th of July previous has not exceeded 20,000 lb. in weight	-	-	5 0 0
If exceeding 20,000 lb. and not exceeding 40,000 lb.	-	-	10 0 0
40,000 — — — 60,000 — — —	-	-	15 0 0
50,000 — — — 80,000 — — —	-	-	20 0 0
80,000 — — — 100,000 — — —	-	-	25 0 0
100,000 lb. weight	-	-	30 0 0
Every Dealer in or Seller of Tobacco and Snuff	-	-	0 5 0

Every person, on first becoming a Manufacturer of Tobacco or Snuff, pays the sum of 5*l.* on taking out his licence, and, within ten days after the 5th July next, such further sum as with the said 5*l.* shall amount to the duty before mentioned.

The acts now in force for regulating the manufacture and sale of tobacco and snuff are the 3 & 4 Vict. c. 18, and the 5 & 6 Vict. c. 93.

By the former act, all manufacturers of, dealers in, and retailers of tobacco or snuff, are required to make *entry* of their premises with the excise, on pain of forfeiting 100*l.*; and officers may enter at any time, but if between ten o'clock in the evening and six in the morning accompanied by a peace officer. Any concealment of tobacco or snuff from, or obstruction of the officer, incurs a penalty of 200*l.*

No manufacturer may receive into his possession any leaf or unmanufactured tobacco otherwise than from the customs warehouse, and in the same chest or package in which it was cleared (except samples duly ticketed and certified by the proper customs officer), nor without a permit accompanying it, which is to be delivered to the excise officer on his next visit, on pain of forfeiture of the same and 200*l.*

No leaf or unmanufactured tobacco can be removed from one place to another without a permit, under the penalties in the 2 & 3 Wm. IV. c. 16. And no tobacco stalks or returns of tobacco can be removed in a less quantity than 50 lbs., nor without a proper certificate firmly pasted or glued on the package, on forfeiture of the same and 100*l.* by the manufacturer sending out or receiving it, and 50*l.* by any person removing the same.

Every manufacturer, on the day on which he receives any leaf or unmanufactured tobacco, or any stalks or returns of tobacco, must enter the particulars thereof in a book furnished by the excise, which is to be kept in an open part of his premises for the inspection of the officer; and any neglect to enter such particulars, or obstructing the officer in making any minute in such book or extract therefrom, or concealing or making away with it, or tearing out any leaf, or fraudulently altering any entry or making a false entry therein, is subject to a forfeiture of 200*l.* and of all tobacco not duly entered.

The manufacturer, on applying for a renewal of his licence, must produce the said book, with the quantities duly cast up and brought into totals, and make a declaration in writing that it contains a full and just account of all leaf or unmanufactured tobacco, tobacco stalks, and returns of tobacco of every description received by him in the year preceding; and his licence duty is to be paid according to the amount of tobacco

shown by the entries in the said book and by the permits to have been received by him in the year previous.

With respect to the *adulteration* of tobacco and snuff, the 3 & 4 Vict. c. 18 contained a clause (sect. 11) against the manufacture of *counterfeit* tobacco, imposing a penalty of 100*l.* on any person who should cut, colour, stain, or manufacture any leaves of trees, herbs, or plants (not being tobacco leaves) into the form of or to imitate tobacco, or mix any such with tobacco, or sell or have them in possession; but there was no express prohibition of that species of adulteration which consists in the addition of sugar, molasses, honey, and other ingredients, under the pretext of flavouring it, and which had been prohibited under former acts,—though ineffectually it would seem, for these adulterations had been carried to such an extent by some portions of the trade as to have given rise to complaints on the part of others as to the hardship and inequality of the law. It became therefore a question, when that act was passed, whether this system of adulteration should be wholly suppressed by increased exertions on the part of the excise and more stringent penalties, or whether it should be thrown open to the trade generally; and the latter alternative was adopted. After a short trial, however, this plan was not found to work well; and accordingly the 5 & 6 Vict. c. 93 has been recently passed, in order to put down every species of adulteration by the most severe penalties.

This act (5 & 6 Vict. c. 93), after reciting that the practice had greatly increased of introducing in the manufacture of tobacco and snuff various articles either as substitutes for or to increase the weight thereof, by which the duties were greatly injured, and the revenue further damaged by drawbacks being obtained on adulterated tobacco, enacts, that no manufacturer shall, in manufacturing tobacco, make use therewith of any other ingredient than water only, or, in manufacturing snuff, of any other ingredient therewith than water, or water and salt, or alkaline salts only, or lime water in Welch or Irish snuff, under pain of forfeiting 300*l.* But no manufacturer or dealer is liable to such penalty for scenting or flavouring snuff, if essential oils usually made use of for that purpose are used, nor any manufacturer for using oil in making up spun or roll tobacco.

And any manufacturer or dealer selling, sending out, or delivering, or having in possession, any tobacco or snuff to which any ingredient other than as above stated has been added, is liable to forfeit 200*l.*; and all such adulterated tobacco or snuff, wherever found shall be forfeited.

This act came into operation on the 10th August, 1842, so far as relates to making use of adulterating ingredients in the manufacture of tobacco or snuff; but, in order to afford manufacturers and dealers an opportunity of disposing of any adulterated stock made previous to that period, the penalty for having in possession or selling such adulterated tobacco did not come into force till after the 1st day of November, 1842, nor with respect to snuff or snuff-work manufactured or in the course of manufacture before the passing of the act, until the 10th August, 1843; but the proof of the same having been so manufactured previously is laid on the manufacturer or dealer in whose possession it may be found.

By sec. 5 of the same act, no manufacturer shall have in his possession any sugar, treacle, molasses, or honey, (except for the necessary use of his family, the proof whereof shall lie with such manufacturer), nor any commings or roots of malt, or any ground or unground roasted grain, ground or unground chicory, lime, sand (not being tobacco sand), umbre, ochre, or other earths, sea-weed, ground or powdered wood, moss, or weeds, or any leaves or any herbs or plants (not being tobacco leaves or plants) respectively, nor any substance or material, syrup, liquid, or preparation, matter, or thing, to be used or capable of being used as a substitute for or to increase the weight of tobacco or snuff, on pain of forfeiting the same and 200*l*.

By sect. 6 provision is made for the case of persons who had carried on the business of a manufacturer of tobacco, and also that of a grocer, before the 1st of June, 1842.

Officers of excise may take samples at any time of tobacco or snuff, paying for the same, if demanded, at the current wholesale price.

The same act also contains more stringent provisions against the manufacture of *counterfeit* or spurious tobacco. By sect. 8, every person who shall cut, grind, pound, colour, stain, dye, or manufacture any leaves, or any herb or plant, moss or weed, or any wood, chicory, commings or roots of malt, or any other vegetable or other matter or material, to imitate or resemble tobacco or snuff, or who shall prepare any of the said articles to be mixed with or added to tobacco or snuff, or who shall have them in his custody or possession so manufactured or prepared for the purpose of being mixed with or added to tobacco or snuff, or intended to be so manufactured or prepared, or who shall sell, dispose of, or deliver to any manufacturer of tobacco any leaves, herbs, plants, moss, or weeds, ground or powdered wood, chicory, commings or roots of malt, or other vegetable or other matter, or any preparation or mixture thereof, or any syrup, liquid, or preparation, to be used in the manufacture of tobacco or snuff, or to be added to or mixed therewith, shall forfeit 200*l*. ; and all such articles, together with all machines, tools, materials, vessels, and utensils for cutting, grinding, pounding, colouring, staining, dying, manufacturing, or preparing the same, shall be forfeited.

No person shall hawk or sell, or offer for sale, any tobacco or snuff in any house or premises, or in or about the streets or highways or other places, or in any other manner or place whatsoever, except as a licensed manufacturer of or dealer in or retailer of tobacco in his entered premises, on pain of forfeiting all the tobacco and snuff in his possession, and 100*l*. Any officer of excise or customs may arrest and detain any person so hawking tobacco or snuff, and convey him before a justice of the peace, who, on proof of the offence, may convict him to pay 100*l*., or some mitigated amount, not being less than one-fourth part thereof; and if the penalty be not forthwith paid, may commit him to any gaol or prison of the county, there to be kept to hard labour for three calendar months. Provided always, that nothing herein shall extend to make liable to the said penalty any servant or person duly employed by a licensed manufacturer of or dealer in tobacco or snuff to travel for orders, and producing samples, in the due and ordinary course of business.

Roasted Malt.

By the 56 Geo. III. c. 58, brewers were prohibited from colouring their beer with any other material than brown malt, or malt made brown by being more highly dried on the kiln in the process of malting. It has been found, however, that roasted malt, or malt roasted in cylinders after the process of malting has been completed, is a preferable material for improving the colour of beer or ale; but as, from the difficulty of distinguishing roasted unmaltered grain from such roasted malt, great frauds might be committed on the revenue if the indiscriminate use of it were allowed, the 5 & 6 Vict. c. 30 was passed to place the manufacture and sale thereof under the supervision of the excise.

Every roaster of malt, and every dealer in roasted malt, are required to take out an excise *licence*, renewable yearly, for which the former pays 20*l.* and the latter 10*l.*, under a penalty of 100*l.*; and also to make *entry* with the excise of all premises, utensils, &c. employed, under penalty of 200*l.* and forfeiture of all malt found in any unentered place. And the officers of excise are to have free access at all times to such premises, to examine the same, and to take an account of the malt there kept, and samples thereof, under a penalty of 200*l.* for any obstruction.

A roaster of malt is not to receive into his possession any corn or grain other than unroasted malt from a licensed maltster or a malt factor; nor a dealer in roasted malt, any corn or grain other than roasted malt from a licensed roaster, with a certificate as hereafter mentioned, under a penalty in either case of 300*l.*

A *malt book* is furnished by the excise, in which every roaster of malt must enter the particulars relative to all malt received, roasted, or sent out, and every dealer the particulars as to all roasted malt received or sent out, under a penalty of 200*l.* The said book is to be kept in a public part of the premises, open to the inspection of the officers; and any neglect in entering the particulars required, refusing inspection thereof, destroying the same or any part thereof, making a false or fraudulently altering any entry therein, subjects to a penalty of 200*l.* And, under a like penalty, every roaster or dealer receiving any malt must produce to the excise officer on his next visit the bill of parcels or invoice or delivery note, or in case of a dealer the certificate accompanying it, and show the malt, or so much as may be remaining, to the officer, who is thereupon to indorse the invoice &c. or certificate with his name and the date of his inspection, or in the case of a certificate may retain it if he think fit.

Roasters of malt, when required, are to level and cast all malt, roasted or unroasted, (not being in sacks) into such regular form that the officers may gauge and take an account thereof; and dealers are to do the same with the roasted malt in their possession. And if any excess or deficiency exceeding ten per cent. in the stock of any roaster, or of three per cent. in the stock of any dealer, be found, they are respectively liable to a penalty of 200*l.* A like penalty is imposed on obstructing the officer in taking an account.

No malt is to be roasted between seven in the evening and five in the morning from the 31st March to the 1st of September, nor between

seven in the evening and six in the morning during the rest of the year, under penalty of 100*l.* and forfeiture of the malt so roasted or roasting.

A *certificate* book is delivered by the excise to every roaster and dealer in roasted malt; and no roasted malt is to be sent out without a certificate properly filled up and cut out progressively from such book, and a corresponding entry made in the counterpart thereof, under a penalty of 200*l.* The same penalty is payable for not leaving the certificate with the person to whom the malt is delivered, making use of one a second time, hindering the officers from examining the book, destroying it or any part thereof, or making any false or fraudulently altering any entry therein. And all roasted malt sold, sent out, or delivered, or removed or removing, or received, without such certificate, is forfeited.

Brewers using roasted malt must make a special entry with the excise of a deposit room or rooms for depositing all the roasted malt they shall receive, and in which no other kind of malt is to be kept; and they are not to receive any roasted malt without a proper certificate, to be delivered up to the excise officer on his next visit, who may examine such roasted malt, and take samples therefrom. And all roasted malt received by any brewer unaccompanied by a certificate, or found in any other place than such deposit room (except in the mill or mill room for grinding, or in the mash tub) is forfeited, with 200*l.* penalty.

No brewer is to receive any roasted malt from any other person than a licensed roaster or dealer in roasted malt, on pain of forfeiting 100*l.* and all the malt so received.

No roaster of malt is to send out any unroasted malt; and all roasted malt sent out by any roaster or dealer is to be whole and unground, upon penalty of 100*l.* and forfeiture of the malt.

The business of a roaster or of a dealer in roasted malt is not to be carried on by any maltster or malt factor within one mile of his malt-house, or of any premises in which he shall make or keep malt, nor by any druggist or vender of drugs, or any grocer. But where a maltster or malt factor or dealer had carried on such business within the prohibited distance before the 1st April, 1842, the commissioners of excise may permit the same business to be continued under regulations to be prescribed by them.

Roasters and dealers in roasted malt are prohibited from selling, or receiving into their possession, any of the articles (except roasted malt) prohibited to be received by brewers &c. by the 56 Geo. III. c. 58, on pain of being subject to the same penalties and forfeitures. (See *ante*, p. 96.)

Vinegar, Acetous Acid, Verjuice.

By 6 & 7 Wm. IV. c. 52, § 10, the excise survey on dealers in vinegar is discontinued; and so much of the 58 Geo. III. c. 65 as required them to make entry of their places for keeping vinegar, and to enter in a book all vinegar sent out exceeding ten gallons at a time, and accompany the same with a certificate, is repealed.

The duty on vinegar was repealed by the act 7 & 8 Vic. c. 25, from the 4th July, 1844.

But nothing therein is to affect the licences required to be taken out by *makers* of vinegar or acetous acid for sale. And every person who shall make, prepare, extract, distil, rectify, purify, or sell any liquors prepared or capable of being used or applied for the purposes of vinegar or acetous acid made for sale (not being a dealer in, retailer, or seller of such only), shall be deemed a vinegar maker, and take out the licence required by law, the duty on which is 5*l.* by 6 Geo. IV. c. 81, and an additional 5 per cent. by 3 & 4 Vic. c. 17.

Makers of vinegar must make entry of every house, building, room, place, still, vessel, and utensil used for making or keeping vinegar or acetous acid for sale; and stills upon such entered places must be used only according to the regulations of the excise, under penalty of 100*l.* 7 & 8 Vic. c. 25.

Concealing or adulterating vinegar &c. subjects to a penalty of 100*l.*

No vinegar maker (except from malt or corn) is to be a distiller or rectifier of spirits within two miles of the same premises.

Wine.

The licences to be taken out by dealers in wine are as follow; with an additional 5 per cent by 3 & 4 Vict. c. 17:—

	£.	s.	d.
Every Dealer in Foreign Wine, who shall not have an excise licence for retailing Spirits, and a licence for retailing Beer	10	0	0
Every Retailer of Foreign Wine, who shall have a licence for retailing Beer, but not an excise licence for retailing Spirits	4	4	0
Every Retailer of Foreign Wine, who shall have taken out excise licences for retailing Beer and Spirits respectively	2	2	0

By the 5 & 6 Wm. IV. c. 39, so much of any act as requires dealers in or retailers of wine to make entry of their premises, and the officers of excise to keep an account of and to survey the stocks of wine in their possession, and the premises in which the same are kept, and as relates to permits for the removal of wine, were repealed from the 31st August, 1835. But nothing herein is to affect the duties on licences required to be taken out by dealers in and retailers of wine, which are to be taken out as heretofore. And where any dealer in or retailer of wine shall also be a retailer of foreign or British spirits in the same premises, or in any other premises within 500 yards, he shall continue to make entry of every house, room, cellar, vault, or place used by him for the keeping or storing of or dealing in or retailing wine, on pain of forfeiting 50*l.* for every unentered place, together with all wine and other liquors found therein; and any officer of excise may enter and examine all wine therein at any time.

The commissioners of excise may grant retail licences to persons to sell beer, spirits, and wine in any theatre, whether established under royal patent or licensed by the lord chamberlain or a justice of the peace, without the production of a magistrate's licence for keeping a common inn, &c.

A dealer in wine must signify over his warehouse that he is *licensed to sell foreign wines by wholesale, or by retail*, as the case may be.

No dealer in wines can be a justice of the peace.

Wire.

The duties &c. on wire were repealed by the 7 Geo. IV. c. 53, from the 5th July, 1826.

¹ Attorney-General v. Green, 4 Price, 224; and Id. v. Haulgrave, 11 Price, 217.

STAMP DUTIES.

THE Stamp Duties are under the management of a Board of Commissioners, whose appointment, powers, and duties are regulated by the 9 & 10 Wm. III. c. 25. There were formerly separate boards and different duties for Great Britain and Ireland; but the boards were consolidated by 7 & 8 Geo. IV. c. 55, and the duties assimilated by 5 & 6 Vic. c. 82. The following is a list of the Stamp Duties now in force by 55 Geo. III. c. 184, as amended by subsequent acts.

TABLE OF STAMP DUTIES.

	£.	s.	d.
ADMISSION to act as Advocate in any Ecclesiastical Court, or High Court of Admiralty in England, or in courts of justice in Scotland, or to the degree of a Barrister at law in England	50	0	0
ADMISSION to act as Attorney, Solicitor, Proctor, Sworn Clerk, Side Clerk, Clerk in Court, or other Clerk or Officer in any court in England, or as Writer to the Signet, Solicitor, Agent, Attorney, or Procurator, or other Clerk or Officer in the Scotch Courts, whose employments depend upon being retained	25	0	0
And when any person is admitted to act as a Solicitor or Agent in the Court of Sessions, Justiciary, or Commission of Teinds in Scotland, who has not served five years under regular articles or indentures of clerkship, a further duty of	60	0	0
And when any person is admitted to act as a Procurator or Solicitor in the High Court of Admiralty in Scotland, the Commissary Court at Edinburgh, or any inferior court in Scotland, who has not served an apprenticeship under regular indentures, the further duty of	30	0	0
ADMISSION as Master in Chancery, one of the Six Clerks, or one of the Cursitors of the Court of Chancery in England; or as a Sworn Clerk, Clerk in Court, or other Clerk or Officer employed to do certain official business, and whose employments are so far certain; when the salary and emoluments of the office do not amount to 50 <i>l.</i> per annum			
Under £100	£4	0	0
200	6	0	0
300	12	0	0
Under £500	25	0	0
750	35	0	0
1000	50	0	0
Under £1500	75	0	0
2000	100	0	0
3000	150	0	0
Amounting to £3000 or upwards	200	0	0
ADMISSION to be a Member of either of the four Inns of Court in England	25	0	0
ADMISSION as a Fellow of the College of Physicians in England or Scotland	25	0	0
ADMISSION to be a Member of either of the Inns of Chancery	3	0	0
ADMISSION or Licence by the College of Physicians in England or Scotland to exercise the faculty of physic or practise as a Licentiate	15	0	0
ADMISSION or Matriculation in either of the English Universities	1	0	0
ADMISSION to the degree of B.A. in the same Universities, if conferred in the ordinary course	3	0	0
If conferred by special grace, royal mandate, by reason of nobility, &c.	5	0	0
ADMISSION to any other degree in the same Universities, if conferred in the ordinary course	6	0	0
If conferred by special grace, &c.	10	0	0
ADMISSION to the degree of M.D. in either of the Universities in Scotland	10	0	0
ADMISSION to any Corporation or Company, in any city, borough, burgh, or town corporate on any other ground than birth, apprenticeship, or marriage	3	0	0
In respect of marriage	1	0	0
(Admissions of persons entitled to take up their freedom by birth or servitude are exempt from stamp duty by the 1 & 2 Vict. c. 35.)			

EXEMPTIONS.—Advocates, Attorneys, or Solicitors, admitted in one court, on being admitted to another, the latter admission is free from duty. Members of any one of the four Inns of Court on being admitted to another. (5 & 6 Wm. IV. c. 64.) Where officers are admitted annually, every admission after the first is free of duty. Also Craftsmen having previously entered Freeman, on being admitted into corporations. But in all cases not expressly exempted, the proper duty is to be paid on every admission of the same person.

Admissions upon Grants or Appointments to Office herein otherwise charged.

Members of Inns of Court in England, on being admitted into the Society of King's Inn in Dublin are allowed the stamp duty charged on admission in England.—5 & 6 Vic. c. 79.

£. s. d.

ADVERTISEMENT contained in or published with any Gazette or Newspaper, or other Periodical Literary Work or Paper, printed and published in Great Britain 0 1 6

A copy of every Periodical Literary Work or Paper (not being a Newspaper) containing any Advertisement liable to stamp duty, must be taken within six days after the publication, if published in the cities of London, Edinburgh, or Dublin, or within twenty miles thereof, to the Head Office of Stamps at those places respectively (or if published elsewhere, to the head distributor of stamps for the district, within ten days of publication), together with all advertisements published therewith, and the title thereof, and the christian and surname of the printer and publisher, with the number of advertisements, and the stamp duty payable in respect thereof registered, and the duty paid for the same to the proper officer. 6 & 7 Wm. IV. c. 76.

AFFIDAVIT, not made for the immediate purpose of being filed in court, on every sheet of paper, parchment, or vellum 0 2 6

EXEMPTIONS.—Affidavits required by law before justices of peace, commissioners of any board of revenue, or officers acting under them, or commissioners appointed by act of parliament.—Affidavits by persons applying for Probates of Wills and Letters of Administration.—Affidavits at the Bank of England to identify or prove the death of any proprietor of stock &c.; or relating to the loss &c. of any Bank post bill.—Affidavits relating to the sale and redemption of the Land Tax.

AGREEMENT, or any Minute or Memorandum of an Agreement, made in England under hand only, or in Scotland without any clause of registration, and not otherwise charged, for matters of the value of 20*l.* or upwards, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument. (Reduced, by 7 & 8 Vic. c. 21, to) 0 2 6

EXEMPTIONS.—Memorandums of heads of insurances to be made by the Royal Exchange and London Assurance Corporations—of Agreements for Lease or Tack at rack rent under £5—for the hire of any labourer, artificer, or servant—relating to sales of goods—of Agreements between ship-masters and sailors for wages on coasting voyages—Letters by post containing evidence of agreement in respect of merchandize between merchants residing 50 miles from each other.

Agreements relating to sea apprentices.—5 & 6 Wm. IV. c. 19, § 35.

Agreement or Memorandum between the master and mariners of a ship, for either wages or service 0 2 0

ALMANACKS.—The stamp duties on Almanacks or Calendars and Dublin Directories were repealed by the 4 & 5 Wm. IV. c. 57

APPOINTMENT of a Chaplain, which qualifies to hold two benefices 2 0 0

Appointment, in execution of a power, of land and other property, when made by any writing not being a deed or will 1 15 0

And for every 1080 words after the first 1080 1 15 0

Appointment of a Gamekeeper 1 15 0

APPRAISEMENT of estate or effects, when the value does not exceed 50*l.* 0 2 0

Not exceeding £100	0 5 0	Not exceeding £300	0 15 0
200	0 10 0	Above £500	1 0 0

EXEMPTIONS.—Appraisements of property for the purpose of ascertaining the legacy duty. But appraisements made for the return or increase of probate duty must be stamped.

Appraisements by order of any Court of Admiralty or Vice-admiralty, or of Appeal therefrom.

APPRENTICESHIP.—Indentures or other instruments relating to the services of persons learning a profession, trade, or employment, except Articles to Attorneys and others specially charged, when the value given does not amount to £30

Under £50	£2 0	Under £400	£20 0	Under £800	1 0 0
100	3 0	500	25 0	1000	40 0 0
200	6 0	600	30 0	£1000 or upwards	50 0 0
					60 0 0

Where there is no such consideration, if the Indenture does not contain more than 1080 words 1 0 0

If the same contain more than that quantity 1 15 0

Indentures of apprentices bound to serve at sea in the merchant service (4 & 5 Wm. IV. c. 89) 0 2 0

The duty on Indentures for transferring apprentices by assignment or turn-over to a new master are the same as at first, in proportion to any new consideration. If no consideration, and the indenture contains no more than 1080 words, the duty of £1. is paid; if more words £1. 15*s.* If duplicates be made, the same duty is charged for each, when it does not exceed 35*s.*; if the duty exceed that, only one part is charged with the *ad valorem* duty, and the other part with 35*s.*

The Indentures of Parish and Charity Apprentices are exempt.

ARTICLES OF CLERKSHIP, or Contract whereby any person becomes bound to serve as a Clerk in order to admission as an Attorney or Solicitor in any of her majesty's courts at Westminster, or as a Sworn Clerk in the office of the Six Clerks in the Court of Chancery, or as a Sworn Clerk, Clerk in Court, or Side Clerk in the office of Pleas, or of the Remembrancer in the Court of Exchequer in England, or as a Proctor in the High Court of Admiralty in England, or in any of the Ecclesiastical Courts in Doctors Commons	120	0	0
In any of the Courts of Great Sessions in Wales, or of the counties palatine of Chester, Lancaster, or Durham, or in any other court of record in England holding pleas to the amount of 40s.	60	0	0
As a Procurator or Solicitor in the High Court of Admiralty, the Commissary Court of Edinburgh, or any other inferior court in Scotland	30	0	0
—When, in consequence of the death of the master, or of the contract being vacated, fresh articles are entered into for the residue of the term	1	10	0
—When any person having been before bound as a Clerk, and not having completed his service, becomes bound afresh for a new term of years for the same purpose, the same duty as is payable on any original Articles. But in this case the stamp on the first Articles would be allowed as a spoiled stamp on being delivered up to the commissioners within six months after the execution of the new Articles.			
—And for any Counterpart or Duplicate of any of the above	1	10	0
ASSIGNATION or ASSIGNMENT of property, real or personal, not otherwise charged or expressly exempted	1	15	0
If containing 2160 words, for every entire 1080 after the first 1080	1	5	0
Assignment or Assignment upon the sale of any property. See CONVEYANCE.			
Assignment of a Mortgage, Wadset, Heritable Bond, &c. See MORTGAGE.			
AWARD in England, and Award or Decreet Arbitral in Scotland	1	15	0
If containing 2160 words, for every entire 1080 after the first 1080	1	5	0
BARGAIN AND SALE (or LEASE) for a year, for vesting the possession of lands or other hereditaments in England, and enabling the bargainee to take a release of the freehold upon the sale or mortgage thereof—			
Where the purchase or consideration money does not amount to £20	0	10	0
Under £50 . . . £0 15 0 | Under £150 . . . £1 0 0 | £150 or upwards	1	15	0
Bargain and Sale (or Lease) for a year, upon any other occasion	1	15	0
Bargain and Sale (to be enrolled) of any estate of freehold in lands, &c. upon any other occasion than the mortgage or sale thereof	5	0	0
— Where any Bargain and Sale, together with any schedule, receipt, &c., contains 2160 words, then for every entire 1080 after the first 1080	1	0	0
Bargain and Sale (to be enrolled) of any estate of freehold in lands or other hereditaments in England, upon the sale thereof, or by way of mortgage.			
See CONVEYANCE, MORTGAGE.			
BILLS OF EXCHANGE.— <i>Inland</i> Bill of Exchange, Draft, or Order for payment to bearer or to order, either on demand or otherwise—			

		Not exceeding Two Months after date, or Sixty Days after sight.	Above Two months.
Amounting to 40s. and not exceeding £5. 5s.		0 1 0	0 1 6
Exceeding £5. 5s.	£20	0 1 6	0 2 0
	30	0 2 0	0 2 6
	50	0 2 6	0 3 6
	100	0 3 6	0 4 6
	200	0 4 6	0 5 0
	300	0 5 0	0 6 0
	500	0 6 0	0 8 6
	1000	0 8 6	0 12 6
	2000	0 12 6	0 15 0
	3000	0 15 0	1 5 0
	3000 and upwards	1 5 0	1 10 0

Inland BILL, though not made payable to bearer or to order, if delivered to the payee, or some person on his behalf, *the same duty as on an Inland Bill of Exchange for the like sum payable to bearer or order.*

Inland BILL, for the payment of any sum of money weekly, monthly, or at any stated periods, if made payable to bearer or to order, or if delivered to the payee or some person on his behalf, where the total amount of the money thereby made payable is specified therein, or can be ascertained therefrom, *the same duty as on a Bill payable to bearer or order for a sum equal to such total amount.*

And where the total amount of the money thereby made payable is indefinite, *the same duty as on a Bill on demand for the sum therein expressed only.*

Penalty for post-dating Bills of Exchange, 100l.

NOTE.—*The following Instruments are deemed Bills within the meaning of this Schedule:—Drafts or orders for payment of any sum by a Bill or Promissory Note, or for the delivery*

of any such bill or note in payment or satisfaction of any sum of money, where such drafts or orders require the payment on delivery to be made to the bearer or to order, or are delivered to the payee or some person on his behalf.

Receipts given by any banker or other person for money received, which entitle the bearer to receive the like sum from a third person.

Bills, Drafts, or Orders for the payment of any sum out of a particular fund which may or may not be available, or upon any condition or contingency which may or may not happen, if the same are made payable to bearer or order, or if delivered to the payee or some person on his behalf.

EXEMPTIONS.—Bills of exchange or Bank post bills issued by the Bank of England.—Bills, Orders, &c. by officers of the navy &c. on the Navy Pay Office; or by Commissioners of the Navy or Victualling Office, Transport Service, or Sick and Wounded, upon the Treasurer of the Navy.—Bills for the pay and allowances of her majesty's land forces by paymasters, &c.

Drafts or Orders for the payment of a sum of money to the bearer on demand, and drawn in any part of Great Britain upon any Banker, or person acting as a Banker, who resides or transacts the business of a Banker within fifteen miles of the place where such drafts or orders are issued, are exempted from any stamp duty; provided the place where such drafts or orders are issued are specified therein, and provided the same bear date on or before the day on which the same are issued, and provided they do not direct the payment to be made by bills or promissory notes. 9 Geo. IV. c. 49.

But by the 55 Geo. III. c. 184, if any person shall make and issue any bill, draft, or order for payment of money to the bearer on demand upon any Banker, dated subsequent to the day of its being issued, or which shall not truly specify the place where issued, unless the same be duly stamped as a bill of exchange, he shall forfeit £100. And any person knowingly receiving any such bill, draft, or order in payment of or as security for the sum therein mentioned shall forfeit £20. And any Banker paying such, knowing of the post-dating, shall forfeit £100, and shall not be able to recover the sum so paid in his account against the drawer or his representatives.

£. s. d.

Foreign BILL OF EXCHANGE (or Bill of Exchange drawn in but payable out of Great Britain), if drawn singly, and not in sets,—the same duty as on an INLAND BILL.

Foreign BILL OF EXCHANGE, drawn in sets according to the custom of merchants, for every bill of each set, where the sum does not exceed £100	0	1	6
Not exceeding £200	£0	3	0
500	0	4	0
1000	0	5	0
Not exceeding £2000	0	7	0
3000	0	10	0
Exceeding £3000 and upwards	0	15	0

BILL OF LADING of or for any goods, merchandize, or effects to be exported or carried coastwise (5 & 6 Vic. c. 79.)

0 0

Every Bill of Lading in a set must be stamped, and before execution. Signing a Bill of Lading not duly stamped incurs a penalty of 50*l.* 5 & 6 Vic. c. 79, § 21.

BILL OF SALE absolute. See CONVEYANCE. Bill of Sale as a Security. See MORTGAGE.

BOND in England, and Personal Bond in Scotland, given as a security for the payment of any definite and certain sum, not exceeding £50	1	0	0
Under £100	£1	10	0
200	2	0	0
300	3	0	0
500	4	0	0
Under £1000	£5	0	0
2000	6	0	0
3000	7	0	0
4000	8	0	0
Under £5,000	9	0	0
10,000	12	0	0
15,000	15	0	0
20,000	20	0	0
Amounting to £20,000 or upwards	25	0	0

Amounting to £20,000 or upwards

Bond in England, and Personal Bond in Scotland, given as a security for the payment of any sum of money, to be thereafter lent or paid, or which may become due upon an account current, where the total amount is uncertain and without limit

25 0 0

Where limited to a given sum, the same as on a Bond for such sum.

Bond in England, and Personal Bond in Scotland, given as a security for the transfer or re-transfer of stock, the same duty as on a Bond for a sum equal in value to the stock.

Bond in England, and Personal Heritable Bond in Scotland, given as security for the payment of any annuity or sum of money at stated periods, for term of life, or any other indefinite period; where the annuity does not amount to £10 per annum

1 0 0

Under £50	£2	0	0
100	3	0	0
200	4	0	0
300	5	0	0
Under £400	£6	0	0
500	7	0	0
750	9	0	0
1000	12	0	0
Under £1500	15	0	0
2000	20	0	0
Amounting to £2000 or upwards	25	0	0

Bond commonly called Counter-Bond in England, and Personal Bond of Relief in Scotland

1 15 0

Bond in England, and Personal Bond in Scotland, for the due execution of an office, and to account for money received by virtue thereof

1 15 0

Bond in respect of any duties of customs or excise, or for preventing frauds or evasions thereof, or for any other matter relating thereto (except Bonds exempted by acts for encouragement of the fisheries, or relating to the exportation of tobacco, or to carrying goods coastwise)

0 5 0

Bonds to prevent the re-landing of plate are liable only to the same stamp duty as bonds for the duties of customs or for preventing frauds or evasion thereof.

Bonds given with relation to the drawback of any duties of customs or excise upon the exportation of goods, or for obtaining a debenture or certificate for entitling any person to receive such drawback, are exempted by 7 & 8 Vic. c. 21.

Bond on obtaining letters of administration in England, or a confirmation of a testament in Scotland	1	0	0
Bond in England, and Personal Bond in Scotland, of any kind whatever not otherwise charged or exempt	1	15	0
—Where any Bond, together with any schedule, receipt, or other matter indorsed or annexed, contains 2160 words, then for every entire quantity of 1080 words after the first 1080, a further duty of	1	5	0

GENERAL DIRECTIONS RESPECTING BONDS.—Where a bond is given as a security for the payment of a sum of money and also of a share in the public stocks or funds, or of an annuity, or both, or for the payment of an annuity and also of a share in any of the said stocks or funds, the proper *ad valorem* duty is charged in respect of each.

And where any bond is given as a security for the payment or transfer to different persons of separate and distinct sums of money, or annuities, or shares in any of the said stocks or funds, the proper *ad valorem* duty is charged in respect of each *separate* sum or annuity or share, and not upon the aggregate amount.

And where any bond in England is given as a security for the performance of any *covenant or agreement* for the payment or transfer of any sum of money or annuity, or any share in any of the said stocks or funds, such Bond is charged with the same duty as if given for the payment or transfer &c.

And where any Bond for the payment or transfer of any sum of money, or annuity or share in the funds, is contained in the same deed or writing with any other matter or thing in this schedule specifically charged with duty (except a Declaration of Trust of the money, annuity, &c.), such deed or writing is charged as if the bond and other matter were contained in separate deeds. But a Bond for the performance of any covenant or agreement, *other* than for the payment or transfer of any sum of money or annuity, or share in the stocks or funds, though contained in the same deed or writing with any other matter or thing, is not so charged separately, but considered as only one deed, and charged accordingly under its proper denomination.

EXEMPTIONS.—Bonds of Royal Exchange or London Assurance Corporations, exempted by 6 Geo. I.—Bonds exempted by the 26 Geo. III. and other acts for the encouragement of the fisheries.—Bonds exempted by the 28 & 29 Geo. III. and other acts relative to the exportation of wool, tobacco, &c.—Bonds for carrying goods coastwise.—Bonds exempted by the acts for the encouragement of friendly societies.—Bonds for making playing cards, and selling or using stamps for newspapers, and for securing the payment of the duties on the advertisements therein.—Bonds given by collectors of Assessed Taxes; by seamen's relations; and by persons administering, when the property does not exceed £20.

CARDS, for every pack	0	1	0
CERTIFICATES taken out yearly by Attorneys, Solicitors, Proctors, Notaries Public, Sworn Clerks, Clerks in Court, &c.; also by Members of Inns of Court acting as Conveyancers, Special Pleaders, Draftsmen in Equity, in England; by writers to the Signet, Solicitors, Agents, Attorneys, or Procurators, in Scotland—			
If of three years standing, and residing in London or within the limits of the Twopenny Post, or within the city or shire of Edinburgh	12	0	0
If not of so long standing	6	0	0
If residing elsewhere, and having been admitted or in possession of his office for three years	8	0	0
If not of so long standing	4	0	0

But no one person is obliged to take out more than one certificate, although he may act in more than one of the capacities, or in several of the courts aforesaid.

EXEMPTIONS.—Serjeants at Law and Barristers.—Attorneys, Solicitors, Proctors, Notaries Public, &c. acting by virtue of any office or appointment, having taken out certificates in those characters.—Public Officers preparing deeds &c. in the course of their official duty only.

Certificate of the Registration of a Design under the Copyright of Designs Act (6 & 7 Vic. c. 65), by 6 & 7 Vic. c. 72.	5	0	0
Certificate of Admission to degrees in the universities. See TESTIMONIAL.			
Certificate of Marriage (except of a common Seaman, Marine, or Soldier)	0	5	0
Certificate of any person having received the Holy Sacrament	0	5	0
Certificate of any goods, wares, or merchandise having been duly entered inwards, which shall be entered outwards for exportation, when issued for enabling any person to obtain a Debenture	0	4	0
CHARTER of Resignation, of Confirmation, or of Novodamus, or upon apprising, or upon a decret or adjudication of sale of any lands or other heritable subject of Scotland, holden of any subject superior	0	9	0
If containing 2160 words, then for every 1080 words after the first 1080	0	9	0
CHARTERPARTY, or any Agreement or Contract for the charter of any ship or vessel, or any memorandum, letter, or other writing relating to the freight, &c.	0	5	0
COLLATION or Appointment by any Archbishop or Bishop to any cathedral, prebend, dignity, office, or honorary canonry, having no endowment or emolument attached or belonging thereto (5 & 6 Vict. c. 79)	2	0	0
Collation to any other ecclesiastical benefice, dignity, &c. in England (Ibid.)	7	0	0
—And where the net yearly value shall amount to £300, then for every £100 over and above the first £200 a further duty of	5	0	0

These duties are payable in respect of EVERY collation to an ecclesiastical benefice, dignity, or promotion in England, whether by an archbishop or bishop, or by any other ordinary or competent authority.—6 & 7 Vic. c. 72.

£. s. d.

Collation, Institution, or Admission to any ecclesiastical benefice in Scotland	2	0	0
Commission to any officer in the army, or in the corps of Royal Marines	1	10	0
Commission by the Admiralty to any officer in the navy	0	5	0
Commission, or Deputation, by the Commissioners of Excise	1	0	0
Commission appointing Receiver-General of the Land and other Taxes for any county or district in Great Britain	25	0	0
Commission appointing any Manager or Director of any Lottery	20	0	0
Commission to act as a Notary Public in Scotland. See FACULTY.			
COMPOSITION DEED between debtors and creditors	1	15	0

If containing 2160 words, for every 1080 words after the first 1080

CONVEYANCE, whether Grant, Disposition, Lease, Assignment, Transfer, Release, Renunciation, or of any other kind whatsoever, upon the sale of any lands, tenements, rents, annuities, or other property, real or personal, or o. any right, title, interest, or claim in or to such; that is, for the principal deed whereby the lands &c. are granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser—			
Where the consideration money does not amount to £20			0 10 0

Under £50	£1 0	Under £4000	£35 0	Under £15,000	130 0 0
150	1 10	5000	45 0	20,000	170 0 0
300	2 0	6000	55 0	30,000	240 0 0
500	3 0	7000	65 0	40,000	350 0 0
750	6 0	8000	75 0	50,000	450 0 0
1000	9 0	9000	85 0	60,000	550 0 0
2000	12 0	10,000	95 0	80,000	600 0 0
3000	25 0	12,000	110 0	100,000	800 0 0

Amounting to £100,000 or upwards 1000 0 0

—And where any freehold lands or hereditaments in England are conveyed by a Deed of Feoffment (with or without a Letter of Attorney to deliver or receive seisin) or by a Deed of Bargain and Sale enrolled, such Deed of Feoffment or Bargain and Sale, unless accompanied with a Lease & Release, is charged with a further duty as follows:—If the consideration money is under 20l.

Under £50	£0 15 0	Under £150	£1 0 0	£150 or upwards	1 15 0
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But if there shall be both a Feoffment and a Bargain and Sale enrolled, then the said further duty shall not attach on either.

—Where the principal deed with schedule and indorsements contains 2160 words, for every 1080 words after the first 1080, a further progressive duty of

Conveyance of any kind not otherwise charged	1	15	0
If containing 2160 words, then for every 1080 words after the first 1080	1	0	0

NOTE.—The purchase money is to be truly set forth in words at length upon every principal or only Deed of Conveyance.

As to what is to be deemed the principal deed:—Where lands or hereditaments are conveyed by Bargain and Sale enrolled, and also by Lease and Release, or by Feoffment, the Release or Feoffment is deemed the principal; and where by Lease and Release, and also by Feoffment, the Release is deemed the principal, and the other deeds are charged only with the duty on deeds in general.

In conveyances of copyhold or customary estates, the Surrender or Voluntary Grant is the principal instrument. Grants of copyhold or customary estates for lives are charged with the *ad valorem* duties as well as those of a greater interest.

Where, upon the sale of any Annuity or other right not before in existence, the same is not created by actual grant or conveyance, but only secured by Bond, Warrant of Attorney, Covenant, Contract, or otherwise, the Bond or other instrument is liable to the same duty as an actual Grant or Conveyance.

In the case of Leases or Tacks, where a yearly rent of £20 or upwards is reserved as part of the consideration, there is charged a further duty; for which see LEASE.

Where there are several deeds or instruments for completing the title, such of them as are not liable to the *ad valorem* duty are charged with the duty to which they are liable under any general or particular description of them in this schedule.

Where there are duplicates of any deed chargeable with the *ad valorem* duty, one of them only is charged therewith, and the other with the ordinary duty on deeds or instruments of the same kind not upon a sale.

Where any deed operating as a conveyance on the sale of any property also operates as a conveyance of any other property by way of settlement or otherwise, or contains any other matter or thing besides what is incident to the sale and conveyance of the property sold, or the title thereto, it is charged with such further duty as a separate deed containing the other matter would be chargeable with, exclusive of the progressive duty.

EXEMPTIONS.—Transfers of shares in any of the Government or Parliamentary Stocks or Funds are exempted from all stamp duties.

Transfers of shares of Bank Stock, South Sea, or East India Stock;—Surrenders &c. relating to Copyhold or Customary estates under 20s. yearly value; Voluntary Grants by a lord of a

manor of copyhold or customary estates for lives for a pecuniary consideration; Leases or Tacks in consideration of a fine or grassum for not exceeding three lives by whomsoever granted, or in consideration of a fine for not exceeding twenty-one years by ecclesiastical corporations, are exempted from the above duty on *Conveyances upon sale*, but are herein otherwise charged.

	£.	s.	d.
Copy of any Agreement, Contract, Bond, Conveyance, or other Deed, attested to be a true copy, for the purpose of being given in evidence, when made for the use of any person being a party to or having any benefit or interest therein, <i>the same duty as for the original instrument</i> ; and where any copy is offered in evidence, it is deemed to have been made for that purpose.			
Where such copy is made for the security or use of any person not having an immediate interest under the deed	0	1	0
And for every entire quantity of 720 words after the first 720	0	1	0
Copy or Extract of any Memorial, or of the Registry thereof	0	5	0
And for every piece of vellum, parchment, or paper, after the first	0	5	0
Copy or Extract of any Deed, not falling under the description of Law Proceedings, taken from the rolls or records of any of the courts at Westminster	0	2	0
And for every piece of vellum, parchment, or paper, after the first	0	2	0
Copy, attested or authenticated, or made for the purpose of being given in evidence as a true copy of any original Will, Testament, or Codicil, or any Probate, Letters of Administration, &c.	0	1	0
And for every 720 words after the first 720	0	1	0
Office Copy or Extract of any Will or Codicil deposited in any Ecclesiastical Court in England	0	1	0
And for every 90 words after the first 90	0	1	0
EXEMPTIONS.—Copies or Extracts of Protests upon Bills or Promissory Notes under 40s.—Certified copies of proceedings and interlocutors in cases of appeal to the House of Lords.			
COPYHOLDS.—Surrender, Admittance, or Licence to demise, made or granted out of court, or Memorandum thereof respectively; and Copy of Court Roll of any Surrender, Admittance, or Licence to demise, made in court, where the clear yearly value exceeds 20s.	1	0	0
Where it does not exceed 20s.	0	5	0
If the same contain 2160 words, for every 1080 words after the first 1080	1	0	0
Copy of Court Roll of the several Surrenders, Admittances, and other acts in court for perfecting a common recovery, if the value of estate exceed 20s., for five times	1	0	0
When it does not exceed 20s. for five times	0	5	0
Voluntary Grant by a Lord or Steward of the Manor, or Memorandum thereof, value of estate above 20s., twice	1	0	0
When the value is not above 20s., twice	0	5	0
If the above Instrument or Copy contain 2160 or more words, then for every 1080 words after the first 1080	1	0	0
EXEMPTIONS.—Surrenders to the use of a will, or to a trustee for the uses and purposes of a will.			
DEBENTURE, or CERTIFICATE, for entitling any person to receive any drawback or bounty of customs or excise; where the value to be received does not exceed 100 <i>l</i> .	0	5	0
Exceeding £100 and not exceeding £200	0	10	0
200 — — 500	1	0	0
500 — — —	2	0	0
EXEMPTIONS.—Debentures or Certificates on the exportation of Linen or Sail Cloth.			
DECLARATION of a Use or Trust, made by any writing not being a deed or will, nor otherwise charged	1	15	0
If containing 2160 words or upwards, for every 1080 words after the first 1080	1	5	0
DECLARATION made by Deed. See DEED.			
DEED of any kind, not otherwise charged nor exempted	1	15	0
If containing 2160 words or upwards, for every 1080 words after the first 1080	1	5	0
DEPUTATION or Appointment of a Gamekeeper	1	15	0
DICE, for every pair	1	0	0
DISPENSATION for holding two ecclesiastical dignities or benefices, where either of them is above the yearly value of 10 <i>l</i> . in the queen's books	40	0	0
And in all other cases	20	0	0
Dispensation of any other kind from the Archbishop of Canterbury or the Master of the Faculties	40	0	0
DOCQUET, on passing under the great seal any Grant, Letters Patent, Exemplification, Constat, &c.	0	2	0
DONATION or Presentation by her Majesty, or her heirs or successors, of or to any ecclesiastical benefice, dignity, or promotion in England (5 & 6 Vic. c. 79)	5	0	0
—And where the net yearly value shall amount to £300, then for every £100 over and above the first £200 a further duty of (Ibid)	5	0	0

These duties are payable upon ALL donations or presentations to an ecclesiastical benefice, dignity, or promotion in England, by whomsoever made or granted.—6 & 7 Vic. c. 72.

£. s. d.

EXCHANGE.—Any Deed or Instrument of Exchange, whereby lands or other hereditaments are to be exchanged for other lands &c., where no sum, or a sum under 300*l.* is paid for equality of exchange 1 15 0

When 300*l.* or upwards is to be paid, the same *ad valorem* duty as for a Conveyance on a sale of lands for an equal sum.

If 2160 words, for every 1080 words after the first 1080, if the deed be liable in the first instance to a duty of 1*l.* 5*s.* 1 5 0

If liable to a higher duty in the first instance 1 10 0

And a duplicate of any such deed is charged with the same duty; and if the Exchange be effected by separate conveyances by distinct deeds, each deed is charged with the same duty.

And in case there is more than one deed for completing the title, the principal deed only is charged under the head of *Exchange*, and any subordinate or collateral deed is charged with the duty to which it may be liable under any other description.

EXEMPLIFICATION of CONSTAT, under the great seal, of any Letters Patent or Grant of any honour, deputy, promotion, liberty, or privilege, for every skin, sheet, or piece of parchment or paper 5 0 0

EXEMPLIFICATION, under the seal of any court of law or equity, of any Record or Proceeding therein 3 0 0

FACULTY, from the Archbishop of Canterbury or the Master of the Faculties for the time being, &c. not otherwise charged 30 0 0

FACULTY, Licence, or Commission, for admitting or authorizing any person to act as a Notary Public in England 30 0 0

— in Scotland 20 0 0

FEOFFMENT, not on Mortgage or Conveyance, or not otherwise charged 1 15 0

And where the same contains any Letter of Attorney to deliver or receive seisin, a further duty of 1 15 0

If containing 2160 words or upwards, for every 1080 words after the first 1080 Feoffment of lands or other hereditaments upon the sale or mortgage thereof. 1 5 0

See CONVEYANCE, MORTGAGE.

GIFT of the vacant Stipend of any parish in Scotland, when the presentation belongs to the crown 1 10 0

GRANT, or **LETTERS PATENT** under the great seal, &c., of the honour or dignity

Of a Duke £350 0 0 | Of a Viscount 200 0 0

Of a Marquis 300 0 0 | Of a Baron 150 0 0

Of an Earl 250 0 0 | Of a Baronet 100 0 0

GRANT of a *Congé d'Elire* to any Dean and Chapter for the Election of a Bishop or Archbishop 30 0 0

— of the Royal Assent to such Election, or of the Nomination by her Majesty in default of such Election 30 0 0

— of the Restitution of the Temporalities to any Archbishop or Bishop 30 0 0

— of any other honour, dignity, or promotion, or of any franchise, liberty, or privilege to any person, or body politic or corporate 30 0 0

Where two or more honours or dignities are granted by the same Letters Patent to the same person, such Letters Patent are charged with duty in respect of the highest only.

And where granted to any persons in remainder, are charged with such further duty in respect of every remainder as an original grant.

And where contained in more than one skin, sheet, or piece of parchment or paper, for every skin &c. after the first 20 0 0

Grant or **Warrant of Precedence**, under the sign manual 100 0 0

Grant or **Licence** under the sign manual to use a Surname and Arms, in compliance with any will or settlement 50 0 0

Upon any voluntary application 10 0 0

Grant of Arms or Armorial Ensigns only, under the sign manual, or by any of the Kings of Arms 10 0 0

Grant of the custody of the person or estate of a Lunatic 2 0 0

Grant, out of the Civil List, or out of any other fund not appropriated by

Parliament, of any certain defined *Sum of Money*—

Under £100... £1 10 | Under £500... £10 0 | Under £1000 30 0 0

150.....4 0 | 750.....20 0 | £1000 or upwards, 5*l.* per cent.

— of any *Annuity* or *Pension*, not amounting to £100 1 0 0

Under £200... £4 0 | Under £600... £20 0 | Under £1000 40 0 0

400... 10 0 | 800.....30 0 | £1000 or upwards 50 0 0

But when made in confirmation or renewal of a former Grant of the like amount and description 1 10 0

Where distinct Annuities are made to different persons by the same instrument, the proper duty is charged in respect of each; but where the Grant is of any Annuity or Pension for the benefit of two or more persons jointly, the duty is charged in respect of the whole.

Grant or Appointment by her Majesty, or any other person, body politic or corporate, of or to any office or employment; where the salary, fees, and emoluments do not amount to 50 <i>l.</i> per annum										£. s. d.										
Under £100 ...			£4	0	0	Under £500 ...			£25	0	0	Under £1500			75	0	0			
200 ...			6	0	0	750 ...			35	0	0	2000			100	0	0			
300 ...			12	0	0	1000 ...			50	0	0	3000			150	0	0			
Amounting to £3000 or upwards																200			0	0

EXEMPTIONS.—Letters Patent and Grants of Offices, where, on the demise of the crown, the successor appoints.

On the promotion of any person in the Customs to any other employment therein, the *ad valorem* duty is payable in respect of the increase of the salary &c., unless the amount of increase is equal to the original salary, in which case the full *ad valorem* duty is payable. 3 Geo. IV. c. 117.

Grant, Lease, or Tack, from her Majesty, of any lands, tenements, or hereditaments, which her Majesty is entitled to dispose of in right of the crown, or of any goods, chattels, or personal estate (not otherwise charged), when intended to operate as a Gift, for every skin, sheet, or piece of parchment or paper 30 0 0

When such Grant, Lease, or Tack is of lands or other hereditaments vested in her Majesty by escheat for want of heirs of any person who was a *bare trustee* thereof, or seized into the hands of the crown upon *outlawry* in a civil action at the suit of a subject 1 15 0

And if such Grant, Lease, or Tack, charged with a duty of 1*l.* 15*s.*, together with any schedule &c., contains 2160 words, then for every 1080 after the first 1080 1 5 0

— When any such Grant, Lease, or Tack is made for a *full and adequate consideration*, as also when made of any lands &c. the *private property* of her majesty, the same duty as if made by a subject.

Grant upon the sale of any property not belonging to the Crown. See CONVEYANCE.

INDENTURES or CHIROGRAPH of a fine levied in any court, for each part or indenture 0 10 0

INSTITUTION granted by any Archbishop, Bishop, Chancellor, or other Ordinary, or by any Ecclesiastical Court, to any ecclesiastical benefice, dignity, or promotion in England, where the same shall proceed upon a presentation 2 0 0

— When upon the petition of the patron to be himself admitted and instituted 7 0 0

— And if in the latter case the net yearly value amount to £300, then for every £100 above the first £200 a further duty of 5 0 0

NOTE.—The value is to be ascertained by the certificate of the Ecclesiastical Commissioners. Two or more benefices episcopally or permanently united to be deemed one benefice only.

Institution to Ecclesiastical Benefices in Scotland. See COLLATION.

INSURANCE. See POLICY.

LAND-TAX, Instruments relating to the redemption and sale thereof are exempted from stamp duty.

LEASE or TACK of any lands, hereditaments, or heritable subjects, at a yearly rent, without any sum of money by way of fine, premium, or grassum, where the yearly rent shall not amount to 20*l.* 1 0 0

Under £100 £1 10 Under £400 £3 0 Under £800 5 0 0

200 2 0 500 4 0 1000 6 0 0

Amounting to £1000 or upwards 10 0 0

Lease or Tack of any lands, hereditaments, or heritable subjects granted in consideration of a sum of money by way of fine, premium, or grassum, without any yearly rent, or with a yearly rent under 20*l.*, the same duty as for a Conveyance on the sale of Lands (except Leases for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, by whomsoever granted, and except Leases for a term absolute not exceeding 21 years by ecclesiastical corporations, aggregate or sole.)

Lease or Tack of any lands &c. granted in consideration of a sum of money by way of fine and also of a yearly rent amounting to 20*l.* or upwards,—both the *ad valorem* duties payable for a Lease in consideration of a fine only, and for a Lease in consideration of a rent only, of the same amount (except the Leases herein-before excepted)

Lease or Tack of any other kind, not otherwise charged 1 15 0

And for the counterpart or duplicate of any Lease or Tack with a duty not exceeding 1*l.*, the same duty as on the Lease or Tack.

And for the counterpart or duplicate of any other Lease or Tack 1 10 0

And when the Lease or Tack, together with any schedule &c. contains 2160 words for every 1080 words after the first 1080 1 0 0

EXEMPTIONS.—Leases of waste or uncultivated land to poor persons for not exceeding three lives or ninety-nine years, when the fine does not exceed 5*s.*, nor the reserved rent one guinea per annum.

Leases or Tacks of land &c. belonging to her Majesty. See GRANT. £. s. d.

Lease (or Bargain and Sale) for a year. See BARGAIN AND SALE.

Legacies, and the Succession to personal and moveable estate upon intestacy;—

For every legacy (specific or pecuniary), and also for the clear residue when devolving to one person, or for every share of the clear residue when devolving to two or more persons (whether accruing by will or intestacy), amounting to 20*l.* or upwards, after deducting debts, funeral expences, legacies, and other charges first payable thereout—

For the benefit of a child, or any descendant of a child of the deceased, or for the benefit of a father or mother, or any lineal ancestor, a per centum duty of 1 0 0

For the benefit of a brother or sister, or any descendant of a brother or sister of the deceased, a per centum duty of 3 0 0

For the benefit of a brother or sister of the father or mother, or any descendant of a brother or sister of the father or mother of the deceased, a per centum duty of 5 0 0

For the benefit of a brother or sister of a grandfather or grandmother, or any descendant of a brother or sister of the grandfather or grandmother of the deceased, a per centum duty of 6 0 0

For the benefit of any person in any other degree of collateral consanguinity to the deceased than above described, or any stranger in blood, a per centum duty of 10 0 0

All gifts of annuities, or by way of annuity, or of any other partial benefit or interest, out of any such estate or effects, are deemed Legacies within the meaning of this schedule. And where any Legatee takes two or more distinct legacies or benefits under any will, which together amount to the value of £20, each is charged with duty, though each separately may be under the value of £20.

As to certain gifts by will or testamentary instrument, respecting the liability of which to legacy duty doubts had been entertained, see 8 & 9 Vic. c. 76.

EXEMPTIONS.—Legacies and residues &c. for the benefit of the husband or wife of the deceased, or any of the Royal Family; also, all Legacies exempted from duty by the 39 Geo. III. c. 73, for exempting certain legacies given to corporate bodies.

LETTERS OF ADMINISTRATION *without a Will annexed*, to be granted in England, or INVENTORY to be exhibited and recorded in any Commissary Court in Scotland, of the estate and effects of any person who shall have died *intestate*,—where the estate and effects exclusive of what the deceased was possessed of or entitled to as a trustee and not beneficially, are above the value of £20 and under £50

Under £100	£1	Under £10,000	£270	Under £100,000	2,025 0 0
200	3	12,000	300	120,000	2,250 0 0
300	8	14,000	330	140,000	2,700 0 0
450	11	16,000	375	160,000	3,150 0 0
600	15	18,000	420	180,000	3,600 0 0
800	22	20,000	465	200,000	4,050 0 0
1000	30	25,000	525	250,000	4,500 0 0
1500	45	30,000	600	300,000	5,625 0 0
2000	60	35,000	675	350,000	6,750 0 0
3000	75	40,000	785	400,000	7,875 0 0
4000	90	45,000	900	500,000	9,000 0 0
5000	120	50,000	1010	600,000	11,250 0 0
6000	150	60,000	1125	700,000	13,500 0 0
7000	180	70,000	1350	800,000	15,750 0 0
8000	210	80,000	1575	900,000	18,000 0 0
9000	240	90,000	1800	1,000,000	20,250 0 0
Amounting to £1,000,000, or upwards					22,500 0 0

EXEMPTIONS.—Letters of Administration &c. of the effects of any common Seaman, Marine, or Soldier dying in the service of her majesty.

Letter or Power of Attorney, made by a petty officer, seaman, marine, or soldier serving as a marine, or by the executors or administrators of any such, for receiving prize money 0 1 0

Letter or Power of Attorney for the sale, transfer, acceptance, or receipt of dividends of any of the Government or Parliamentary stocks or funds 1 0 0

EXEMPTIONS.—Letters of Attorney for the receipt of any definite and certain share of such funds producing a yearly dividend of not less than £3. Letters of Attorney for voting at any election of the Directors of the East India Company. (5 & 6 Wm. IV. c. 64.)

Letter or Power of Attorney, or other instrument, made for the sole purpose of appointing a Proxy to vote at a meeting of the proprietors or shareholders of a Joint Stock Company, or other Company, whose stock or funds are divided into shares, and transferable 0 2 6

Such letters of attorney are available only to enable the Proxy to vote upon any matter at one meeting (the time of holding whereof must be specified in the instrument), or at any adjournment of such meeting. They cannot be stamped after execution. Penalty for signing an unstamped power, £30.

	£.	s.	d.
Letter or Power of Attorney of any other kind, or Commission or Faculty in the nature thereof	1	10	0
If containing 2160 words, for every 1080 words after the first 1080	1	0	0
Letter of Licence from creditors to a debtor	1	15	0
If containing 2160 words, for every 1080 words after the first 1080	1	5	0
Letters of Marque and Reprisal	5	0	0
Letters Patent. See GRANT.			
LICENCES.— <i>Appraiser</i> (not being an Auctioneer) yearly	2	0	0
<i>Banker</i> or other person re-issuing notes payable to the bearer on demand, yearly	30	0	0
<i>Makers of Playing Cards and Dice</i> , yearly	0	5	0
<i>Notary Public</i> . See FACULTY.			
<i>Physic</i> , to exercise the faculty of. See ADMISSION.			
<i>Hackney Coach Proprietors &c.</i> See post, art. HACKNEY CARRIAGES.			
<i>Hawkers</i> . See post, art. HAWKERS AND PEDLARS.			
<i>Pawnbrokers</i> , in London and Westminster, or within the limits of the London District Post, yearly	15	0	0
— in any other place, yearly	7	10	0
<i>Plate</i> :—Persons dealing in Gold or Silver Plate in which any quantity of gold exceeding 2 dwts. and under 2 oz., or of silver exceeding 2 dwts. and under 30 oz. is in one piece (except watches) yearly	2	6	0
— Persons dealing in articles of greater weight; and every Pawnbroker taking in or delivering out pawns of such plate; and every Refiner of Gold or Silver, yearly	5	15	0
. But Gold or Silver Lace is not deemed Plate.			
<i>Postmasters</i> . See post, art. POST HORSES.			
<i>Quack Medicines, Dealers in</i> , within London and the limits of the London District Post, annually	2	10	0
— in Manchester, Birmingham, or Sheffield	0	10	0
— elsewhere	0	5	0
<i>Stage Coach Proprietors &c.</i> See post, art. STAGE CARRIAGES.			
Licence for Marriage, in England, if special	5	0	0
If not special	0	10	0
Licence to hold a Perpetual Curacy, not proceeding upon a nomination	3	10	0
Licence for the non-residence of a clergyman upon his living (1 & 2 Vict. c. 106)	1	0	0

EXEMPTIONS.—Licences to Stipendiary Curates in England, wherein the annual amount of the stipend is specified; and Licence for non-residence upon the ground of there being no fit house of residence.

Licence of any kind not otherwise charged, under the seal of any archbishop, bishop, chancellor, or other ordinary, or of any ecclesiastical court in England, or granted by any presbytery or other ecclesiastical power in Scotland	2	0	0
MEMORIAL, to be registered pursuant to any act of parliament for the public registering of deeds and conveyances, in England	0	10	0
And for every piece of vellum, parchment, or paper, upon which any such memorial shall be written, after the first, a further duty of	0	10	0
Memorial, to be registered or enrolled pursuant to act of parliament, of any deed or instrument whereby any annuity is granted or secured in England	1	0	0
And for every piece of vellum, parchment, or paper upon which such Memorial is written after the first	1	0	0
MORTGAGE, Conditional Surrender by way of mortgage, Further Charge, Wadset, and Heritable Bond; Disposition, Assignment, or Tack, in security; and Eik to a Reversion; or of affecting any lands, estate, or property, real or personal, heritable or moveable whatsoever; also any Conveyance of any lands, estate, or property whatsoever in trust, to be sold or otherwise converted into money, which is intended only as a security, and is redeemable before the sale or other disposal thereof, either by express stipulation or otherwise (except where such Conveyance is made for the benefit of creditors specified, who shall accept the provision made for payment of their debts in full satisfaction thereof, or who shall exceed five in number); also any Defeazance, Letter of Reversion, Back Bond, Declaration, or other Deed or Writing for defeating or making redeemable, or explaining or qualifying any conveyance, disposition, assignment, or tack, of any lands, estate, or property whatsoever, which shall be apparently absolute but intended only as a security; also any Agreement, Contract, or Bond, accompanied with a deposit of title deeds for making a Mortgage, Wadset, or any such other security or conveyance as aforesaid, of any			

lands, estate, or property comprised in such title deeds, or for pledging or charging the same as a security;

- Where the same is made as a security for the payment of any definite and certain sum of money, advanced or lent at the time or previously due and owing, or forborne to be paid, being payable—

Not exceeding £50	£1 0 0	Not exceeding £3000	7 0 0
100	1 10 0	4000	8 0 0
200	2 0 0	5000	9 0 0
300	3 0 0	10,000	12 0 0
500	4 0 0	15,000	15 0 0
1000	5 0 0	20,000	20 0 0
2000	6 0 0	Exceeding £20,000	25 0 0

If the total amount secured be *uncertain and without limit*

- Where made as a security for the re-payment of money to be *thereafter* lent, advanced, or paid, or which may become due upon an *account current*, together with any sum already advanced or due, or without, as the case may be (other than and except any sums advanced for the insurance of any property comprised in such Mortgage &c. against damage by fire, or to be advanced for the insurance of any life or lives, pursuant to any agreement in a deed whereby any annuity is granted or secured for such life or lives)—
- If the total amount secured, or to be ultimately recoverable thereupon, shall be *uncertain and without any limit* 25 0 0
- But if the total amount be limited not to exceed a given sum, the same duty as on a Mortgage for such limited sum.
- And where any Mortgage, Wadset, &c., together with any schedule, receipt, &c., contains 2160 words or upwards, for every 1080 words after the first 1080, a *further duty of* 1 0 0

Where any such Mortgage is made as a security for the transfer or re-transfer of any share in the Government or Parliamentary, Bank, East India, or South Sea Stock, in consideration of stock or money advanced or lent at the time, or previously due and owing, the same as on a Mortgage for a sum equal in value to the stock or fund secured on the day of the date, or on either of the ten days preceding.

And if made as a security for the payment of a sum of money and also for the transfer or re-transfer of such stock, the *ad valorem* duty is charged in respect of each.

And if made as a security for the payment or transfer to different persons of separate and distinct sums or shares, the *ad valorem* duty is charged in respect of each separate and distinct sum, and not on the aggregate amount.

Where several distinct deeds or instruments falling within the description of any of the instruments hereby charged with the *ad valorem* duty on Mortgages, are made at the same time for securing the payment or transfer of one and the same sum of money or share in the said stocks, or where there are Duplicates of any deed or instrument chargeable with the *ad valorem* duty on Mortgages &c., such *ad valorem* duty, if exceeding 2*l.*, is charged only on one of them, and the rest are charged with the duty to which they are liable under any more general description thereof in this Schedule; and, if required for the sake of evidence, the rest of such deeds may be stamped with a particular stamp denoting the payment of the *ad valorem* duty, on all of them being produced duly stamped at the Stamp Office.

Where any deed shall operate as a Mortgage hereby charged with the *ad valorem* duties, and also as a Conveyance of the equity or right of redemption or reversion of any lands, estate, or property therein comprised, to or in trust for, or according to the direction of a purchaser, it is also chargeable with the *ad valorem* duty on Conveyances upon sale. But where the equity or right of redemption &c. is thereby conveyed or limited in any other manner, it is charged only as a Mortgage.

And in all other cases when a Mortgage charged with the *ad valorem* duty is contained in the same deed with any other matter except what is incident to such mortgage, it is charged with the same duties (except the progressive duty) as such Mortgage and other matter would have been charged with if contained in separate deeds.

MORTGAGE, &c.—Any Transfer, Assignment, Disposition, Assignment, or Reconveyance of any Mortgage &c., if no further sum of money or stock be added to the principal money or stock already secured 1 15 0

And where any such Transfer or Assignment, together with any schedule, receipt, &c. contains 2160 or more words, then for every 1080 after the first 1080, a *further duty of* 1 5 0

But if any further sum of money or stock be added to the principal money or stock already secured, the *ad valorem* duty on Mortgages for such further sum of money or stock is charged. (3 Geo. IV. c. 117.)

NEWSPAPERS.—(By 7 Wm. IV. c. 76, from 15th Sept. 1836). For every sheet 0 0 1

If containing a superficies on one side (exclusive of the margin of the letter-press) exceeding 1530 inches, an additional 0 0 0½

If containing a superficies &c. exceeding 2295 inches, an additional 0 0 1

Supplements containing a superficies &c. not exceeding 765 inches 0 0 0½

£. s. d.

Policy of Assurance or Insurance, or other instrument, whereby any such insurance as aforesaid shall be made for *any certain term or period of time*, the following rates or sums for every £100, and also for any fractional part of £100, whereof the same shall consist :—

Where made for any term or period not exceeding six calendar months	0	2	6
--- Exceeding six calendar months	0	4	0

Policy of Assurance or Insurance, or other instrument, by whatever name the same shall be called, whereby any insurance commonly called a *Mutual Insurance* shall be made, or whereby divers persons shall insure or agree to insure one another, without any premium or pecuniary consideration, from any loss, damage, or misfortune that may happen of or to any ship or vessel, or any goods, merchandize, or other property on board of any ship or vessel, or the freight of any ship or vessel, or any other interest in or relating to any ship or vessel which may lawfully be insured, upon any voyage whatever, and not for any period of time :—For every sum of £100, and also for each and every fractional part of £100

0 2 6

Policy whereby any other lawful insurance whatsoever, not hereinbefore charged, is made against loss or damage of any kind :—For every £100, and also for every fractional part of £100 :—

Where the premium does not exceed 20s. per cent. on the sum insured	0	2	6
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Where the premium exceeds the rate of 20s. per cent. or where the insurance is made for any other than a pecuniary consideration	0	5	0
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Note.—If the separate interests of two or more distinct persons are insured by one policy, the per centum duty is charged, in every kind of insurance, in respect of every fractional part of 100*l.* as well as of every full sum of 100*l.*, upon every separate and distinct interest.

Signing a policy of assurance not duly stamped, or any contrivance to evade the duties, subjects the assurer to a penalty of 100*l.*—7 & 8 Vic. c. 21.

Although a policy of insurance produced at the trial of an action have a sufficient stamp, evidence will be received that it had no such stamp when it was effected; in which case it is a mere nullity; for the Commissioners of Stamps are forbidden by the 35 Geo. III. c. 63, to stamp such instruments after execution, and they are not authorized by the 37 Geo. III. c. 136, § 2, which extends only to such instruments as could before be legally stamped after they were executed.—Roderick v Hovill, 3 Campb. 103.

PROBATE of a Will, and Letters of Administration *with a Will annexed*, to be granted in England, or INVENTORY to be exhibited and recorded in any Commissary Court in Scotland, of the estate and effects of any person deceased after the 10th October, 1803, and *who has left any testamentary disposition*; where the estate and effects for which such Probate &c. is granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee and not beneficially, shall be above the value of 20*l.* and under 100*l.*

Under £200	£2	Under £12,000	£200	Under £120,000	1,500	0	0
300	5	14,000	220	140,000	1,800	0	0
450	8	16,000	250	160,000	2,100	0	0
600	11	18,000	280	180,000	2,400	0	0
800	15	20,000	310	200,000	2,700	0	0
1000	22	25,000	350	250,000	3,000	0	0
1500	30	30,000	400	300,000	3,750	0	0
2000	40	35,000	450	350,000	4,500	0	0
3000	50	40,000	525	400,000	5,250	0	0
4000	60	45,000	600	500,000	6,000	0	0
5000	80	50,000	675	600,000	7,500	0	0
6000	100	60,000	750	700,000	9,000	0	0
7000	120	70,000	900	800,000	10,500	0	0
8000	140	80,000	1050	900,000	12,000	0	0
9000	160	90,000	1200	1,000,000	13,500	0	0
10,000	180	100,000	1350	£1,000,000 & upwards	15,000	0	0

EXEMPTIONS.—Probate of a Will, Letters of Administration, and Inventory of the effects of any common Seaman, Marine, or Soldier dying in the service of her majesty.

PROCURATION, deed or other instrument of

If containing 2160 words or upwards, for every 1080 words after the first 1080	1	10	0
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PROMISSORY NOTE, for payment of any sum of money to the Bearer *on demand*—

Not exceeding £1.	1s.	0	0	5	Not exceeding £20	0	2	0
"	2	2	0	0	10	"	30	0
"	5	5	0	1	3	"	50	0
"	10	0	0	1	9	"	100	0

These notes may be re-issued after payment thereof, as often as may be thought fit, by any person who has taken out a licence as a *Banker*. But any person re-issuing such notes without being duly licensed forfeits 100*l.* for every offence. 55 Geo. III. c. 184, § 27.

By the 7 Geo. IV. c. 6, the issuing of bank notes or promissory notes, payable on demand, under *five pounds*, either by the Bank of England or any licensed English bankers was prohibited after the 5th April, 1829, under a penalty of 20*l*.

No Banker or other person shall issue any note for payment to bearer on demand, liable to stamp duty, with the date printed thereon, under penalty of 50*l*.

By the 9 Geo. IV. c. 23, bankers (except in London, or within three miles thereof) may issue unstamped Promissory Notes and Bills of Exchange (not being under 5*l*., and not exceeding seven days after sight, or twenty-one days after date) on taking out a licence for that purpose, which costs 30*l*. for each place at which such bills or notes shall be issued (but not more than four licences are required for any number of places), and entering into a bond to keep a regular account of all Bills and Notes issued, and of the amount in circulation on a given day (Saturday) in every week, and to deliver such account half-yearly, and pay a composition at the rate of 3*s*. 6*d*. for every 100*l*. of the average amount. The act imposes a penalty of 100*l*. on post-dating any such notes or bills.

Promissory Note, for payment of any sum of money in *any other manner than to Bearer on demand*; or if exceeding 100*l*., whether to Bearer on demand or otherwise,—the same duty as on **BILLS OF EXCHANGE**.

. These Notes are not to be re-issued after being once paid.

Promissory Note for the payment of any sum of money by instalments, or for the payment of several sums of money at different days or times, so that the whole sum to be paid is definite and certain, the same duty as on a Promissory Note payable in less than two months after date for a sum equal to the whole amount.

NOTE.—The following Instruments are deemed Promissory Notes within the meaning of this Schedule.—All notes promising the payment of any sum out of a particular fund which may or may not be available, or upon any condition or contingency which may or may not happen, if the same be made payable to Bearer or to Order, or if the same be definite and certain, and do not amount in the whole to 20*l*.

And all Receipts for money deposited in any bank, or in the hands of any banker, containing an agreement or memorandum that interest shall be paid for the money so deposited.

If any person shall make, sign, or issue, or shall accept or pay any Bill, Draft, or Order, or Promissory Note, liable to duty, without being duly stamped, he shall forfeit 50*l*. 55 Geo. III. c. 184, § 10.

And if any person shall make or issue any Bill of Exchange, Draft, Order, or Promissory Note for the payment of money at any time after date or sight, which shall bear date subsequent to the day on which it is issued, so that it shall not become payable in two months (if payable after date), or in sixty days (if payable after sight) from the time of issuing, unless stamped with the higher duty, he shall forfeit 100*l*. *Id*. § 12.

EXEMPTIONS.—All notes promising the payment of any sum out of a particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen, where the same is *not* made payable to Bearer or to Order; and also when made payable to Bearer or to Order, if it amount to 20*l*., or is indefinite.—And all other Instruments bearing the form of Promissory Notes, but which in law are deemed Special Agreements, except those hereby expressly directed to be deemed Promissory Notes. But such Instruments are nevertheless liable to the duty which may attach thereon as Agreements or otherwise.—Promissory Notes of the Bank of England are exempted, the Bank paying an annual composition on account thereof.

	£. s. d.	
PROTEST of any Bill of Exchange or Promissory Note for any sum of money not amounting to £20		0 2 0
Under £100.....£0 3 0 | Under £500.....£0 5 0 | £500 or upwards ...		0 10 0
Protest of any other kind		0 5 0
And for every sheet or piece of paper, parchment, &c. after the first		0 5 0
RECEIPT or discharge given for or upon the payment of money, amounting to £5 and not amounting to £10		0 0 3
Under £20...£0 0 6 | Under £200...£0 2 6 | Under £1000.....		0 7 6
50.....0 1 0 | 300.....0 4 0 | Amounting to £1000 }		0 10 0
100.....0 1 6 | 500.....0 5 0 | or upwards.....		
When the sum is acknowledged to be received in full of all demands		0 10 0

NOTE.—Any note, memorandum, or writing given to any person upon the payment of money, whereby any sum, debt, or demand, or part thereof therein specified, amounting to 5*l*. or upwards is expressed or acknowledged to be *paid, settled, balanced, or otherwise discharged or satisfied*, and whether signed or not by any person, is a Receipt within the meaning of this schedule.

And any receipt given upon the payment of money containing any *general* acknowledgment of any debt, account, claim, or demand, whereof the amount is not therein specified, having been paid, settled, balanced, or otherwise discharged, or whereby any sum therein mentioned is acknowledged to be received *in full*, or in discharge of such debt, &c. and whether signed with the name of any person or not, is chargeable as a Receipt *in full of all demands*, with the duty of 10*s*. And all receipts, discharges, and acknowledgments of such description, given for or upon payment by any bills of exchange, drafts, promissory notes, or other securities for money, are deemed Receipts given upon the payment of money within the meaning of this schedule.

The stamp is to be paid by the person giving the receipt, except when the money is paid for the use of her majesty. And any person refusing to give a receipt, or to pay the amount of the stamp, is liable to the penalty of 10*l*. And any person writing or signing, or causing to be written or signed, any receipt without the same being first duly stamped, or upon a stamp of a lower denomination than is required, shall forfeit 10*l*. if the sum paid be under 100*l*.; and 20*l*. if amounting to 100*l*. or upwards. 35 Geo. III. c. 55.

EXEMPTIONS.—Receipts exempted from stamp duty by any act relating to the Assessed Taxes.—Receipts given by the Treasurer of the Navy.—Receipts on account of the pay of the Army or Ordnance.—Receipts given by any officer, seaman, marine, or soldier, or their representatives.—Receipts for the consideration money for the purchase of any parliamentary stocks or funds, and for any dividend paid on any share of the said stocks or funds.—Receipts on Exchequer bills.—Receipts given for money deposited in the Bank of England, or in the hands of any banker, to be accounted for on demand, provided the same be not expressed to be received of or by the hands of any other than the person to whom the same is to be accounted for. But if with interest, see PROMISSORY NOTE.—Receipts written upon Promissory Notes, Bills of Exchange, Drafts, or Orders for the payment of money.—Receipts given upon bills or notes of the Bank of England.—Letters by the General Post acknowledging the safe arrival of any bills of exchange, promissory notes, or other securities.—Receipts indorsed upon any Bond, Mortgage, or other security, or any conveyance whatever.—Releases or discharges for money by deeds duly stamped.—Receipts or discharges for the return of duties of Customs.—Receipts indorsed upon Navy bills.—Receipts upon Victualling and Transport bills.—Receipts given solely for the duty on insurances against fire.

£. s. d.

RECOGNIZANCE, Statute Merchant, and Statute Staple, entered into as a security for the performance of any covenant, contract, or agreement; or for the due execution of any office or trust; or for rendering a due account of money received or to be received; or for indemnifying against any matter or thing	1	15	0
If containing 2160 words, for every 1080 words after the first 1080	1	5	0
Recognizance, Statute Merchant, and Statute Staple, as a security for the payment of any sum of money, or annuity, or transfer of any share in the funds, where not already secured by a Bond or Mortgage, same duty as on a Bond.			
And where such payment or transfer is already so secured	1	0	0
RELEASE and Renunciation of lands or other property, real or personal, heritable or moveable, or of any right or interest therein, any deed or instrument of, not otherwise charged, nor expressly exempted from all stamp duty	1	15	0
If containing 2160 words, for every 1080 words after the first 1080	1	5	0
Release upon the sale of any property. See CONVEYANCE.			
REVOCATION of any use or trust, of or concerning any estate or property, real or personal, where made by any writing not being a deed or will	1	15	0
If containing 2160 words, for every 1080 words after the first 1080	1	5	0
SCHEDULE, Inventory, or Catalogue of any lands, hereditaments, or heritable subjects, or of any furniture, fixtures, or other goods or effects; or containing the terms and conditions of any proposed sale, lease, tack, &c., or the conditions and regulations for the cultivation or management of any farm, lands, or other property leased or agreed to be leased; or containing any other matter of contract or stipulation, which shall be referred to in, or by, and be intended to be used in evidence as part of or as material to any Agreement, Lease, Bond, Deed, &c., yet separate and distinct therefrom	1	5	0
If containing 2160 words, for every 1080 words after the first 1080	1	0	0
SETTLEMENT.—Any deed or instrument, whether voluntary or gratuitous, or upon any good or valuable consideration other than a <i>bonâ fide</i> pecuniary consideration, whereby any definite and certain principal sum or sums of money, or share or shares in the public stocks or funds, are settled upon any person, either in possession or reversion, absolutely or conditionally, or in any other manner:—If such sums, or the value of such shares in all or any of the said stocks or funds, or both, do not amount to 1000 <i>l</i> .	1	15	0
Under £2000 £2 0 Under £5000 £5 0 Under £12,000 ... 12 0 0			
3000 3 0 7000 7 0 15,000 ... 15 0 0			
4000 4 0 9000 9 0 20,000 ... 20 0 0			
Amounting to £20,000 or upwards		25	0 0
If containing 2160 words, for every 1080 words after the first 1080	1	5	0
And for any duplicate of any such instrument, the same duty or duties.			
EXEMPTIONS. —Bonds, Mortgages, and other securities operating as Settlements, if chargeable with the <i>ad valorem</i> duties on Bonds and Mortgages.—Deeds of Appointment or Apportionment in execution of powers given by any previous Settlement, Deed, or Will, to or in favour of persons specially named as the objects of such powers.—Deeds or instruments merely declaring the trusts of any money or stock pursuant to any previous Settlement, Deed, or Will, or for securing any gifts or dispositions made by any previous Settlement, Deed, or Will.—Wills, Testaments, and Testamentary Instruments, and Dispositions <i>mortis causâ</i> of every description.			
SPECIFICATION, to be enrolled or recorded, of any Discovery or Invention for which a Patent is obtained	5	0	0
If containing 2160 words, for every 1080 words after the first 1080	1	0	0
SURRENDER upon the sale of lands or other property. See CONVEYANCE.			
Surrender of copyhold lands or tenements. See COPYHOLD and MORTGAGE.			
Surrender (not otherwise charged nor expressly exempted) of any term or terms of years, or of any freehold or uncertain interest in any lands, hereditaments, or heritable subjects, not being of copyhold or customary tenure.	1	15	0
If containing 2160 words, for every 1080 words after the first 1080	1	5	0

	£.	s.	d.
TESTIMONIAL or Certificate of the admission of any person to the degree of a Bachelor of Arts, in either of the Universities in England	3	0	0
Of any person to any other degree in either of the said Universities	10	0	0
TRANSFER of any share in the stock and funds of the Bank of England, or of the South-Sea Company, whether upon a sale or otherwise	0	7	6
Transfer of any share in the stock and funds of the East India Company, whether upon sale or otherwise	1	10	0
Transfer of any share in the stock and funds of any other corporation, company, or society whatsoever, not otherwise charged under the head of Mortgage, or of Conveyance upon the sale of property.	1	10	0
Transfer upon the sale of any other property. See CONVEYANCE.			
EXEMPTIONS.—Transfer of Shares in any of the Government or Parliamentary Stocks or Funds are exempt from stamp duty.			
WARRANT of ATTORNEY (with or without a Release of Errors), to enter up a judgment for the payment of money or transfer of stock; where such payment or transfer is not already secured by a Bond, Mortgage, or other Instrument charged with the <i>ad valorem</i> duty,—the same as on a Bond.			
Where such payment or transfer is already secured by a Bond, Mortgage, or other security which has paid the <i>ad valorem</i> duty; or where the same is given for securing any sum for which the person is in custody under an arrest, or for any other purpose not otherwise charged	1	0	0
Warrant or Order beneficial, under the sign manual of her majesty, except where the same is for the service of the navy, army, or ordnance	1	10	0
Where the same is for the service of the navy, army, or ordnance	0	12	6
Where several persons are separately and distinctly (and not jointly) benefited by one Warrant, the proper duty is charged in respect of each person.			
Writ of Covenant for levying a fine	2	0	0
Writ of Entry for suffering a common recovery	2	0	0
Writ of Error	1	0	0

GENERAL EXEMPTIONS FROM STAMP DUTIES.

All Bonds, Contracts, Mortgages, Conveyances, Deeds, &c. exempted by the 17 Geo. III. c. 53, or other acts for promoting the residence of the clergy.

All Affidavits, Contracts, Mortgages, Conveyances, &c., exempted from stamp duty by the 42 Geo. III. c. 116, or other acts for the redemption and sale of the Land Tax.

All Transfers of Shares in the Government or Parliamentary Stocks or Funds.

All Grants, Leases, Conveyances, &c. exempted from stamp duty by any acts relating to the Land Revenues of the Crown.

All Bonds, Contracts, and Assignments relating to the transportation of Convicts.

Bill of Sale, Conveyance, Assignment, or other instrument, for the sale, transfer, or other disposition, either absolutely or by way of mortgage, of a ship or vessel, or any part, interest, share, or property of or in any ship or vessel. 6 Geo. IV. c. 41.

Advertisements, Agreements, Awards, and Powers of Attorney under the Tithe Commutation Act, 6 & 7 Wm. IV. c. 71.

Powers of Attorney for Transfer of Stock, Receipts, Bonds, or other securities, Drafts or Orders, Assurances, Appointments of Agents, Certificates of Revocation thereof, and other instruments required under the Friendly Societies Act, 10 Geo. IV. c. 56.

Powers of Attorney under the Savings Banks Act, 9 Geo. IV. c. 92.

The duties on Proceedings in Courts of Law, Equity, and Bankruptcy, contained in the Second Part of the Schedule to the 55 Geo. III. c. 184, were repealed by the 5 Geo. IV. c. 41, from the 10th October, 1824.

What Instruments require Stamps.—Acts of parliament imposing stamp duties are so construed as not to make any instrument liable to them, unless manifestly within the intent of the legislature, being liberally construed in favour of exemption. Thus, a memorandum, “Mr. T. has left in my hands £200,” was held to be neither an agreement to repay, nor a receipt, but like an I O U, and not requiring a stamp to render it admissible in evidence in an action to recover the money.¹ So a document in the following form—“I have this day received a bill of exchange, which I hold as your attorney, to recover the value from the parties, or to make such other arrangements for your benefit as may appear to me in my professional capacity reasonable and proper,” was held to be a mere acknowledgment of the duty which the party took upon himself to perform, and therefore ad

¹ Tomkins v. Ashby, 6 B. & C. 541.

missible in evidence without a stamp.¹ So a paper, stating that the party signing it had received certain bills in his hands which he had to get discounted, or to return on demand, was held not to require an agreement stamp.² So a note sent by a broker to his principal, of a purchase he had made, was admitted as evidence, without being stamped as a minute or memorandum of an agreement, though the subject of the purchase was above 20*l.* value, and it did not come within the terms of any exemption from the stamp duty.³ So, in an action for work and labour, a proposal on the part of the defendant which was not finally acceded to, but containing an estimate of the amount of the work, was allowed to be read in evidence for the defendant, although not stamped.⁴

But if an acknowledgment be expressed in such a form as to bear the purport also of an instrument requiring a stamp, it will not then be admitted in evidence even as an acknowledgment. Thus, the 9 Geo. IV. c. 14, in requiring that an acknowledgment or promise, in order to take a debt out of the Statute of Limitations, must be in writing, expressly exempts the same from any stamp duty. Yet, in the case *Singleton v. Ballot*, a book containing a written entry signed by the defendant was adduced to prove the defendant's admission of a debt due, but, being in the terms of a promise to pay, it was rejected for want of a stamp.⁵ So a cognovit, which merely gives the defendant time, need not be stamped.⁶ But if it contain any terms of agreement, as to take the debt by instalments, it must have an agreement stamp.⁷ So a mere attornment need not be stamped; yet if any engagement to pay the rent be added, it requires an agreement stamp.⁸ The notice of a dissolution of partnership, inserted in the *London Gazette*, may be read in evidence without a stamp.⁹ But in *May v. Smith*, where the form of dissolution was, that "J. S. & M. M. had agreed to dissolve the partnership," &c., it was not allowed to be read in evidence, as being an agreement which required a stamp.¹⁰ So where a written paper was delivered by an auctioneer to the bidder to whom lands were let by auction, containing the description of the lands, the terms for which they were let to the bidder, and the rent payable, but it was *not signed* by the auctioneer or any of the parties; this was held not to be such a minute of the agreement as required to be stamped, nor such a writing as would exclude parol evidence.¹¹ But in another case, where a paper *signed* by the auctioneer was delivered to the bidder to whom lands were let by auction, containing the description of the lands, the terms for which they were to be let, and the rent payable, it was held that it should be stamped, though it was evidence only of part of the contract.¹²

¹ *Langdon v. Wilson*, 2 Man. & Ry. 10; 7 B. & C. 640. But see *Cott v. Howard*, 3 Starkie, 3.

² *Mullet v. Hutchinson*, 7 B. & C. 639; 1 M. & R. 522.

³ *Joseph v. Pebrer*, 1 C. & P. 341.

⁴ *Penniford v. Hamilton*, 2 Stark. 475.

⁵ *Tyrr*, 409.

⁶ *Per Abbott C. J.*, *Jay v. Warren*, 1 C. & P. 532.

⁷ *Reardon v. Swaby*, 4 East. 188. *Ames v. Hill*, 2 B. & P. 150.

⁸ *Cornish v. Searell*, 8 Barn. & Cres. 471; 1 Man. & Ry. 703.

⁹ *Jenkins and another v. Blizard and another*, 1 Stark. 448.

¹⁰ *May v. Smith*, 1 Esp. 283.

¹¹ *Ramsbottom and another v. Tunbridge*, 2 M. & S. 434.

¹² *Ramsbottom v. Mortley*, 2 M. & S. 445.

Neither do the stamp laws in general require that a contract shall be in writing when it is not by any other law (as by the Statute of Frauds) made a requisite towards its validity; they only impose the necessity for a stamp when the parties themselves think fit to have *written* evidence of the contract. But when a contract is in writing, there are many acts which require that the true state of the transaction should be stated, in order that the proper stamp may be placed on it; and if this is not duly observed, the instrument is often declared to be absolutely void. Where premises were held under a written agreement unstamped, the landlord was not allowed to prove the demise by parol evidence.¹ And where an agreement on unstamped paper had been destroyed, parol evidence was not allowed to be given of its contents, even though it had been destroyed by the wrongful act of the party who took the objection.²

With regard to *appraisements*, the 46 Geo. III. c. 43, § 8, expressly provides that they shall be in writing.

Almost all instruments made in England, though to take effect abroad, must be stamped, or they cannot be enforced here. But, in general, instruments made abroad do not require stamps, unless in the British plantations or settlements, where they are requisite if by the law of such places a stamp is necessary. Thus, articles of a foreign ship, made abroad or on the high seas, regulating wages of sailors, &c.; or foreign bills, as a bill drawn at Antwerp, and filled up and accepted here; or a bond for foreign stock, signed at Paris but issued in England, do not require English stamps. An agreement, however, made in a foreign country cannot be received in evidence here, if it appear that by the laws of that country the instrument would not be available there for want of a stamp; but until the law of such country is distinctly proved, it will be presumed that no stamp is necessary.

Where a bill of exchange was drawn in Jamaica upon a stamp of that island, with a blank for the payee's name, and transmitted to England, where a *bonâ fide* holder filled in his own name as payee, it was considered that an English stamp was not necessary.³ But if a bill be drawn in England, though dated in some foreign place, such bill cannot be enforced here without an English stamp.⁴

Of the Description of Stamps on particular Instruments. — The stamps for different instruments vary in form; and as the courts considered it necessary, where the distinction could be ascertained, that it should be observed, there was formerly sometimes great difficulty in determining what was the proper stamp. But now, to remedy this difficulty, it is provided by the 55 Geo. III., that all instruments for or upon which any stamp shall have been used of an improper denomination or rate of duty, but of *equal* or *greater* value in the whole than the stamp or stamps which ought regularly to have been used thereon, the same shall be deemed valid and effectual in law, "*except in cases where the stamp used on such instrument shall have been specially appropriated to any other instrument, by having its name on the face thereof*," as is the case with respect to bill and receipt stamps.

¹ Brewer v. Palmer, 3 Esp. 213.

² Rippiner v. Wright, 2 B. & A. 478.

³ Crutchley v. Mann, 1 Marsh, 29.

⁴ Jordaine v. Lashbrooke, 7 T. R. 601.

Every instrument should be stamped according to its legal operation. Thus, an instrument purporting to be a conveyance of land, but which not being under seal could not operate as such, was held to operate as an agreement, and therefore required an agreement stamp.¹ So a bill of exchange expressing the terms of an agreement between a landlord and an incoming tenant, was held not admissible to prove such terms without an agreement stamp.²

When several Stamps are requisite.—In general, distinct contracts require distinct stamps; and if several things requiring distinct stamps (as several demises to several tenants) are written on the same paper with only one stamp, the contract is void, and cannot be made good by annexing distinct stamps on separate papers. So, if the terms of an agreement which is stamped and executed be altered, and the alteration be indorsed on the same paper, a new stamp is necessary. But if a contract is signed by one party, and previously to the accession of the other a new stipulation is inserted, the agreement is single and entire, and requires but one stamp.³

But many cases go to show that several subjects of contract may be included in one instrument, impressed with one stamp, if the whole be manifestly *one* transaction, and no fraud is intended. Thus, a lease containing two demises at distinct rents was held to be sufficient if stamped according to the aggregate amount of rent. As, in *Boase v. Jackson*,⁴ where the plaintiff demised a slate-pit at S., and stone-quarries at M., under an indenture of lease, to hold the one from Lady-day 1815, and the other from Michaelmas 1817, for the several terms of fourteen years from the respective dates thereof, at the yearly rent of 70*l.* for the slate-pit, and 130*l.* for the quarries; it was held, that all the premises might be demised by one indenture of lease, and that one *ad valorem* stamp on the aggregate amount was sufficient, as the letting must be considered as one transaction, there being no evidence of an intent by the parties to defraud the revenue. So where a bond for the performance of covenants or agreements (other than for the payment or transfer of any sum or annuity, or share in the stocks or funds) is contained in the same deed with other matter, it is only once chargeable; and the deed indorsed on a former deed as a further security for advances under the first deed, is exempted under the 48 Geo. III. c. 149 from an *ad valorem* duty, provided the first deed is properly stamped according to the value. But where a bond and mortgage are executed on the same day, for securing the same sum of money, but bearing different dates, an *ad valorem* duty on each is requisite.⁵ So several letters may be offered in evidence to prove an agreement between parties who shall have written them, if one of them be stamped with a duty of 1*l.* 15*s.*, they being considered as one transaction.

Where there are several parties to an instrument, whose interests relate to the same thing, a single stamp is sufficient. As, where several persons enter into an agreement to refer a cause to arbitration, such agreement and the award require each but one stamp. So in the case of an agreement relative to prize shares, though several as to each, one stamp only is required.

¹ *Rex v. Ridgwell*, 6 B. & C. 665.

² *Nicholson v. Smith*, 3 Starkie, 130.

³ *Knight v. Crockford*, 1 Esp. 189.

⁴ 6 Moore, 3 B. & B. 185.

⁵ *Wood v. Merton*, 4 M. & R. 673.

If a paper be produced with a single stamp, and it appear to have contained originally two distinct agreements, one of which is erased, the stamp is *prima facie* sufficient, and it lies upon the opposite party to show that both agreements were on the paper at the time the stamp was affixed.¹ If two persons, by agreement in writing, lay a wager, and then, by another agreement indorsed on the first, agree that the bet shall be doubled, it requires two stamps.² But if there be one stamp only, the instrument is evidence of the first wager.³

Time and Manner of Stamping.—Deeds, agreements, and writings in general may be stamped at any time after execution, on payment of 5*l.* penalty (37 Geo. III. c. 136); and if within twelve months, the commissioners may remit the penalty, on sufficient reasons being stated to them by affidavit. But if a deed has been stamped and executed, and is found to require a further progressive duty, the penalty on such further stamp is 10*l.*⁴ Where the stamp is affixed after execution, the solicitor to the commissioners must first authenticate it. Agreements (formerly liable to a 20*s.* stamp, but now by 7 & 8 Vic. c. 21, to a duty of 2*s.* 6*d.*) may be stamped within fourteen days after they have been made or entered into; but after that time, only upon payment of a penalty of 10*l.* besides the duty. Soldiers' and sailors' powers may be stamped within three months without a penalty. Receipts may be stamped within fourteen days after execution, on payment of the duty and 5*l.* penalty; and within one calendar month on payment of the duty and 10*l.* But the stamp on bills and promissory notes must be affixed before writing the document. So also bills of lading, charterparties,⁵ policies of insurance, powers of attorney for the appointment of proxies to vote at meetings of railway or other companies,⁶ cannot be stamped after execution.

Consequences of Instruments not being duly Stamped.—In general, the stamp acts do not render instruments *void* which are not properly stamped, but merely subject the parties to penalties, to enforce the duties, and prohibit the instruments being used as evidence unless stamped; neither can parol evidence be given, so as to get over the difficulty. In the case of a bill or promissory note, the original debt may in general be recovered. But a note given for an apprentice fee cannot be enforced, if the indentures are void for want of a stamp, even though the master has supported the apprentice for a time.

¹ Waddington v. Francis, 5 Esp. 182.

² Robson v. Hall, Peake's N.P.C. 127.

³ Id. ib. Reed v. Deere, 7 B & C. 264.

⁴ In case of accumulated penalties, one penalty of 10*l.* may be taken.—37 Geo. III. c. 136, § 2.

⁵ 5 & 6 Vic. c. 79, § 21. Any person making or signing a bill of lading not duly stamped incurs a forfeiture of 50*l.* And the Commissioners of Stamps are prohibited from stamping any bill of lading, or any charterparty, or any agreement, contract, memorandum, letter, or other writing chargeable as a charterparty, after the same shall have been executed or signed by any party; except that if a charterparty, or an instrument chargeable as a charterparty, be brought to the Head Office within fourteen days after it shall bear date, and shall have

been executed or signed by the party thereto who shall have first executed or signed the same, it shall be lawful for the commissioners to stamp the same upon payment of the duty, without any penalty; or if brought after that time and within one calendar month, upon payment of the duty and a further sum of 10*l.* by way of penalty.

⁶ 7 & 8 Vic. c. 21, § 7. The Commissioners of Stamps are prohibited from stamping any such power of attorney, appointing on nominating a proxy, after the same shall have been signed by any person. And any person making or signing any such power or unstamped paper, and any person voting or attempting to vote as a proxy in pursuance thereof, are liable to a penalty of 50*l.*; and every vote so given is void.

Where the original debt is resorted to, if in attempting to give parol evidence of it, it turn out that there has been a written contract not duly stamped, the plaintiff will be nonsuited.

Any unstamped document may, however, be sometimes used as evidence of collateral facts.

Spoiled stamps are in general allowed for at the Stamp Office, and others, or their value in money, given in lieu thereof.

The days for the allowance of spoiled stamps at the Head Stamp-office are Tuesdays, Thursdays, and Saturdays, from 12 to 2 o'clock. If parties reside within ten miles of London, application must be made within six calendar months from the time the stamps became spoiled, when not upon executed instruments; and when upon such instruments, within six months from their date. If parties reside beyond the said limit of ten miles, the application must also be made within six months from the date, when the stamps are upon executed instruments; but in all other cases within twelve months from the date of the stamps becoming spoiled. The affidavit in support of the application, when not made before a commissioner at Somerset-house, must be upon a stamp of 2s. 6d., and made before a master extraordinary in chancery. The deeds executed in lieu of the spoiled ones should be produced.¹

Bill stamps signed by the drawer are not allowed for, unless upon oath that they have not been presented for acceptance.

Sale of Stamps.—To prevent the extensive forgeries of stamps that formerly took place, the 3 & 4 Wm. IV. c. 97 provides, that the commissioners may grant a licence, free of expence, to any person to sell stamps, on such person entering into a bond (exempt from duty) in 100l. penalty not to sell stamps other than those received from the head offices at Westminster or Edinburgh, or from some duly appointed distributor. Such licence to be revocable at the pleasure of the commissioners. One licence and one bond are sufficient for any number of partners. The licence to contain the christian and surname and place of abode of the person to whom it is granted, and a description of his house or shop; but not to authorize the party to deal in stamps at any other places than such as are specified therein.

And no person (other than a distributor or sub-distributor) can deal in stamps in any part of Great Britain without such licence, under 20l. penalty for every offence, and double the penalty if the stamps are forged, together with all other legal consequences of selling, uttering, or having in possession false, forged, or counterfeit stamps. But any person employed to prepare, write, or engross any instrument liable to stamp duty may charge his employer with the amount of the stamps thereon, without having a licence to vend stamps.

Licensed venders must have their names at full length painted in Roman capital letters (one inch at least in height, and of a proportionate breadth) in front of their shop, together with the words *Licensed to Sell Stamps*, under a penalty of 10l. But, in the case of several persons in copartnership, it is sufficient if the name of one of them is so painted. Unlicensed persons affixing such notice forfeit 10l. a day.

¹ By a recent arrangement, spoiled stamps can be recovered on application to the distributors of stamps at Liverpool, Manchester, Chester, Hull, Birmingham, Nottingham, York, Leicester, Newcastle-on-Tyne, Bristol, and Norwich, who are empowered to administer affidavits on unstamped paper, free of expence.

Premises of licensed dealers may be searched for counterfeit stamps by any officer of the stamp duties, under warrant of the commissioners.

Any person *hawking* stamps (whether licensed to deal in stamps or not) at any place other than the house or shop in which he resides or *bonâ fide* carries on trade or business, forfeits 20*l.* above any penalty to which he is liable for dealing in stamps without a licence; and any person, without any other warrant than this act, may apprehend any person so hawking, and take him before a justice of the peace having jurisdiction where the offence is committed; and if he shall not immediately pay the penalty, the justices shall commit him to prison for not less than one or more than three calendar months, unless the penalty be sooner paid; and all stamps found in his possession are forfeited, and are to be delivered over to the commissioners.

The allowance on the purchase of stamps at the Head Office is 30*s.* per cent to persons purchasing to the amount of 30*l.* at one time; but no discount is allowed in respect of stamps impressed upon paper which has been previously written upon. On receipt stamps the allowance is 7*l.* 10*s.* per cent on taking to the amount of 5*l.* at one time at the Head Office, or of one pound at a time of any distributor or sub-distributor at a distance of ten miles from the Head Office; and no charge is made by the commissioners for the paper upon which receipt stamps are printed. Persons desirous of having their own paper or parchment stamped with receipt stamps, on which any special form is printed, may have the same allowance made on taking it to the Head Office to be stamped in quantities not less than 5*l.* at a time. No person selling receipt stamps is to charge for the paper on which the same are printed, or under any pretence to charge more than the amount of the stamp duty, under penalty of 10*l.* But this is not to prevent any person from making a charge for any bound book of receipts, or for any folio sheet of paper containing not more than one stamp, or for any skin or piece of vellum or parchment whereon such stamp is impressed. 9 Geo. IV. c. 27.

The execution of the stamp laws is in general entrusted to justices of the peace, who have power to hear and determine all cases arising out of them, and generally to mitigate the penalties to a certain degree; but the party convicted may appeal to the next sessions. Forgery of stamps is felony, and was formerly punishable with death; but by the 2 Wm. IV. c. 66. and the 2 & 3 Wm. IV. c. 123, the punishment is commuted to transportation for life. Persons knowingly having forged dies or stamps in their possession, or fraudulently affixing stamps cut or torn from parchment or paper, or erasing names, dates, sums, or other matter, with intent to use the same again, are guilty of felony, and liable to transportation for seven years or for life, or to be imprisoned for two years or not exceeding four.¹ And the houses of persons suspected of being concerned in the forging of dies or stamps, or other felonious acts, may be searched by a warrant of a justice of peace.² Other frauds against this department of the revenue are punishable on conviction by indictment or information, at the discretion of the court where the party is tried.³

¹ 3 & 4 Wm. IV. c. 97, § 12.

² Id. § 13.

³ See generally Chitty's Stamp Acts.

STAGE CARRIAGES.

THE duties on stage carriages are under the management of the Commissioners of Stamps, and are deemed stamp duties. By the 2 & 3 Wm. IV. c. 120, as amended by 5 & 6 Vic. c. 79, the following duties are imposed and regulations enacted:—

<i>Duties on Stage Carriages.</i> —(5 & 6 Vic. c. 79.)		£.	s.	d.
For every <i>Original</i> Licence taken out yearly by the person who shall keep, use, or employ any Stage Carriage in Great Britain, that is to say,—	For every such Stage Carriage	3	3	0
And for every <i>Supplementary</i> Licence for the same carriage, taken out in any of the cases provided for during the period for which such Original Licence is granted		0	5	0
And for every Mile which such Stage Carriage is licensed to travel		0	0	1½

Duty in respect of Passengers conveyed by Carriages upon RAILWAYS.

For and in respect of all passengers conveyed for hire upon or along any Railway, a duty at and after the rate of 5*l.* for 100*l.* upon all sums received or charged for the hire, fare, or conveyance of all such passengers.

Every carriage used for conveying passengers for hire to or from any place in Great Britain, and which travels at the rate of *four*¹ miles or more in the hour, is, without regard to the form or construction thereof, to be deemed a *stage carriage*, provided the passengers or any of them are charged separate fares.

Commissioners of stamps, or their officers in the country, may grant licences, renewable annually, to any person of the age of 21; and with every licence a pair of plates is delivered. Persons in arrear for duties or penalties are not entitled to a fresh licence until payment of arrears.

A person applying for a licence must sign a requisition, in a form provided by the commissioners, containing the names and places of abode of the applicant and all the proprietors. Omitting the name of a proprietor in such requisition subjects the party to a penalty of 10*l.* and inserting a false name &c. is a misdemeanor.

The licence specifies the name and place of abode of every proprietor, the number on the plates, the extreme places from and to which the carriage is authorized to go, the route, the distance between such places, the number of journeys, and the total number of miles upon which the duty is assessed (either separately or in conjunction with other licensed carriages) within the day, week, or month, as the commissioners think fit, the days of the week on which it is to be used, and the greatest number of outside and of inside passengers.

Licences are in force till the first Monday in October following their date. But persons desirous of discontinuing may give notice to the commissioners &c., and, on giving up the licence and plates, will be no longer chargeable with duty. Plates must also be delivered up on the expiration of the licence, or the duties continue payable.

If any alteration takes place in the proprietorship of the carriage, in the number of its journeys, or the days of performing the same, or in the route, a supplementary licence must be obtained.

The duties may be compounded for by the day, week, or month; and in such case the amount is specified in the licence.

¹ 6 & 7 Wm. IV. c. 65. It was *three* miles under the 3 & 4 Wm. IV. c. 140.

Commissioners may make an allowance of duties for journeys not performed; but the penalty for rendering a false account is 50*l*.

Persons keeping stage carriages without a licence are liable to the duties over and above the penalty. A separate licence is required for every pair of plates. Persons using stage carriages contrary to their licences, or with improper plates, are deemed to use them without a licence. But the representatives of persons licensed may use stage carriages for thirty days without further licence. New plates are delivered in lieu of defaced or lost plates, upon payment of 10*s*. for each pair.

The penalty on plying for hire with carriages not having plates thereon, is 20*l*. if the owner, and 10*l*. if a driver merely. Offenders may be conveyed before a justice of the peace, and the carriages taken to the green-yard or other place for safe custody, as with hackney coaches.

On each side of every stage carriage must be painted, in letters at least one inch in length, the name of a proprietor and the places from and to which it is licensed to travel, under a penalty of 5*l*. And, by 5 & 6 Vict. c. 79, there must also be painted, in words at length, and in letters at least one inch in height, on the outside at the back, and also in the inside, and if constructed to carry passengers in different compartments, then in each such compartment, the number of passengers it is constructed to carry in the whole, and on the outside and in the inside thereof respectively, and in each such compartment, under a penalty of 10*l*. on the proprietor for the omission, or for stating a greater number than the carriage is constructed to carry, according to the regulations of the act; which require, that for every passenger there shall be allowed on an average a space convenient for sitting of 16 inches, measuring in a straight line lengthwise on the front of each seat. And for carrying a greater number, the driver and conductor or guard are liable to a penalty of 5*l*. Children in the lap under five years of age are not reckoned. Any constable or other peace officer at any time, and any person travelling or having immediately before travelled by a stage carriage, may measure the seats, in order to ascertain the number of passengers the carriage is constructed to carry; and any person obstructing is liable to a penalty of 5*l*.

No stage carriage the top or roof of which is more than 8 feet 6 inches from the ground, or the bearing of which on the ground is less than 4 feet 6 inches from the centre of the track of the right or off wheel to the centre of the track of the left or near wheel, is allowed to carry more than the number of *outside* passengers hereinafter mentioned, *viz.* not more than *five* outside passengers, where it is constructed to carry not exceeding nine passengers in the whole; not more than *eight* outside, when constructed to carry in the whole exceeding nine and not exceeding twelve passengers; not more than *eleven* outside, when constructed to carry in the whole exceeding twelve and not exceeding fifteen passengers; not more than *twelve* outside, when constructed to carry in the whole exceeding fifteen and not exceeding eighteen passengers; and not more than *two* additional outside for every three additional passengers which it is constructed to carry in the whole. And if any greater number of outside passengers be carried than is here allowed, the driver and the conductor or guard thereof shall respectively forfeit the sum of 5*l*.

The enactments respecting the inscriptions, outside passengers, and luggage, do not extend to mail coaches carrying not more than four outside passengers.

The driver of any stage carriage drawn by three or more horses quitting the box or horses without delivering the reins into the hands of some fit person, or before some person is placed at the horses' heads; or such person leaving the horses before the driver has returned; or the driver of any stage carriage permitting any other person to drive, or quitting the box without occasion, or concealing or misplacing plates; or the guard discharging fire-arms unnecessarily; or the driver or guard neglecting to take care of luggage, asking more than the proper fare, refusing to account to their employer, or assaulting or using abusive language to any person, or endangering passengers or property through negligence, intoxication, or wanton or furious driving, are liable respectively to a penalty of 5*l.* for every such offence.

METROPOLITAN STAGE CARRIAGES.—Under this designation, certain provisions were made by 1 & 2 Vic. c. 79, which have been since replaced by 6 & 7 Vic. c. 86, for the regulation of the London omnibuses and short stages near town.

Metropolitan stage carriage, as defined by the last-mentioned act, includes every stage carriage except such as shall on every journey go to or come from some place every part of which is beyond the distance of ten miles from the General Post Office. The proprietor of every such carriage is required to keep distinctly painted, both on the outside and inside of the same, in such a manner and in such a position as shall from time to time be directed by the registrar, the words "*Metropolitan Stage Carriage*," or such other words as the registrar shall direct, together with the number of the Stamp-office plate relating to such carriage; and shall also, on the inside of every such carriage, keep distinctly painted in a conspicuous manner a table of fares to be demanded of passengers; and the fares therein specified shall be deemed to be the only lawful fares, and may be recovered by the driver or conductor, as in the case of hackney carriages, in a summary way before any justice of the peace. And every proprietor making default in the premises shall forfeit 20*s.* for every offence.

A variety of provisions are then made for the regulation of the drivers and conductors of these vehicles, who are required to take out a licence annually, which costs 5*s.*, and to wear metal tickets or badges; but as these provisions apply also to the drivers of hackney carriages, we shall refer to them more particularly under that head. See *post*, 145.

HACKNEY CARRIAGES.

The regulations as to hackney carriages in and near London were consolidated by the 1 & 2 Wm. IV. c. 22, all former acts being repealed. The collection of the duties is placed under the management of the Commissioners of Stamps, and the same are declared to be stamp duties.

A *hackney carriage* within the meaning of this act is defined to include every carriage with two or more wheels used for the purpose

of standing or plying for hire in any public street or road at any place within the distance of *five miles* from the General Post Office, whatever be the form or construction, or the number of persons it may be calculated to convey, or the number of horses by which it shall be drawn; but not to extend to any stage coach used for the purpose of standing or plying for passengers to be carried for hire at separate fares, and duly licensed for that purpose, and having thereon the proper numbered plates required by law.

No hackney carriage is to be used without a licence from the Commissioners of Stamps, and a plate with a number corresponding with the licence received from the Stamp Office affixed thereon, under 10*l.* penalty on the driver if he is also the owner, and 5*l.* if not the owner; who may be carried before a magistrate by a peace officer, and the carriage and horses driven to any livery stable &c. for custody. If the party be the owner, they may be detained and held liable for all expences and penalties; and if such are not paid within five days, may be sold to defray the same. If he be the driver merely, he is, in default of payment of the fine &c., liable to three months imprisonment; and if the expences be not then paid, the carriage &c. may in like manner be sold to pay them. Similar rules apply to leaving coaches in the street unattended; but in such cases the penalty is 20*s.* A penalty of 5*l.* attaches for preventing any person by any means from seeing the number.

The commissioners may refuse licences to those whose former licence they have revoked, or who are in arrear for duties, or are under twenty-one years of age, or have been convicted of felony or of knowingly receiving stolen property. Licences may be granted without limitation as to number.

In the requisition for a licence, the party must state the names of all the proprietors and their residences, under 10*l.* penalty; and in case of a change of abode, notice is to be given within seven days, under 2*l.* penalty. The price of the licence is 5*l.*; and the duty 10*s.* per week, to be paid in advance on the first Monday of every month. Upon discontinuing to use any carriage, the proprietor is to give notice in writing to the commissioners, and at the time appointed must give up the plates, under 10*l.* penalty. The carriage, horses, and harness are liable to be seized for arrears of duties, whether in the party's hands or in those of others.

Drivers may be compelled to go any distance not exceeding five miles from the General Post Office or from the place where they are hired, under 2*l.* penalty; and hackney coaches standing in the street, though not on the stand, may be compelled to take a fare. If they are summoned for refusing, and they prove that they were actually engaged at the time by another fare, and rejected the first with civility, they are to receive compensation for loss of time. Drivers may ply on Sundays; and if they do, must take whatever fares may offer, as at other times.

The fares for hackney coaches drawn by two horses are, 1*s.* for the first mile or under, and 6*d.* for every other half mile or under. By time, they are 1*s.* for the first half hour or under, and 6*d.* for every other quarter of an hour or under. Cab fares are two thirds of the above.

The price of the fare may be reckoned, at the option of the driver,

either by the *time* or *distance*. The driver can under no circumstances demand *more* than the legal fare, but an agreement to take *less* is binding on him. If desired to wait at any place, the driver cannot refuse, but may demand a reasonable deposit; and he is bound to wait no longer than the time for which the deposit is equivalent.

As to *back fares*, if a coach be discharged at any place beyond the limits of the metropolis (a circle of three miles radius from the General Post Office) after eight in the evening and before five in the morning, the full fare to the nearest point of the limits, or to any stand beyond the limits where the coach was hired, at the option of the fare, is to be paid in addition to the regular fare. If discharged at any other time of the day, half back fare is to be paid, if the distance is four miles or more beyond the limits. Persons refusing to pay the fare, or doing any damage to the coach, are liable to a month's imprisonment with hard labour.

Property found in coaches is to be taken within four days to the Stamp Office; and if claimed, the expences are to be paid, and the coachman rewarded. If not claimed within a year, it is given up to the coachman, on application within a month, or sold.

Check strings are to be provided and held by the driver, under 20s. penalty; and the same penalty attaches if the driver takes up any other person against the consent of the fare. No two coaches are to stand by the side of each other (except in Palace-Yard), or across the street, or within eight feet of the curb stone, under 20s. penalty; and, under the like penalty, ten clear feet are to be left after every fourth coach on a stand. Improper conduct or even rudeness in the driver subjects him to 5l. penalty, or two months imprisonment; and it endangers the proprietor's licence, if he is to blame.

DRIVERS, CONDUCTORS, AND WATERMEN. — By 1 & 2 Vic. c. 79, since replaced by 6 & 7 Vic. c. 86, further regulations have been made for the regulation of hackney carriages and metropolitan stage carriages, and especially for licensing the drivers and conductors thereof, and the watermen employed at the coach-standings.

For the purpose of granting such licences, a public officer, styled "The Registrar of Metropolitan Public Carriages," is provided. On each licence is imposed a stamp duty of 5s.; and with the licence is delivered a metal ticket, to be worn by the person licensed at all times during his employment, and whenever he is required to appear before a justice of peace, on pain of forfeiting 40s.

No person shall act as the driver of a hackney carriage within the limits of this act,¹ or as the driver or the conductor of a metropolitan stage carriage,¹ or as a waterman, without having a licence for such purposes respectively. And every person acting as such driver, conductor, or waterman, without a licence, and every licensed waterman acting at any other standing or place than those mentioned in his licence, and any person lending his licence or ticket, shall for every such offence forfeit the sum of 5l.; and if any proprietor employ any

¹ The limits of the act include the city of London and the liberties thereof, and the Metropolitan Police District; and the term *metropolitan stage carriage* in this act in-

cludes every stage carriage except such as shall on every journey go to or come from some place beyond the said limits.

unlicensed person, he shall forfeit 10*l*. In cases of unavoidable necessity, however, any competent person, though not licensed, may be employed for a time not exceeding twenty-four hours.

Licences continue in force till the 1st of June next after their date, except sooner revoked or suspended; and on their expiration must, with the tickets, be delivered up to the registrar. Using a ticket after the expiration of the licence, or neglecting for three days to deliver it up, or wearing one without having a licence in force, or any thing resembling one, for the purpose of deception, subjects to a forfeiture of 5*l*.; and any peace officer may seize the same.

If a ticket be defaced or lost, a new one may be had on payment of 3*s*. Using a ticket on which the number is obliterated or defaced subjects the party to a forfeiture of 40*s*.

Forging or counterfeiting, or uttering any forged or counterfeited licence or ticket, or knowingly having such in possession, is a misdemeanor, punishable by fine or imprisonment, or by both, in the common gaol or house of correction, and with or without hard labour, as the court shall think fit. Any person may detain any such forged or counterfeited licence or ticket, and any peace officer may seize and take away the same, for the purpose of being produced in evidence against the offender.

The proprietors of hackney carriages or metropolitan stage carriages are to hold the licences of the drivers or conductors, and produce them to any justice of the peace before whom a complaint is made against them, or they are liable to a forfeiture of 3*l*.; and the justice may make an indorsement upon the licence, stating the nature of the offence of which the driver or conductor is adjudged guilty, and the amount of the penalty inflicted.

A justice of the peace may *revoke* or *suspend* the licence of any driver, conductor, or waterman, convicted of any offence under this act or any other law. The licence so suspended or revoked, with the ticket belonging thereto, is to be thereupon delivered up to the justice, to be transmitted to the registrar, who may, at the expiration of the period for which it is suspended, re-deliver it to the person licensed. Any proprietor, driver, conductor, or waterman refusing to deliver up a licence or ticket when required, incurs a forfeiture of 5*l*.

If the driver of any hackney carriage or of any metropolitan stage carriage shall be guilty of any wanton or furious driving, or shall, by negligence, wilful misbehaviour, or other misconduct, cause any hurt or damage to any person or property upon any street or highway, or if any driver, conductor, or waterman shall during his employment be drunk, or make use of any insulting or abusive language, or any insulting gesture, or any misbehaviour, he shall for every such offence forfeit any sum not exceeding 3*l*.; or the justice, instead of inflicting such penalty, may forthwith commit him to prison for not exceeding two calendar months, with or without hard labour. And where any such hurt or damage shall have been caused, the justice may award that the proprietor shall pay such a sum not exceeding 10*l*. as shall appear a reasonable compensation to the person ^{who}aggrieved or injured, which such proprietor shall be entitled to recover from the driver in a summary manner before a justice of the peace.

Every driver of a hackney carriage who shall ply for hire elsewhere than at some standing, or who by loitering or any wilful misbehaviour shall cause any obstruction in any public street, road, or place; and every driver or conductor of a metropolitan stage carriage who by loitering or any wilful misbehaviour shall cause any obstruction in any public street, road, or place, or shall improperly delay such carriage on any journey, or wilfully deceive any person in respect to the route or destination thereof, or who shall refuse to admit and carry at the lawful fare any passenger for whom there is room, and to whose admission no reasonable objection is made, or who shall demand more than the legal fare for any passenger, or who, for the purpose of taking up or setting down a passenger, or, except in case of accident or other unavoidable necessity, shall stop such carriage opposite to the end of any street, or upon any place where foot passengers usually cross the carriage way, or who shall ply for hire or passengers by blowing a horn or using any other noisy instrument within the limits of the metropolis as defined by 1 & 2 Wm. IV. c. 22; and every conductor who shall allow any person besides himself to ride upon the steps, or in the place provided for him; and every driver of a hackney carriage, whether hired or unhired, who shall allow any person besides himself, not being the hirer nor any person employed by such hirer, to ride on the driving-box; and every driver or conductor of a metropolitan stage carriage who shall smoke whilst acting in such capacity, after an objection taken by any person riding in or upon that carriage, shall for every such offence forfeit the sum of 20s.

In cases of complaint against a driver or conductor, which must be made within seven days after the offence committed, any justice of peace may summon the proprietor to produce the driver or conductor, and in default may inflict a fine not exceeding 40s., and so from time to time until he produce such driver or conductor. But the justice, if he think proper, instead of issuing a second summons, may proceed to hear and determine the complaint. And any penalty inflicted upon the driver or conductor shall be paid by the proprietor who has failed to produce him, but it may be recovered back from such driver or conductor in a summary manner before a justice of peace.

On the nonpayment of any penalty together with all costs and expenses, the justice may either adjudge the person convicted to be imprisoned for two months in the common gaol or house of correction, or may issue a warrant for levying the same by distress and sale of his goods; and if sufficient goods be not found, may then imprison him as before mentioned. Proceedings before justices are final, and not removable to a superior court.

Justices may award reasonable compensation for costs and loss of time of himself and witnesses, to any driver, conductor, waterman, or proprietor, summoned before them by any person other than an officer of stamps and taxes, or a police constable, when the complaint is withdrawn or dismissed, or the defendant is acquitted.

Waggon, carts, &c. driven in the public streets within five miles of the Post Office, must have the names and places of abode of the proprietors painted thereon, under 5*l.* penalty.

POST HORSES.

Duties on HORSES LET FOR HIRE, and on LICENCES to let the same.

	£.	s.	d.
For every <i>Licence</i> , to be taken out yearly by every person who shall let any horse for hire	0	7	6
And for every Horse let by the mile, at the rate charged for horses travelling post; that is to say, for every mile	0	0	1½
And for every Horse let to go no greater distance than 8 miles	0	1	9
And for every Horse let to go no greater distance than 8 miles, where he shall not bring back any person, and shall not deviate from the usual line of road	0	1	0
And for every Horse let for hire or used for less than 28 successive days, or in any other manner than as aforesaid;	}	One fifth of the sum charged for every letting for hire.	
And also for every Horse let for hire for 28 successive days or longer, where he is returned in less time than 28 successive days and is not exchanged for another horse			
<i>Or, in lieu of such one fifth part,</i>			
For every day not exceeding 3 days	0	2	6
For every day exceeding 3, and not exceeding 13	0	1	9
For every day exceeding 13 and less than 28	0	1	3

These duties were formerly under the management of the Commissioners of Stamps, but were transferred to the Commissioners of Excise by the 6 & 7 Wm. IV. c. 44. They are payable, by the 2 & 3 Wm. IV. c. 120, upon every horse let for hire, used either as a saddle horse or for drawing any carriage or vehicle conveying any person, or for drawing any mourning-coach or hearse; but not for horses used in drawing licensed stage carriages, hackney carriages in London, or carriages employed for the conveyance of fish.

Horses used for drawing hackney carriages in any city, town, or place except London, in lieu of and as a composition for the duties on horses let to hire, are charged as follows, viz., 5s. per week for the horses used in drawing such hackney carriage if drawn by two horses, and 3s. if drawn by one horse only, provided the proprietors take out a licence for that purpose, and paint their names &c. on the carriages. But horses so used are not exempt from the post-horse duties, unless the carriages are regularly used for plying; and they must not go a greater distance than five miles from the general post office of such city or place, or they become chargeable to the post-horse duty.

Licences to let horses for hire are granted by the Commissioners of Excise, or their collectors or supervisors; and they continue in force from the day of the date until the 31st January ensuing. Persons letting horses for hire without having a proper licence are liable to a penalty of 10*l.* for every horse. No licensed postmaster can let horses at more than one place by virtue of one licence, under a penalty of 20*l.* And the words "Licensed to let Horses for hire" must be painted on a sign or board, under penalty of 5*l.* On the death &c. of a licensed postmaster, his representatives may act under the licence for thirty days.

Carriages kept to be let with horses are to be numbered, and have the name &c. of the postmaster painted thereon, under penalty of 10*l.*

Postmasters and toll-gate keepers are supplied by the commissioners or their officers with proper tickets, to be delivered with the hire of horses on penalty of 10*l.*; and no person need pay for more miles than are expressed in the ticket. The penalty for not filling up the ticket truly is 10*l.* The tickets are to be delivered at the first toll-gate, and check tickets received. Persons not producing tickets pay

1s. 9d. for every horse. Toll-gate keepers, for neglecting to demand tickets, or for other improper conduct relative to such tickets, forfeit 10l.; and the same penalty is imposed on persons neglecting to deliver tickets, or falsely alleging hired horses to be their own.

Horses kept beyond the period for which they are hired are deemed to be retained on a new hiring.

Postmasters receive from the commissioners papers intituled "Excise Office Weekly Accounts;" in which they must insert the day of the month, the month, and year on which every horse is let for hire, and from and to what place it is hired to go, the number of every carriage furnished therewith, the christian and surname of every postilion or driver employed, the sum charged for the hire where the postmaster elects to pay one-fifth thereof for the duty on such letting, the time for which let for hire or used, the number of horses let, and the number of miles the same are hired to go, or such of the particulars aforesaid as are applicable to each letting, and the duty payable for every horse. Whenever the postmaster lets any horses for hire for twenty-eight days or more, he must insert in his weekly account the number of horses so let, the day of the month, the month, and year on which the hiring commences, the number of every carriage furnished therewith, the christian and surname of every driver employed, the time for which the same are hired, and the name and place of abode of the person hiring the same. He must also insert in such account a notice of every horse let for hire by him for twenty-eight days or more and which was returned to him before the expiration of the time for which it was let, the day of the month on which it was so returned, and the duty payable. Penalty for neglect, 20l. Such entries are to be made on the day the horses are let or returned, or on the next day, on penalty of 40s.

Every postmaster residing within five miles of the Head Office must deliver his weekly accounts, and pay the duties there, at the time appointed; and every other, to the collector at the market town nearest to his place of residence, under penalty of 20l. The allowance to postmasters out of money duly accounted for and paid is 3d. in the pound.

Persons letting horses are chargeable with the duty. Postmasters who cannot furnish horses must give tickets for horses furnished by others, and receive the duty.

Neither farmers of the duties, nor collectors, are disqualified from voting at the election of members of parliament.

The consent of the Commissioners of Excise is requisite to sue for penalties under this act. But penalties not exceeding 20l. are recoverable before one justice of the peace; one half to her majesty, and the other to the person suing. Officers of stamp duties are not disqualified from being witnesses.

HAWKERS AND PEDLARS.

HAWKERS are itinerant traders, who go about from place to place, carrying with them and selling wares. **Pedlars** are hawkers of small wares. The expediency of the laws respecting these persons arises from their being less beneficial to the state, and their character less known, than local traders; and in order to suppress them as much as

possible, and at the same time to turn such suppression into a branch of revenue, the laws have charged certain taxes upon them.

They are, by the 50 Geo. III. c. 41, obliged to take out an annual licence of 4*l.*, and an additional licence of 4*l.* for every horse &c. with which they travel. A single act of selling a particular parcel of goods in this manner does not require a licence; but all itinerant dealers who sell by retail, how extensive soever their transactions may be, must take out a licence. But it does not extend to a traveller who goes about and takes orders, and afterwards conveys the goods to the persons who give the order.

In order to obtain a licence, the party must produce to the Commissioners of Stamps at Somerset House, or their deputies appointed in other parts of the country, a certificate of character and fitness, signed by the clergyman and two reputable inhabitants of the place where he usually resides, in a form prescribed by sec. 13 of the act.

The packages with which they travel must be marked "*Licensed Hawker*," together with the name and number of the licence, on penalty of 10*l.* for each offence. Persons not licensed using such marks forfeit the like sum.

A licensed auctioneer going from town to town by a public stage coach, sending goods by a public conveyance, and selling them on commission by retail or auction, is a *trading* person within the 50 Geo. III. c. 41, § 6, and must take out a hawker's and pedlar's licence.

Any goods may, however, be exhibited for sale in a public market; and printed papers licensed by authority, or fish, fruit, or victuals, or goods *bonâ fide* manufactured by the trader or his known agents &c., and the manufactures of Scotland by wholesale, may be vended without licence. So tinkers, coopers, plumbers, glaziers, harness-menders, and other persons usually trading in such matters and carrying about the materials for so doing, do not require a licence. Nor need any wholesale vender of the manufactures of Great Britain. Neither are coals, or, it should seem, turf, wood, &c., prohibited from being sold without a licence.

A licensed hawker, like a soldier, may set up any trade in his place of residence without having been apprenticed thereto.

Hawkers are prohibited from hawking any spirituous liquors, tea, tobacco, or snuff, under any circumstances, on pain of forfeiting them and 100*l.*, or of three months imprisonment; and they may be detained by any person, and carried before a justice for that offence. Trading in goods smuggled or dishonestly procured forfeits the licence, and incapacitates them from ever after taking out another. Neither can they sell by outcry, or by any kind of auction, except in the place of their residence, under 50*l.* penalty. Hawking without a licence subjects the party to 10*l.* penalty; and a party having a licence should always carry it with him, since if he refuses to produce it to any person he is liable to the same penalty.

Lending or borrowing a licence subjects the party to 40*l.* penalty, and forfeiture of the licence, with future incapacity to trade, unless it be to his *bonâ fide* servant; and forging a licence is 300*l.* penalty. If a constable or other peace officer refuse to assist in the execution of these laws, he forfeits for each offence 10*l.*

ASSESSED TAXES.

THESE consist of the duties on windows (and until recently on houses), on male servants, carriages, horses and mules, dogs, horse-dealers, hair powder, armorial bearings, and game certificates; and are by 43 Geo. III. c. 99, under the management of the Commissioners of Stamps and Taxes.

Subordinate, however, to the principal board, *district commissioners* are appointed throughout the kingdom, who must, in all cases, be inhabitants of the district where they are appointed to act. In London and the circumjacent places, each must swear that he possesses property to the amount of 5000*l.* clear of all incumbrances, specifying wherein it consists. They meet annually, on or before the 10th April, in order to elect clerks and assistants, who remain in office for one year, unless there be cause for their earlier removal.

Assessors are appointed by the district commissioners, whose duty it is to make out the assessments, which, when duly approved and signed by the commissioners, are transmitted to the Tax Office.

Collectors are also nominated and sworn in by the commissioners, who, in addition to the security to the commissioners, may be required by the parish to give security, because, in case of their default, the parish is liable to be re-assessed to pay any deficiency. 43 Geo. III. c. 99, § 45. These, as well as the assessors, are liable to a fine of 20*l.* for any neglect or breach of duty.

Where collectors and assessors are not appointed by the commissioners, justices may appoint them; and persons so appointed refusing the office forfeit 20*l.*

Collectors are empowered to give receipts, but may take nothing beyond the assessment, except for the receipt stamp. They are remunerated by 3*d.* in the pound on all moneys paid in by them, except upon the duties under Schedule L. A demand for the assessed taxes should be made within ten days after they are due.

Inspectors and *surveyors* are also appointed, whose principal duty is to certify to the commissioners, and give notice to the parties to be affected thereby, of charges which have been omitted. These are denominated *surcharges*, and though omitted for the first half year may be afterwards made for the whole year. If a surveyor or inspector be guilty of vexatious charges or corrupt practices, he forfeits his office and 100*l.* In case the surcharge is verified, double duty is payable; but if, on receiving the notice, the party make out a true list of all things for which he is chargeable, and deliver it to the surveyor or inspector, together with a declaration containing a satisfactory excuse, attested by a credible witness, for the non-insertion of the articles in respect of which he is chargeable in the return, the double duty may be avoided; other means of doing so are pointed out in the rules contained in 50 Geo. III. c. 105.

For the purpose of preparing the assessments, lists are left annually by the assessors at every dwelling house; which must be duly filled up

¹ The 9 & 10 Vic. c. 56 provides forms of proceedings for assessed taxes as well as for the property and income tax.

and returned by all persons liable. If a person has two places of residence, he must make a return at each place, though he is only chargeable in one, except to the window tax.

Persons may compound for their assessed taxes; and in such case they are not liable to any additional assessment, although they increase their establishment in the mean time.

Appeals.—By 43 Geo. III. c. 99, § 24, persons having ground of complaint against either the assessment or surcharge may appeal to the commissioners, on giving ten days notice to the surveyor or assessor; and by 48 Geo. III. c. 141, No. III, Rule 6, all appeals against the first assessment in every year are to be heard between the 20th August and the 20th September; and by No. IV., Rule 2, appeals against surcharges between the 20th January and the 20th February following. No assessment is to be altered till the appeal is heard; and if clerks or others alter them improperly, 50*l.* penalty attaches.

No alteration of an assessment is to be made, unless the party verify his grounds of reduction to the satisfaction of the commissioners, and give a true list, also verified, of all that he is chargeable with. The surveyor or inspector may attend to support the assessment.

No person in the law is allowed to plead on behalf of another person before the commissioners; whose determination is final, except where the party shall demand that a case shall be stated for the opinion of a judge.

Distress for Taxes.—Collectors having allowed a reasonable time to elapse after making a formal demand for the taxes, may distrain by the 43 Geo. III. c. 99, § 34; but if they do not allow such reasonable time, they may be liable to an action of trespass.¹ And by 48 Geo. III. c. 141, No. V., Rule 6, if a collector advance the money to pay the taxes for the party liable, he may distrain in like manner within six months, though not afterwards. The distress is to be kept four days; and if the taxes are not then paid, the things distrained are to be sold.

The collector, having a warrant from the commissioners, and a constable with him, may break open the house, in the day-time, if admission is refused; and if sufficient property cannot be found, the party may be committed to prison. If parties remove to another district, leaving taxes unpaid in their former district, the commissioners of the district where the taxes are due certify the same to the commissioners of the place where they remove to, and the latter are empowered to distrain on them there.

A distress for taxes has precedence over all other kinds of execution, unless the party issuing the latter process pay *one year's* taxes, if so much is due. Landlords are, however, excepted, whose distress for rent is good for *one year's* arrear. It seems that for arrears of taxes on houses or windows the goods of any person on the premises may be taken; but on horses, carriages, dogs, and others mentioned in Schedule C to K, only the goods of the person can be taken, except in the instances specially provided for.

Additional 10 per Cent.—By the 3 & 4 Vict. c. 17, an addition of 10 per cent, or 2*s.* for every 20*s.*, is made to all assessments of the duties under the following Schedules from the 6th April, 1840.

¹ Gibbs v. Stead, 8 Barn. & C. 528.

I.—WINDOWS. (SCHEDULE A.)

For every dwelling-house, of the value of 5 <i>l.</i> per annum or upwards, containing seven and not more than eight windows or lights												£. s. d.			
Windows.	L.	s.	d.	Windows.	L.	s.	d.	Windows.	L.	s.	d.	Windows.	L.	s.	d.
9	1	1	0	23	6	17	6	37	12	15	3	90 to 94	26	12	3
10	1	8	0	24	7	5	9	38	13	3	6	95 - 99	27	14	9
11	1	16	3	25	7	14	3	39	13	12	0	100 - 109	29	8	6
12	2	4	9	26	8	2	9	40 to 44	14	8	9	110 - 119	31	13	3
13	2	13	3	27	8	11	0	45 - 49	15	16	9	120 - 129	33	18	3
14	3	1	9	28	8	19	6	50 - 54	17	5	0	130 - 139	36	3	0
15	3	10	0	29	9	8	0	55 - 59	18	3	0	140 - 149	38	8	0
16	3	18	6	30	9	16	3	60 - 64	19	17	9	150 - 159	40	12	9
17	4	7	0	31	10	4	9	65 - 69	21	0	3	160 - 169	42	17	9
18	4	15	3	32	10	13	3	70 - 74	22	6	0	170 - 179	45	2	6
19	5	3	9	33	11	1	6	75 - 79	23	5	0	180	46	11	3
20	5	12	3	34	11	10	0	80 - 84	24	7	6	And for every window			
21	6	0	6	35	11	18	3	85 - 89	25	10	0	above 180, <i>ls. 6d.</i>			
22	6	9	0	36	12	6	9								

RULES FOR CHARGING THE DUTIES ON WINDOWS.

All exterior windows, however constructed, are chargeable; as are all skylights, and windows in staircases, garrets, cellars, passages, and all other parts of dwelling-houses; also every window in any kitchen, cellar, scullery, buttery, pantry, larder, wash-house, laundry, bakehouse, brewhouse, and lodging room, belonging to any dwelling-house, whether within or contiguous to or disjoined from the body of the house.

Every window extending so far as to give light into more rooms, landings, or stories than one, is charged separate. When a partition or division between two or more windows fixed in one frame is of the breadth of twelve inches, the window on each side is charged as a distinct window.

Every window which, including the frame, partitions, and divisions thereof, by admeasurement of the whole space on the aperture of the wall of the house on the outside, exceeds in height 12 feet, or in breadth 4 feet 9 inches, is chargeable as two windows; except—1. Windows which are not more than 3 feet 6 inches in height, although above 4 feet 9 inches in breadth; 2. Windows which were made of greater dimensions previous to the 5th of April, 1785; 3. Windows in shops, workshops, and warehouses employed solely for the purpose of trade or as warehouses, provided no person dwells in the same; 4. Windows in the coffee-room, tap-room, or other public room of any house licensed to sell wine, ale, &c.; and, 5. Windows or lights in farm-houses or dwelling houses exempt from the inhabited house duty.—If the windows in any dwelling-house cannot be conveniently numbered or measured without passing through such house, the assessors are authorized to pass through the house, and externally to view and measure the windows; and in case of any dispute, the proof lies with the occupier.

The duties are charged yearly, from the 5th of April, upon the occupier.

Where any change in the occupation takes place after the assessment is made for the year, the duties are to be paid by the occupier, landlord, or owner for the time being. But where a tenant quits on the termination of a lease or demise, and has given notice to the assessor, the duty is discharged for each entire quarter that the house remains unoccupied. Any house from which the occupier has *bona fide* removed, and which is wholly unfurnished at the time of making the assessment, is to be considered as unoccupied, although left in the care of a person; but if such house becomes occupied within the year of assessment, it is to be charged for such part of the year during which it may be occupied.

Where any dwelling house is let in different apartments, the landlord or owner is deemed the occupier; but if he do not reside within the limits of the collector, the duties may be levied on the occupier, who is to be allowed the same out of the rent.

Every house left to the care of a servant is chargeable as if inhabited by the owner.

Chambers in inns of court, universities, or public hospitals, are liable as an entire house; and if containing less than seven windows are chargeable at the rate of *1s. 9d.* per window.

Every tenement of a house divided into different tenements, is chargeable as an entire house; and if containing less than seven windows, at the rate of *1s. 9d.* for each window.

No window is exempt from duty by reason of its being stopped up, unless it be effectually done with the same materials as the outside wall chiefly consists of. Nor is any window to be opened or made, or stopped up, unless six days notice is given to the surveyor.

If any window is opened after the commencement of the year's assessment, and notice thereof is given to the assessor, the duty for such window is only to be charged for the remainder of the year, commencing from the end of the quarter preceding the opening of the window; but in default of notice being given to the assessor, the duty is charged for the whole of the year.

EXEMPTIONS FROM THE DUTIES ON WINDOWS.

Houses belonging to her majesty or any of the royal family; and public offices.

Hospitals, charity schools, and poor-houses, except such apartments as are occupied by the officers or servants; and any room of a dwelling-house licensed for divine worship, and used for no other purpose. Where an exemption is claimed in respect of hospitals, charity schools, poor-houses, or licensed chapels, notice must be given, under the 43 Geo. III. c. 161, § 17.

Every farm-house *bona fide* used for the purposes of husbandry only, and occupied by the tenant of a farm at rack-rent of less than 20*0l.* a year, or by a person occupying an estate on any other tenure than as tenant at rack-rent, or occupying any such other estate and also a farm at rack-rent, the value of the whole being less than equivalent to a farm at the rack-rent of 20*0l.* a year (reckoning the value of every estate occupied on any other tenure as equivalent

to double the amount of the like at rack-rent), is exempt from the duties on windows, provided the occupier does not derive an income exceeding 100*l.* a year from any other source.—4 & 5 Wm. IV. c. 73, § 2.

The windows in any dairy or cheese-room belonging to and occupied with any dwelling-house, provided the windows are made with splines or wooden laths, or iron bars or wires, and wholly without glass, and the words *Dairy* or *Cheese-Rooms* are painted on the outer door, and on the out side of the windows, in large Roman letters. And by 37 Geo. III. c. 25, one glazed window or light in every dairy in a farm-house. And by the 6 Geo. IV. c. 7, one glazed window or light shall be allowed in any cheese-room distinct from such dairy; but the exemption shall not be claimed for more than two such windows in any one farm-house.

Windows in any room used wholly for the purpose of carrying on any manufacture, and not having any internal communication with the dwelling-house, although adjoining thereto.—50 Geo. III. c. 101.

Windows in any shop or warehouse (not exceeding three) in the front and on the basement story of a dwelling-house occupied by any person in trade who shall expose to sale any goods or merchandize. 4 Geo. IV. c. 11.

Tenements, though formerly occupied as dwelling houses, are not to be charged when used for the purposes of trade only, or as warehouses or shops or counting-houses, no person dwelling therein except in the day-time, and the owner having a distinct place of residence. But all such tenements must be brought into the assessment of the current year, although discharged for the preceding year; and persons claiming relief must give notice to the assessor, who, on request made, shall be admitted in the day time, to inspect such tenements.—57 Geo. III. c. 25, § 1, 7.

Mills, places of manufacture, or warehouses not attached to a dwelling-house, are not liable, though a servant is appointed to watch and guard the same in the night time, provided such servant be named in a licence to be obtained from the commissioners of the district.—*Id.* § 4.

Poor persons occupying houses containing more than seven windows may claim exemption from payment of the duties on giving notice in writing to the assessors, stating their poverty, and annexing a certificate of inability from the minister or overseers or churchwardens &c.

II.—HOUSES. (SCHEDULE B.)

These duties were repealed by 4 & 5 Wm. IV. c. 19, from 5th April, 1834.

III.—MALE SERVANTS. (SCHEDULE C.)

III.—MALE SERVANTS. (SCHEDULE C.)									
For 1	Servant		1	4	0	For 7	Servants	each	£. s. d.
2	ditto	each	1	11	0	8	ditto	"	2 12 6
3	ditto	"	1	18	0	9	ditto	"	3 1 1
4	ditto	"	2	3	6	10	ditto	"	3 6 6
5	ditto	"	2	9	0	11	ditto and above	"	3 16 6
6	ditto	"	2	11	6				

Bachelors pay 1*l.* additional for each Servant.

For every Male person (not being a Servant) employed in any of the capacities mentioned in Schedule C, No. 1, if the employer be otherwise chargeable to the duties on Servants, or for a Carriage, or for more than one Horse . . . 1 4 0

--- But if not so chargeable . . . 0 10 0

For every Gardener, where the constant labour of one is necessary . . . 1 4 0

For every Waiter in any tavern, coffee-house, inn, ale-house, hotel, or eating-house (except occasional waiters) . . . 1 10 0

For every Servant kept by a Stable-keeper to look after race or running horses . . . 1 0 0

For every person employed as an Under-keeper under a Game-keeper . . . 0 10 0

For every Coachman, Groom, &c. kept to be let to hire for less than one year . . . 1 5 0

(The duty is paid by the person letting to hire; but if the person hiring do not make a return thereof, then the progressive duty payable on servants shall be charged in respect of every such servant on the person hiring and making default, according to the number of servants retained by him, and he shall also forfeit for such default 50*l.*)

EXEMPTIONS FROM THE DUTIES ON MALE SERVANTS

Butlers, manciples, cooks, gardeners, or porters employed by any of the Royal Family, or in either University, or in the colleges of Westminster, Eton, or Winchester, or in Christ's Hospital, St. Bartholomew's, Guy's, St. Thomas's, Bridewell, Bethlehem, or the Foundling.

Servants employed in any trade, manufacture, or calling, or in husbandry, to earn a livelihood or profit, and not in any capacity already chargeable.

Riders or travellers, clerks, book-keepers or office-keepers,—stewards, bailiffs, overseers, or managers, and clerks under stewards, bailiffs, overseers, or managers,—shopmen, warehousemen, porters, or cellarmen,—and grooms, stable boys, or helpers in the stables, solely employed in their respective occupations by any livery stable keeper, horse-dealer, postmaster or other person licensed to let post-horses or carriages for hire.—3 & 4 Wm. IV. c. 20. And where any licensed victualler as in the acts described employs one male person only *bona fide* and generally to carry out beer, ale, or other liquors to customers, such person shall be considered a porter hereby exempt from duty, although employed occasionally to wait on the guests.

Ostlers and helpers in the stables of persons licensed to sell ale, wine, or other liquors by retail, or of stage-coach proprietors.

Drivers employed by any person duly licensed to let horses for hire, whether licensed as an innkeeper or not.—6 & 7 Wm. IV. c. 63.

Servants being the sons of the master, under 21 years of age.—11 Geo. IV. & 1 Wm. IV. c. 33. The duties on Stage Coachmen and Guards were repealed by 5 & 6 Vict. c. 20, from 5th April, 1842.

Any male servant *under the age of eighteen* employed by a person residing in the parish or place in which such servant has a legal settlement, provided the exemption be duly claimed.—4 & 5 Wm. IV. c. 73.

Roman Catholic clergymen who have taken and subscribed the oaths and declarations required by law, are exempt from the additional charge as bachelors, provided the exemption be duly claimed.—4 & 5 Wm. IV. c. 73, § 4.

Officers serving in any regiment of horse or dragoons, or in any regiment of artillery, infantry, royal marines, royal garrison battalion, or corps of engineers, for so many servants (being soldiers in the same regiment) as may be allowed by the regulations of the service, in whatever capacity employed, and without regard to any other servants kept by them; provided all such servants be returned and the exemption duly claimed. 5 & 6 Wm. IV. c. 64. And this exemption is extended by 6 & 7 Wm. IV. c. 65, to general officers and officers of the staff.

Officers of the navy, of whatever rank, in actual employ, for any number of servants borne upon the ship's books, in whatever capacity employed, and without regard to any other servants kept by them; provided all such servants be returned and the exemption duly claimed.—5 & 6 Wm. IV. c. 64.

Disabled officers on half-pay may keep one servant duty free.

Under Gamekeepers are not to be assessed as additional servants, but to be charged at 10s. each per annum.

IV.—CARRIAGES. (SCHEDULE D.)

CARRIAGES WITH FOUR WHEELS.

For 1 Carriage	6 0 0	For 6 Carriages	each £8 4 0
2 ditto	6 10 0	7 ditto	" 8 10 0
3 ditto	7 0 0	8 ditto	" 8 16 0
4 ditto	7 10 0	9 ditto and upwards	" 9 1 6
5 ditto	7 17 6		

And for every additional body used on the same carriage or wheels 3 3 0

For every Carriage with four wheels, each of less diameter than 30 inches, drawn by ponies or mules between twelve and thirteen hands high (11 Geo. IV. & 1 Wm. IV. c. 35) 3 5 0

For every Carriage with four wheels, drawn by one horse, &c. 4 10 0

For every Coach, Diligence, Chaise, &c. with four wheels or more, used as a public Stage Coach 5 5 0

For every four-wheel Carriage kept for letting to hire for a period less than a year, so that the Stamp Office duty is not payable at such letting 6 0 0

--- If drawn by one horse only (6 & 7 Wm. IV. c. 65) 4 10 0

For every Carriage with two or more wheels kept for the purpose of being let for hire by a person duly licensed to let post-horses, and solely used so that the post-horse duty is payable in respect of the horses used therewith (3 & 4 Vict. c. 71) 3 0 0

For Common Carriers' Carts, although sometimes carrying passengers, but not paying the stamp office duty 2 10 0

--- If less than four wheels (11 Geo. IV. & 1 Wm. IV. c. 35) 1 5 0

CARRIAGES WITH LESS THAN FOUR WHEELS.

For every Carriage with two wheels, whether kept for a person's use or to be let out to hire, if drawn by one horse 3 5 0

--- If drawn by two or more horses 4 10 0

And for every additional body used on the same carriage or wheels 1 11 6

EXEMPTIONS.

Carriages of the Royal Family; hackney coaches duly licensed; carriages kept by any maker of carriages for sale or for being lent to any person during the time such person's carriage of the same description is under repair, and not employed for his own use, or let to hire, or lent otherwise than as aforesaid.

Carriages with four wheels of less diameter than 30 inches, or with three wheels, and drawn by ponies or mules under twelve hands high, or oxen or asses, if built according to the regulations prescribed for taxed carts, and not exceeding the value of 15*l*. and without springs.

Carriages with less than four wheels, each of less diameter than 30 inches, kept by a person for his own use and not for hire, and drawn by a pony or mule not exceeding 12 hands in height. 11 Geo. IV. & 1 Wm. IV. c. 35.

Carriages with less than four wheels, kept by any person for his own use, and not for hire or profit (except for the conveyance of prisoners or paupers, as hereinafter mentioned), and drawn by one horse, mare, gelding, or mule only, and not otherwise, whatever may be the form or construction of such carriage, or the materials with which the same shall be built or fitted up, provided the price or value of such carriage, together with the cushions and every other thing used therewith or belonging thereto, shall not exceed the sum of 21*l*.; and provided also that such carriage shall have the christian and surname and place of abode and occupation or calling of the owner and of every owner thereof painted in words at length, and in legible and conspicuous Roman letters, two* inches at least in height and of a proper and proportionate breadth, in one or more straight lines, in white upon a black ground or in black upon a white ground, on a plain and even surface, on the outside of such carriage, that is to say, upon the back part of the body; or if there be no back part, then upon the panel on the right or off-side of the body; or if there be no panel, then upon some other conspicuous part of the side; or if there be no side,

* By 7 Wm. IV. & 1 Vict. c. 61, it is sufficient if the letters be one inch in height.

then upon the outer part of the right off-side shaft; and in such plain and conspicuous manner that the same shall be at all times visible and legible.—6 & 7 Wm. IV. c. 65.

Carriages with less than four wheels, built wholly of wood and iron, with springs (wholly or in part of metal), without any other than a tilted covering, and without any lining, apron, or cushion, and with the seat fixed or suspended by slings or braces, such carriage not being on any occasion let or used for hire or profit, but kept as a common stage cart, and used without fraud in the affairs of husbandry, or in the carriage of goods, or in the course of trade, although used occasionally for the purpose of riding therein; provided every such Common Stage Cart have the Christian and surname, residence and occupation or calling of the owner, and also the words "Common Stage Cart," painted thereon in the manner hereinbefore prescribed.

V.—HORSES, &c. (SCHEDULES E & F.)

For 1 Horse	£.	s.	d.	For 11 Horses	each	£.	s.	d.
2 do. each	2	7	3	12 do. "		3	3	6
3 do. "	2	12	3	13 do. "		3	3	9
4 do. "	2	15	0	14 do. "		3	3	9
5 do. "	2	15	9	15 do. "		3	3	9
6 do. "	2	18	0	16 do. "		3	3	9
7 do. "	2	19	9	17 do. "		3	4	0
8 do. "	2	19	9	18 do. "		3	4	6
9 do. "	3	0	9	19 do. "		3	5	0
10 do. "	3	3	6	20 do. and upwards		3	6	0

(The duties are to be paid annually for every horse used on any occasion for riding or for drawing any carriage for which duty is payable, or hired by the year or any longer period, and to be paid by the person using the same, except as after mentioned.)

For every Horse, Mare, or Gelding kept for racing or running for any plate, prize, or sum of money, whether in the stable of the proprietor or other person (5 & 6 Wm. IV. c. 64) 3 10 0

(To be paid by the person having the charge thereof, in lieu of the several duties of 2*l*. 16*s*. charged by the 44 Geo. III. c. 98, and of 1*l*. 8*s*. 9*d*. by the 48 Geo. III. c. 55, and 52 Geo. III. c. 93.)—5 & 6 Wm. IV. c. 64.

Horses let to hire for riding or drawing any carriage, for any period short of a year, in any manner so that the Stamp Office duty is not payable . . . 1 8 9
(Which duty is chargeable on the person letting the same.)

Horses or Mules used for riding or drawing, 13 hands high (4 inches to a hand) 1 1 0

Horses or Mules for labour, 13 hands high . . . 0 10 6

One horse used by a Butcher wholly in his trade . . . 1 8 9

—Where two only are kept, for the second . . . 0 10 6

One Horse used by a Bailiff on a farm . . . 1 5 0

For every other Horse not kept for the purpose of riding or of drawing carriages, of the height of 13 hands, and for every mule, except for husbandry . . . 0 10 6

Carriers' and Waggoners' horses, not exceeding 13 hands high, are charged with the same duty as draught horses.

EXEMPTIONS.

Horses belonging to any of the Royal Family; post and stage-coach horses liable to posting duties; and horses kept by horse-dealers for sale.

Horses of market gardeners, and mares kept for breeding, are also exempt.

Horses kept by poor persons discharged from house duties; by clergymen whose preferments do not produce more than 60*l*. per annum; by volunteer commanding officers; or by the privates or officers of volunteer cavalry, or of the cavalry or artillery of the line.

Horses *bona fide* kept for the purposes of husbandry, or for drawing any carriage not liable to duty, although used when going to or returning from any place with a load; or for riding to procure medical assistance—to or from market—to or from any place of public worship—to or from an election for a member of parliament—to or from any court of justice—or any meeting of Commissioners of Taxes, although occasionally used for other purposes in drawing burthens, and although occasionally used by the owner or let for the purpose of drawing for hire or profit, provided they be not used for drawing any carriage chargeable with duty.—4 & 5 Wm. IV. c. 73, § 7.

And any person keeping any horse &c. *bona fide* for the purpose of husbandry, may use such horse &c. in drawing any carriage of the description of a taxed cart or common stage cart kept by such person for his own use, and built in such manner as to be exempt from duty, without being chargeable with duty.

Any person occupying a farm or estate of less value than 500*l*. a year (estimated in the manner directed with regard to the exemption from window duties) and obtaining his livelihood principally by husbandry on such farm or estate, is exempt from the duty for one horse kept for the purpose of riding, or of drawing any carriage not chargeable with duty; provided he do not keep more than one which would otherwise be chargeable, and do not derive any profit or income exceeding 100*l*. a year from any other source, and the exemption be duly claimed.—4 & 5 Wm. IV. c. 73, § 6; and 5 & 6 Wm. IV. c. 64, § 16.

Any rector, vicar, or curate actually doing duty in the church or chapel of which he is rector &c.; any Roman Catholic priest having taken and subscribed the oaths and declarations required by law; and any teacher or preacher of a separate congregation of Protestant Dissenters, whose place of meeting is duly registered, having taken and subscribed the oaths and declarations required by law, and not following any secular occupation except that of a school-

master, are respectively exempt from the duties for *one horse kept* for the purpose of riding, or of drawing any carriage not chargeable with duty; provided he be not possessed of an income of 120*l.* per annum, and do not keep more than one horse which would otherwise be chargeable, and the exemption be duly claimed.—4 & 5 Wm. IV. c. 73, § 5.

A postmaster or innkeeper licensed to let horses to hire is not chargeable in respect of horses *bona fide* kept for the purpose of being let to hire by reason of their being also used by him for the purpose of husbandry, or for drawing fuel to his dwelling-house, or manure, or hay, straw, corn, or fodder, to or from his stables or premises.—4 & 5 Wm. IV. c. 73, § 8.

The duty is not chargeable in respect of *one horse bona fide* kept and usually employed by any bailiff upon the concerns of any farms with which he may be entrusted, and also in respect of *one horse bona fide* kept and employed by any shepherd or herdsman solely in tending sheep or cattle; provided these exemptions be duly claimed.—4 & 5 Wm. IV. c. 73, § 9.

VI.—DOGS. (SCHEDULE G.)

	£.	s.	d.
For every greyhound kept by any person, whether his property or not	1	0	0
For every hound, pointer, setting-dog, spaniel, terrier, or other dog of whatever denomination (except greyhounds), where more than one dog is kept, whether for his own use or any other person's	0	14	0
Where one dog only is kept, of any denomination, except greyhounds, whether for his own use or another person's (Which duty is to be paid by the person keeping such dogs.)	0	8	0

EXEMPTIONS.—Dogs belonging to her Majesty or the Royal Family.

Persons discharged from the duty on houses on account of poverty may keep one dog, not being a greyhound, hound, pointer, setting dog, spaniel, lurcher, or terrier.

Whelps not six months old at the time of returning the list are exempt.

Dogs wholly used in the care of sheep or cattle; provided they be not a greyhound, pointer, setting dog, spaniel, lurcher, or terrier, and the exemption be duly claimed.—4 & 5 Wm. IV. c. 73 § 10.

Any person may *compound* for any number of hounds kept by him for any year, on payment of the sum of 3*6l.* Where two or more persons join to keep such hounds, and do not *compound*, they are chargeable for each hound.

VII.—HORSE DEALERS. (SCHEDULE H.)

Any person exercising the business of a Horse-dealer in London, Westminster and its liberties, the parishes of St. Mary-le-bone and St. Pancras, the weekly bills of mortality, or the borough of Southwark	25	0	0
--- In any other part of Great Britain	12	10	0

EXEMPTIONS.—Persons selling horses bred by them are not deemed horse-dealers.

VIII.—HAIR POWDER. (SCHEDULE I.)

Every person wearing hair powder	1	3	6
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EXEMPTIONS.—The Royal Family; naval and military officers, soldiers, volunteers; and clergymen whose income is under 100*l.* per annum.

IX.—ARMORIAL BEARINGS. (SCHEDULE K.)

Persons using armorial bearings and keeping a coach or other taxable carriage...	2	8	0
Persons not keeping such carriage but chargeable to the house or window duty...	1	4	0
Persons not keeping such carriage nor chargeable to the house or window duty...	0	12	0

EXEMPTIONS.—The Royal Family; and public officers in respect of the insignia of office.

X.—GAME DUTIES. (SCHEDULE L.)

For every Gamekeeper otherwise charged as a servant	1	5	6
For every Gamekeeper not otherwise charged, and every other person	3	13	6
For every Game-dealing licence (not to be paid by those having a 3 <i>l.</i> 13 <i>s.</i> 6 <i>d.</i> sporting licence)	2	2	0

EXEMPTIONS.—The Royal Family. A gamekeeper may be appointed by the lord of a manor to kill game on the manor for his own use, or for the use of any other person specified in his appointment, and not for the use of the lord, without being chargeable with duty either as a gamekeeper or a male servant. 1 Wm. IV. c. 36.

Persons taking or killing game without having taken out a certificate are liable to *double* duty.—6 & 7 Wm. IV. c. 65, § 8.

NOTE.—An additional 10 per cent is added to all assessments under the foregoing Schedules by 3 & 4 Vict. c. 17, from the 6th April, 1840; which additional duty is to be computed on the total amount; but no fraction of a penny to be charged.

PROPERTY AND INCOME TAX.

By 5 & 6 Vict. c. 35, the following duties are imposed upon the annual profits arising from property, professions, trades, and offices; being, in effect, a tax of *sevenpence* in the pound upon all incomes, amounting to 150*l.* or upwards, in Great Britain, from whatever source arising. These duties commenced from the 5th of April, 1842, charged under separate schedules, according to the source from whence the income is derived.¹

SCHEDULE A.

For all lands, tenements, and hereditaments or heritages, in Great Britain, there shall be charged yearly, in respect of the **PROPERTY** thereof, for every 20*s.* of the annual value, the sum of *sevenpence*.

The duties under this schedule are assessed upon and payable in the first instance by the occupier or tenant, who is authorized to deduct the same from his rent, or so much thereof as a rate of 7*d.* for every 20*s.* of rent payable by him to his landlord amounts to, all sums allowed by the commissioners being first deducted; and the landlord, in like manner, is entitled to deduct 7*d.* in the pound from any rent-charge, annuity, fee-farm rent, rent-service, quit rent, feu duty, teind duty, stipend to licensed curates, or other rent or annual payment reserved or charged upon the land &c., which is paid by him. So, the occupier of lands, who is charged with the duty on any composition, rent, or payment for tithes, is entitled to deduct the amount from such composition &c., on paying the same.

But for a dwelling house which with the offices &c. is under the annual value of 10*l.*, and also for lands and tenements let for a less period than a year, the assessment is to be made on the landlord, but so as not to impeach the remedy of recovery from the occupier in default of payment by the landlord. So the duty on any house or tenement occupied by a minister of a foreign state is to be paid by the landlord.

Where a house is divided into distinct properties, and occupied by distinct owners or their respective tenants, such properties are chargeable separately.

The duties are to be assessed on all lands, tenements, and hereditaments, whether occupied at the time of assessment or not; and where lands charged to the duties in this schedule are unoccupied, and no distress can be found, the collector may at any time afterwards enter upon them when there shall be any distress, and seize and sell the same. But the duties are not to be levied on any house for the time it shall have been unoccupied.

GENERAL RULE for estimating the Annual Value.—The annual value of lands, tenements, and hereditaments is the rent by the year at which the same are let at rack rent, if the amount has been settled by agreement within the last seven years; but if not so let at rack rent, then at the rack rent at which the same are worth to be let by the year. This rule extends to all lands, tenements, and hereditaments capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, except the following:—

1. Tithes, if taken in kind, to be charged on an average of the three preceding years.
2. All dues and money payments in right of the church or by endowment, or in lieu of tithes (not being tithes arising from land), on the like average.
3. Tithes arising from land if compounded for, and all rents and other money payments in lieu thereof (except rent-charges under the Tithes Commutation Act), on the amount for one year preceding.

The duty in each of these cases to be charged on the person entitled to such tithes or payments, or his lessee or tenant, agent or factor. But for compositions, rents, or other payments in lieu of tithes, the assessment may be made, if the commissioners think fit, on the occupiers of the lands from which such tithes arise, or on the persons liable to the payment of such compositions, rents, &c.

4. Manors and other royalties (including all dues, services, or other casual profits), on an average of the seven preceding years. To be charged on the lord of the manor or person renting the same.

5. Fines upon leases (not being parcel of a manor or royalty demisable by custom) on the amount received within the last year. But if any part has been invested as productive capital, on which a profit will arise otherwise chargeable for the year in which the assessment is made, the commissioners may discharge such part from the assessment.

6. All other profits from lands, tenements, and hereditaments not in the actual occupation of the party to be charged, on such a fair average as the commissioners shall, on the statement of such party, judge proper. To be charged on the receivers of such profits, or the persons entitled thereto.

7. Quarries of stone, slate, limestone, or chalk, on the amount of profits of the preceding year.

8. Mines of coal, tin, lead, copper, mundic, iron, &c., on an average of five preceding years.

9. Iron works, gas works, salt springs or works, alum mines or works, water-works, streams of water, canals, inland navigations, docks, drains and levels, fishings, rights of markets and fairs, tolls, railways and other ways, bridges, ferries, and other concerns of the like nature from or arising out of any lands, tenements, or hereditaments, on the profits of the year preceding.

The duties in each of the last three cases to be charged on the person, corporation, or company carrying on the concern, or their officers having the management thereof, before paying the proceeds to the different members, or to the owner of the soil or property, or to any creditor having any claim thereon. And the charge is to be made on the said profits exclusively of any lands used or occupied in or about the concern.

¹ This tax was originally imposed for a period of three years only; but by the 8 & 9 Vict. c. 4, it is continued for a further term of three years.

Though the computation of duty in respect of a mine is to be made in one sum, yet any adventurer therein may claim to be charged separately, and may set off his loss in one concern against his profits in other concerns of the like nature.

DEDUCTIONS AND ALLOWANCES.—1. For the amount of tithes and first-fruits, duties, and fees on presentations, paid by any ecclesiastical person within the year preceding. 2. For procurations and synodals paid by ecclesiastical persons, on an average of seven years preceding. 3. For repairs of collegiate churches and chapels, and chancels of churches, or of any college or hall in any of the universities of Great Britain, by any ecclesiastical or collegiate body, rector, vicar, or other person bound to repair the same, on an average of 21 years preceding. 4. For the parochial rates, taxes, and assessments upon any rent-charge under the Tithes Commutation Act, upon the amount paid in the year preceding. 5. For the amount of the land tax, where the same shall not have been redeemed. 6. For the amount charged on lands, tenements, hereditaments, or heritages, by a public rate or assessment in respect of draining, fencing, or embanking the same. These deductions are not to be allowed in any case where they are paid by the tenant.

Allowances are also granted for the duties charged on colleges and halls in the universities, in respect of the public buildings and offices not occupied by any individual member, or any person paying rent for them; on hospitals, public schools, alms-houses, and also on the lands, tenements, hereditaments, &c. belonging to any hospital, public school, or almshouse, or vested in trustees for charitable objects, so far as the same are applied to charitable purposes.

SCHEDULE B.

For all lands, tenements, and hereditaments, in England, there shall be charged yearly, in respect of the occupation thereof, for every 20s. of the annual value thereof, the sum of *threepence-halfpenny*.

For all lands, tenements, and heritages in Scotland, there shall be charged yearly, in respect of the occupation thereof, for every 20s. of the annual value thereof, the sum of *twopence-halfpenny*.

These duties are charged, in addition to those under Schedule A, on all the properties directed to be charged to the said duties, according to the General Rule before mentioned, on the full amount of the *annual value*, EXCEPT dwelling-houses with the domestic offices thereto belonging, when such dwelling-houses are not occupied with a farm of lands or of tithes, and EXCEPT warehouses or other buildings occupied for the purpose of carrying on a profession or trade.

This schedule is intended to charge the incomes of all who derive profits from the occupation of lands &c., and is made upon the supposition that the profits arising therefrom amount on an average in England to one half, and in Scotland to about one third of the rent, supposing the lands to be liable to tithes, and the tenant to pay all parochial rates, taxes, and assessments.

When, therefore, the lands are tithe-free, or are subject to a rent-charge under the Tithes Commutation Act payable by the landlord, as it is presumed the tenant pays a higher rent in consequence, a deduction of one-eighth of the duty is allowed. So when the landlord pays any rates, taxes, or assessments which are usually a charge upon the occupier, or any composition for tithes, the annual value is to be computed exclusive of such rates, taxes, and assessments, or composition. If, on the other hand, the tenant pays any taxes chargeable by law on the landlord, such as land-tax &c., the amount thereof is to be added to the rent in ascertaining the value.

When the land is subject to a modus or composition real, and not subject to tithe, there shall be deducted from the duties so much as with the like rate on such modus or composition real, shall not exceed one-eighth part of such duties.

Where lands are subject to a modus or composition real in lieu of certain specific tithes, or are free from some and subject to other tithes, the value is to be taken at the rack rent for which the land would let if wholly free from tithe, and one-eighth of the duty is to be deducted, as in the case of tithe-free land.

Any person being lessee and occupier of tithes taken in kind, or being the occupier of the lands from whence they arise, and compounding for the same, is charged at the rate of 2d. for every 20s. of the annual value.

The profits from nurseries, market-gardens, and hop-grounds (except hop-grounds occupied with a farm, and not exceeding one-tenth part thereof), are charged according to the Rules in Schedule D, but are payable under this Schedule.

Cattle-dealers and milk-sellers are subject to an assessment according to the ordinary rule in Schedules A and B, and for a further charge in respect of the profits of their trade under Schedule D.

The commissioners are empowered to abate the assessment in case of loss by floods or tempests, both as respects the duty on the owner and on the occupier.

In case of any change of occupation, the duties are to be collected from the occupier for the time being; but the former tenant is liable for the arrears which accrued in his time, which are to be levied by the commissioners, and repaid by the tenant for the time being.

SCHEDULE C.

Upon all profits arising from annuities, dividends, and shares of annuities, payable to any person, body politic or corporate, company, or society, whether corporate or not corporate, out of any public revenue, there shall be charged yearly, for every 20s. of the annual amount thereof, the sum of *seven-pence*, without deduction.

The duty is deducted from all dividends payable after the 5th April 1842, except when the half-yearly payment does not amount to 20s. in which case it is to be accounted for under Schedule D.

It extends to all public annuities whatever payable in Great Britain, and to all annuities payable in Ireland out of the revenue of the United Kingdom to or for the use or benefit of any person not resident in Ireland. And no person (other than a member of parliament entitled to be exempted from the assessed taxes) shall be deemed to be resident in Ireland who has been

absent for a period equal to six months, either at one or several times, during the year immediately preceding the day on which such dividends are payable.

EXEMPTIONS.—The stock or dividends belonging to her majesty, any accredited minister of a foreign state, commissioners for the reduction of the national debt, friendly societies established under act of parliament (provided the sum assured to any individual does not exceed 30*l.* or the amount of annuity 30*l.*), savings banks, charitable institutions, British Museum, or funds applicable to the repairs of places of worship or colleges, are exempted.

Claims for exemption must be made in writing to the Commissioners for Special Purposes, at the Head Office for Stamps, verified upon oath in such form as they shall direct; who will grant an order for repayment upon the receiver general of stamps and taxes, an officer for receipt, or collector for taxes, or a distributor or sub-distributor of stamps, as may be most convenient to the party.

Any person making a fraudulent claim is liable to a penalty of 100*l.* and treble duty.

SCHEDULE D.

Upon the annual profits or gains arising or accruing to any person residing in Great Britain, from any kind of property whatever, whether situate in Great Britain or elsewhere, there shall be charged yearly, for every 20*s.* of the amount of such profits or gains, the sum of *seven-pence*;

And upon the annual profits or gains arising or accruing to any person residing in Great Britain, from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in Great Britain or elsewhere, there shall be charged yearly, for every 20*s.* of the amount of such profits or gains, the sum of *seven-pence*.

And upon the annual profits or gains arising or accruing to any person whatever, whether a subject of her majesty or not, although not resident within Great Britain, from any property whatever in Great Britain, or any profession, trade, employment, or vocation exercised within Great Britain, there shall be charged yearly, for every 20*s.* of the amount of such profits or gains, the sum of *seven-pence*.

This schedule extends to every description of property or profits, and to every employment of profit, not contained in either of the other schedules, and not specially exempted; among others, to all dividends arising from sources chargeable under Schedule C, when the half-yearly payment does not amount to 50*s.*

It extends to all trades, professions, employments, or vocations carried on or exercised in Great Britain or elsewhere by persons residing in Great Britain, or carried on or exercised in Great Britain by any persons (whether subjects of her majesty or not) although not resident in Great Britain; and to every art, mystery, adventure, or concern carried on by them respectively; except such adventures or concerns on or about lands, tenements, or hereditaments as, we have seen, are chargeable under Schedule A, namely, quarries of stone, limestone, slate, or chalk, coal mines and other mines, iron-works, gas-works, salt-works, water-works, canals, docks, &c., right of markets, fairs, tolls, railways, &c.

The balance of the profits of trade or manufacture is to be returned at the place where it is carried on, on an average of three years preceding; or if set up within three years, on an average from the period of commencing the same.

In estimating the profits and gains in trade, **DEDUCTIONS** are allowed for repairs of premises, for supply or repairs of implements, utensils, or articles employed, not exceeding the sum usually employed for such purposes, according to an average of three years;—for bad debts only, or such part thereof as shall be proved to the satisfaction of the commissioners to be such;—for any average loss not exceeding the actual amount of loss after adjustment;—and for the rent or value of any dwelling-house or domestic offices used for the purposes of trade, a sum not exceeding two third parts of such rent.

But no **deductions** are allowed on account of loss not connected with or arising out of trade, &c.;—nor for any sums employed or intended to be employed as capital therein;—nor on account of capital withdrawn therefrom;—nor for any capital employed in the improvement of premises occupied for the purposes of trade;—nor on account or under pretence of any interest which might have been made on capital if laid out at interest;—nor on account of any annual interest, or any annuity or other annual payment payable out of such profits or gains;—nor for any sum recoverable under an insurance or contract of indemnity;—nor for any disbursements or expenses which shall not be money wholly and exclusively laid out for trade, &c.;—nor for any disbursements or expenses of maintenance of the parties, their families or establishments;—nor for any sum expended in any other domestic or private purposes distinct from the purposes of trade.

The computation of the duty is to be made exclusive of the profits of lands, tenements, and hereditaments occupied for the purpose of trade, profession, &c.

The profits on **professions** &c. are to be returned on the amount of the preceding year. The rules as to **deductions** are the same as in the case of **trade** profits, so far as they are applicable.

Persons carrying on two or more trades or concerns chargeable under this schedule may set off their loss in one concern against their profits in another.

The computation of duty in respect of any trade, profession, &c. carried on by two or more persons jointly, is to be made and stated jointly and in one sum, and separately from any other duty chargeable on the same persons, or either of them. The return is to be made by the principal or precedent acting partner, on behalf of himself and the other partners, whose names and residences are to be returned. But any partner may declare his share of the profits, in order to a separate assessment, for the purpose either of claiming an exemption from duty (as not having an income of £150 a year), or for the purpose of setting off his loss in any other concern chargeable under this schedule.

The profits on all securities bearing interest payable out of the public revenue (except dividends payable out of the public revenue, or the interest of East India Bonds, which are otherwise charged), and all discounts and interest of money, not being annual interest, payable by any

person whatever, are to be returned on the full amount of profits and gains arising therefrom within the preceding year.

The returns of profits arising in any other manner than as above described, comprehending every possible source of profit, of whatever nature or kind, may either be formed on an average of years, if uncertain in their annual amount, or if certain in their annual amount, on the profits of the preceding year.

When the assessment for the first year has been duly certified, persons may compound for the remaining two years upon payment of an additional 5 per cent., and thus render further returns unnecessary, provided the contract of composition is entered into within one month after the assessment is fixed. Obtaining a compound by any false statement subjects the party to a penalty of 50%, and forfeiture of all sums paid under it.

Persons paying duties in advance (not less than half a year) are entitled to a discount at the rate of four per cent per annum.

When a person charged under this schedule shall prove to the satisfaction of the commissioners that his profits fell short of the sum at which he was assessed, the commissioners are empowered to amend the assessment for the current year, and to order repayment of the sums proved to their satisfaction to have been overpaid.

Assessments are also to be amended when persons die or cease to exercise any trade; provided, that if the trade or calling be still carried on, the same duties shall still be charged to the persons conducting it, subject only to deductions on account of any diminution of profits that shall be proved to have occurred.

Parties chargeable under Schedule D may, if they prefer it, have their duties assessed by the Special Commissioners instead of the commissioners of the district, by delivering a request to the assessor, with a sealed statement of their incomes, which will only be open to the inspection of the Special Commissioners and the surveyor of the district.

So appeals under the Schedule may be made to the Special Commissioners, by giving notice to the inspector, except in the case of claims for exemption by persons whose incomes are under £150 a year, which must be to the commissioners for the district. And where the parties appealing are dissatisfied with the decision of the Special Commissioners, they may require the latter to transmit the case to the Commissioners of Stamps and Taxes, whose decision is final.

SCHEDULE E.

Upon every public office or employment of profit, and upon every annuity, pension, or stipend, payable by her majesty or out of the public revenue of the United Kingdom, except annuities before charged to the duties in Schedule C, for every twenty shillings of the annual amount thereof respectively, there shall be charged yearly the sum of *seven-pence*.

The duty is payable on all annuities, pensions, or stipends from any public office or employment of profit of a public nature in Great Britain, and for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason thereof, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any act of parliament, where the same have been really and *bona fide* paid and borne by the party to be charged.

GENERAL EXEMPTION.

Any person whose income in the whole is less than 150% per annum is entitled to an exemption from the duties under this act, and to be repaid the amount of any deduction or payment which he shall have made out of any rent, annuity, interest, or other annual payment. In order to entitle him to this exemption, he must deliver to the assessor of the district, within the time limited for delivering in the lists, declarations, and statements required by the act, a notice of such claim for exemption, together with a declaration and statement (in a form provided by the commissioners) setting forth the separate sources of his income, with the particular amount derived from each, and including all annual interests or other payments charged thereon, by which such income is diminished, and also a statement of the sums which the party is entitled to deduct and retain from any other person on account of duty. This statement is transmitted by the assessor to the commissioners, and is open to the inspectors and surveyors, who are to have forty days to examine and object to it; after which, if no objection be made, the commissioners may allow the exemption, and discharge the assessment made on any property of the party within their district; and, upon their certifying the facts to the Commissioners for Stamps and Taxes, they will direct the assessment upon such party in any other district to be discharged; and also, upon their certifying to the Commissioners for Special Purposes that such party has actually paid any duty by way of deduction from any rent, interest, dividend, or other payment, the last-named commissioners will give the party an order entitling him to a re-payment of the amount so paid or deducted upon the Receiver General of Stamps and Taxes, or an officer of receipt or collector of the duties, or a distributor or sub-distributor of stamps.

Appeals are heard and determined against claims for exemption by the Commissioners for General Purposes in the same manner as other appeals. For making fraudulent claims of exemption, a penalty of 50% is imposed.

The claim is to be made where the claimant resides, except in cases of offices, pensions, and stipends, when the claim is to be made before the commissioners of the department.

Persons residing out of Great Britain may claim exemption by affidavit. Claims of exemption may also be made by agents or trustees on account of others.

CHAPTER V.

Of Subordinate Magistrates.

SHERIFF.

THE sheriff is said formerly to have been the deputy of the earl (to whose care a county was entrusted), to act in his stead when the earl had occasion to go elsewhere in his attendance on the sovereign. But although the sheriff is still styled *vice-comes*, or deputy of the earl, yet his authority and all he does are now immediately from and under the crown, and not from or under the earl.¹

The sheriff is the conservator of the queen's peace in the county for which he is appointed, and has various powers in respect thereof. He may imprison breakers of the peace, and bind persons in recognizance to keep it; he must pursue and (if possible) take all traitors, murderers, felons, and rioters; he has the keeping of the county gaol; and in order to keep the peace, he may summon what is called the *posse comitatûs*, that is, all persons in the county above fifteen years old and of less degree than a peer, who are bound to attend him under pain of fine and imprisonment.

He is bound to execute in the county all writs of the superior courts directed to him: he must serve the writ, arrest, take bail, summon juries, and execute judgment. So in criminal matters, he must arrest and imprison, return the jury, is answerable for the safe custody of the prisoner, and must see to the execution of the sentence.

He hears, in the county court, all matters in dispute of and under the value of 40s.; has certain duties, as before-mentioned, in the election of members of parliament; and decides on the election of coroners and verderors.

He has generally no power out of his own county; but, on *habeas corpus*, he may bring up a prisoner to a superior court through intermediate counties, and, on an involuntary escape, he may retake the prisoner in another county. So there are certain mere ministerial acts which he may do out of the county.²

His *qualification* is, that he have sufficient land within the county to answer the queen and her people; but he need not reside in the county.³

No man is exempted at common law from serving this office, but may be by act of parliament or letters patent;⁴ as, by 42 Geo. III. c. 9, § 172, officers of the militia. But this exemption is now confined, by 2 & 3 Vict. c. 59, to such officers as were employed in actual service in the militia before the end of the war in 1815. An attorney is not capable of holding the office;⁵ and, after serving, a man is exempt for three years.⁶ A fine paid under 9 Geo. I. c. 9, to exempt, only extends to a year, unless there is an agreement extending it.⁷ A sheriff cannot be a justice of peace, or a member for the county.

¹ Watson's Sheriff, 1, 2; 5 Chitty's Burn. J. 493.

² Dalton, 23; Watson, 4, 6.

³ 5 Chit. Burn. J. 494; Watson, 4.

⁴ Earl Shrewsbury's case, 9 Co. Rep. 46; Moor. 111; Saville, 43; Watson, 5.

⁵ 4 Burr. 2109.

⁶ 1 Ric. II. c. 11.

⁷ 2 T. R. 731; 1 B. & C. 585.

The endeavour to take a grant of the office for an estate for years, or greater estate, wholly incapacitates the party.¹ Dissenters are disabled.² A party capable, and not exempted from taking the office, is, on refusal to do so, liable to an information in the Queen's Bench.³

The office lasts only for a year, but may be sooner determined by the queen, though it continues till a successor is appointed in all cases, except the sheriff's own death; and so on the demise of the crown it determines, but he continues to hold it till a successor is named.

How chosen.—At common law the sheriff was chosen by the county; but by the 14 Edw. III. stat. 1. c. 7, he is to be appointed yearly on the morrow of All Souls (now, by 24 Geo. II. c. 48, on the morrow of St. Martin) at the exchequer, by the chancellor, treasurer, and chief baron, taking to them the chief justices. Each of the three first-named officers pricks with a pin the name of one person (hence the term *pricking for sheriffs*), and from the three so named the crown chooses one.⁴ Without this ceremony the crown has no power to make a compulsory appointment. In Durham, while the palatine jurisdiction of that county was in the bishop, the bishop appointed the sheriff, not annually, but during pleasure; and the bishop's death, as in other counties the demise of the crown, determined the office. By 1 Wm. & Mary, c. 27, § 4, the nomination of sheriffs in Wales was in the justices of Great Sessions; but, the Welsh judicature being abolished by the 1 Wm. IV. c. 70, their nomination, like that of other sheriffs, is now in the exchequer. In Westmoreland the appointment is hereditary in the Thanet family. In many cities and towns which are counties of themselves, they have particular modes of appointing sheriffs; and in these places the power of the sheriff of the county at large ceases. The shrievalty of London and Middlesex is vested by charter in the city of London, and two persons are usually appointed, who are styled the *sheriffs* of London, though they both make but one *sheriff* of Middlesex. A writ, therefore, addressed "To the *sheriffs*" cannot be executed in Middlesex, nor can a writ addressed "To the *sheriff*" be executed in London.⁵

For all counties in England and Wales (except the county palatine of Lancaster) the sheriff now, by 3 & 4 Wm. IV. c. 99, takes his appointment by its notification in the London Gazette, and a warrant under the hand of the clerk of the privy council (a copy of which is to be enrolled with the clerk of the peace for the county), without the necessity for any patent, writ of assistance, or giving bond with sureties, as were formerly required. The sheriff must then take an oath to execute all his duties; which oath (except in the case of the sheriffs of London and Middlesex and their under-sheriffs) is to be fairly written on parchment (without a stamp), signed by him, and sworn before one of the barons of the exchequer, or a justice of peace of the county; it is then filed by the clerk of the peace among the records of his office, who is entitled to the fee of 5s. for so doing. The old sheriff turns over to the new one all writs and process unexecuted, and also all prisoners in his custody. For this purpose the outgoing sheriff must make out and deliver to the in-

¹ 23 Hen. VI. c. 8.

² Harrison v. Evans, 2 Burn. Eccl. L. 185; Bro. P. C. 181.

³ 5 Chit. Burn. J. 495; 2 T. R. 781.

⁴ Impey's Sheriff, 9.

⁵ Watson, 11.

coming sheriff a true and correct list and account, with all such particulars as are necessary to explain the several matters; and the incoming sheriff signs a duplicate thereof, which is as sufficient a discharge to the outgoing sheriff as if they had been turned over by indenture and schedule, and a writ of discharge &c. issued, as formerly required.

Writs coming from the old sheriff's hands must be executed, and returns made thereto, by the new one; but the old sheriff is in some cases still liable to be called on for past matters:¹ steps, however should be taken against him within six months from the end of his serving.

The sheriff cannot let or farm out his bailiwick;² but he may appoint certain officers to act under him, without taking any profit for so doing,³ except in London, Middlesex, Durham, and Westmoreland.⁴

By 3 & 4 Wm. IV. c. 42, § 20, the sheriff of each county in England and Wales shall severally name a sufficient *deputy*, who shall be resident or have an office within one mile from the Inner Temple Hall, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders to be made on or touching the execution of any process or writ to be directed to such sheriff.

UNDER-SHERIFF.

The office of under-sheriff is likewise a very ancient one. Formerly he was appointed by deed under the seal of office; though if by parol, it was sufficient. But by 3 & 4 Wm. IV. c. 99, the sheriff is directed to appoint him by writing under his hand without stamp within one month after his own appointment, and transmit a duplicate to the clerk of the peace, to be filed among the records of the county, for which a fee of 5s. is paid by the under-sheriff. He takes an oath (similar to the sheriff's) for due performance of his duty.⁵

He executes in the name of the sheriff all the powers of the sheriff, except his judicial acts, as writs of re-disseisin, of inquiry, of waste, of partition, and of admeasurement of dower and pasture. But, except as to these, the sheriff must depute the *whole* of his office, or no part of it.⁶

All acts of the under-sheriff must be done in the name of the high sheriff; and by them the high sheriff is bound, and is alone responsible to any party injured thereby. But, as between the high and the under-sheriff, the former may require the latter to give security for the due performance of his office, and has his remedy thereon against him. This security is usually entered into at the time of the appointment, when it is usual for the sheriff to execute a deputation to the under-sheriff to fill his office, and a power of attorney for the under-sheriff to receive the prisoners from the late sheriff, and execute a counterpart of the assignment of the gaol, and also to execute a letter of attorney empowering the under-sheriff or his agent to receive the sum of money appointed to be paid under the 4 Geo. I. c. 16.

The appointment of the under-sheriff lasts only during the pleasure of the high sheriff. If the high sheriff is discharged, the under-sheriff ceases to hold office. But if the high sheriff dies, the under-sheriff retains office till a successor is appointed, and is answerable for the due execution of the office during the interval.

¹ Watson, 21.

² 4 Hen. IV. c. 5; 23 Hen. VI. c. 9.

³ 4 Geo. I. c. 15, § 10.

⁴ Id. § 19.

⁵ Id. § 21.

⁶ Watson, 31.

BAILIFFS, AND SHERIFF'S OFFICERS.

Bailiffs are of several kinds.

There are, first, *bailiffs of franchises*. In many hundreds and other districts, private persons or bodies politic have the return of writs to be executed therein. This franchise exists either by grant or prescription; and where the bailiff of a franchise has the return of writs within his liberty, he has also the execution of such writs as are incident thereto.

Secondly, there are *perpetual bailiffs*, or *bailiffs in fee*, who have by charter or prescription the execution only of writs within a particular district. These are different from the bailiffs of franchises just spoken of; for these have not the return of writs, but the sheriff must make the return to a writ executed by such bailiffs.

Thirdly, the ordinary officers of the sheriff, who are called *bound bailiffs*, being bound in an obligation for the due execution of their office to the sheriff, who is responsible for their acts.

Fourthly, when a person is appointed merely for the execution of a particular writ at the instance of the plaintiff, he is called a *special bailiff*. In this case the sheriff's responsibility to the plaintiff ceases; though after the arrest is made, and the defendant is placed in the sheriff's custody, he is answerable for him.

A sheriff's officer cannot be an attorney, nor bail in any action.

If any sheriff, under-sheriff, bailiff of a liberty, or his deputy, or other sheriff's bailiff, wilfully delay the execution or return of any process or execution, or take or require any undue fees for the same, or give notice to the defendant in order to frustrate the execution of any process or writ, or, having levied money, detain it in his hands after the return of the writ, he is liable to an attachment, &c.

By 5 & 6 Vic. c. 98, § 31, no poundage shall be payable to sheriffs, bailiffs, or others for taking the body of any person in execution, but such fees only, to the sheriff or other person having the return of writs, as are allowed under the sanction of the judges, pursuant to 1 Vic. c. 55. See *post*, 180.

And by the same act, if any debtor in execution escape out of legal custody, the sheriff, bailiff, or other person having the custody of such debtor, shall be liable only to an action on the case for the damages sustained by the person at whose suit such debtor was taken or imprisoned, and not to an action of debt in consequence thereof.

Bailiffs are sometimes punished summarily by the courts, either on petition or motion. If the sheriff be damnified, he has his remedy on the bailiff's bond.¹

GAOLERS.

In every county there is one gaol for debtors, and another for criminals, both of which are under the care of the sheriff, who appoints the gaolers during his pleasure. The sheriff is, in general, liable for the escape of a prisoner; but there are cases in which the gaoler only is liable.

The gaoler should be required by the sheriff to give bond for the due performance of his office, and against escapes.

¹ Watson, 34—39; Chitty's Stat. 53.

The gaoler is bound to receive a party from the sheriff, whether the arrest is legal or not.

If the sheriff directs a writ of *habeas corpus* to the gaoler and another party to execute, and the custody of the prisoner is entrusted to the other party, and an escape happens, the gaoler is not liable to the sheriff under his bond.¹

By 8 & 9 Wm. III. c. 37, § 8, if the gaoler, after one day's notice, refuse to show any prisoner to his creditor or his attorney, it is deemed an escape. And by § 9 of that act, and 6 Geo. IV. c. 16, § 38, if a gaoler connive at an escape, he is liable to a penalty of 500*l.*, and is for ever after incapable of being a gaoler. By 19 Hen. VIII. c. 10, the negligent escape of a party indicted for high treason subjects the gaoler to the penalty of 100 marks at the least; if committed on suspicion of high treason, 40*l.*; if indicted for murder or petty treason, 20*l.*; if on suspicion of these, or indicted for any other felony, 10*l.*; and if not indicted, 5*l.* If the gaoler is not able to pay the penalty, the sheriff is liable.

The gaoler is bound to use sufficient force for the preservation of the gaol, but must not use unnecessary coercion towards the prisoners. And it has been held, that if a gaoler confine a prisoner against his will with another afflicted with an infectious disorder, wherefrom death ensues, it is murder.

If the gaoler take any bond from a prisoner for greater ease or favour than other prisoners, or tending to the commission of any illegal act, it is void.

It is a misdemeanor, punishable by fine and imprisonment, if the gaoler take any illegal fee on the entrance, commitment, or discharge of a prisoner, or detain him for nonpayment of any fees; he is also thereby rendered incapable of holding his office.

OF THE EXECUTION AND RETURN OF WRITS IN GENERAL.

The execution of writs from the superior courts of law formerly constituted a much larger share of the sheriff's ministerial duties than it does at present. By recent enactments of the legislature a great portion of this department of his official business has been almost entirely swept away: we allude to the alterations which have taken place in the law of arrest upon mesne process, and the abolition of imprisonment for debt, even upon execution, when the sum recovered does not exceed *twenty pounds* exclusive of costs. A brief summary of these important alterations and the additional remedies provided for creditors in lieu of the power of imprisonment thus taken away, will form a necessary introduction to the subject before us.

Abolition of Arrest on Mesne Process.—The 1 & 2 Vic. c. 110, after reciting that "the power of arrest on mesne process is unnecessarily extensive and severe, and ought to be relaxed," enacts, "That from and after the 1st October, 1838, no person shall be arrested on mesne process in any civil action in any inferior court whatsoever, or (*except in the cases and in the manner hereinafter provided for*) in any superior court." And, by sec. 2, "That all personal actions

¹ Ryland v. Lavender, 2 Bing. 65.

in her majesty's superior courts of law at Westminster shall be commenced by writ of summons."

The excepted case, and the manner of proceeding therein, are then given in the third and following sections, as follows:—

"If a plaintiff in any action in any of her majesty's superior courts of law at Westminster, in which the defendant is now liable to arrest (whether upon the order of a judge or without such order), shall, by the affidavit of himself or of some other person, show, to the satisfaction of a judge of one of the said superior courts, that such plaintiff has a cause of action against the defendant or defendants to the amount of *twenty pounds* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant, or any one or more of the defendants, is or are about to quit England unless he or they be forthwith apprehended, it shall be lawful for such judge, by a special order, to direct that such defendant or defendants so about to quit England shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt or damages. And thereupon it shall be lawful for such plaintiff, within the time which shall be expressed in such order, but not afterwards, to sue out one or more writ or writs of *capias* into one or more different counties, as the case may require, against any such defendant so directed to be held to bail; which writ of *capias* shall be in the form contained in the schedule to this act, and shall bear date on the day on which the same shall be issued.

"And the sheriff or other officer to whom any such writ of *capias* shall be directed shall (within one calendar month after the date thereof, including the day of such date, but not afterwards) proceed to arrest the defendant thereupon. And such defendant, when so arrested, shall remain in custody until he shall have given a bail bond to the sheriff, or shall have made deposit of the sum indorsed on such writ of *capias*, together with ten pounds for costs, according to the present practice of the said superior courts; and all subsequent proceedings as to the putting in and perfecting special bail, or of making deposit and payment of money into court instead of putting in and perfecting special bail, shall be according to the like practice of the said superior courts, or as near thereto as the circumstances of the case will admit.

"Any such special order may be made, and the defendant arrested in pursuance thereof, at any time after the commencement of such action and before final judgment obtained therein; and a defendant in custody upon such arrest, and not previously served with a copy the writ of summons, may be lawfully served therewith.

"It shall be lawful for any person arrested upon any such writ of *capias* to apply, at any time after such arrest, to a judge of one of the superior courts at Westminster, or to the court in which the action shall have been commenced, for an order or rule on the plaintiff to show cause why the person arrested should not be discharged out of custody. And it shall be lawful for such judge or court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such other order therein as shall seem fit. Provided, that any such order made by a judge

may be discharged or varied by the court, on application made thereto by either party.

The act, having thus in a great measure abolished arrest on mesne process, proceeds to give more effectual remedies to creditors to obtain satisfaction from the property of their debtors when they have succeeded in getting judgment against them. With this view additional efficacy is given to the writs of *fiery facias* and *elegit*, and to the judgments, orders, and decrees of the superior courts. By the writ of *fiery facias* the sheriff is now empowered to take money, bank notes, bills of exchange, and other securities, which were not formerly seizable under that writ; and under a writ of *elegit* he is enabled to take the whole of the debtor's real property, instead of a moiety only as theretofore, and copyhold lands as well as others, subject to such account in the court out of which the writ is issued as a tenant by *elegit* was before subject to in a court of equity. Protection, however, is given to such purchasers, mortgagees, and creditors, as had become such before the commencement of the act (1st October, 1838), who remain subject to the old law. Then as to judgments of the superior courts, these are made to operate as a charge upon all the real estate (including copyholds) of the debtor, whether in possession, reversion, remainder, or expectancy, and the judgment creditor has the same remedies in equity as if a charge on such estates had been made by the debtor in writing. But he cannot proceed to obtain the benefit of such charge until one year after judgment has been obtained; and in case of the bankruptcy of the debtor, the judgment creditor will have no preference, unless his judgment has been entered up a year before the bankruptcy. It is also provided that the doctrine of courts of equity, which affords protection to purchasers for valuable consideration *without notice*, shall not be affected by this act. After judgment, stock in the public funds, and shares in public companies, belonging to the debtor, may be charged by an order of a judge; which order will operate as a *distringas*; but no proceedings can be taken to have the benefit of such order until after six months. All judgment debts are made to bear interest at four per cent. Orders and decrees of superior courts of law and equity for payment of money or costs, charges, or expenses, have the same effect given them as judgments. But neither such orders or decrees, nor any judgments, will affect real estate as to purchasers, mortgagees, or creditors, *until they have been registered* with the senior master of the Court of Common Pleas at Westminster. And if any judgment creditor having obtained, or become entitled to the benefit of any security whatsoever, shall, before the security be realized, arrest the person of the debtor, he thereby relinquishes his security. The judgments of inferior courts may be removed into a superior court, and thus become of the same efficacy as if originally of such superior court; but they will not affect lands &c. as to purchasers, mortgagees, and creditors, until execution be lodged with the sheriff.

Such are the principal provisions of this act (the remaining clauses relating solely to the Court for the Relief of Insolvent Debtors); and, to carry them into effect, the judges of the courts of law and equity were empowered to sue out new, or alter existing writs, to be executed in the same manner as writs of execution were previously enforced.

Abolition of Imprisonment for Debt under Twenty Pounds.—By another of the statutes above referred to, the power of imprisonment for debt has been still further restricted, being taken away, even *after judgment*, in all cases *where the sum recovered does not exceed twenty pounds* exclusive of the costs, except where the debt has been incurred under circumstances of fraud, &c.

The 7 & 8 Vic. c. 96, § 57, reciting that “it is expedient to limit the power of arrest upon *final process*,” enacts, “That from and after the passing of this act (9th August, 1844) no person shall be taken or charged in execution upon any judgment obtained in any of her majesty’s superior courts, or in any county court, court of requests, or other inferior court, in any action for the recovery of any debt wherein the sum recovered shall not exceed the sum of £20, exclusive of the costs recovered by such judgment.”

By the 59th section, however, a power is reserved, to the judge trying the cause to award imprisonment under certain circumstances of fraud. “Provided, that if it shall appear to the judge who shall try such cause (being either a judge of one of the superior courts, or a barrister, or attorney at law), that the defendant, in incurring the debt or liability which may be the subject of demand, has obtained credit from the plaintiff under false pretences, or with a fraudulent intent, or has wilfully contracted such debt or liability without having at the time a reasonable assurance of being able to pay or discharge the same, or shall have made or caused to be made any gift, delivery, or transfer of any personal property, or shall have removed or concealed the same, with an intent to defraud his creditors or any of them, it shall be lawful for such judge, if he think fit, to order that such defendant may be taken and detained in execution upon such judgment in like manner and for such time as he might have been if this act had not been passed, or for any time not exceeding six calendar months in any case in which the time for which a person taken in execution under process issuing out of any such court could lawfully be detained in custody, according to the constitution of the said court, before the passing of this act, is less than six calendar months, whether or not execution against the goods and chattels of such defendant shall have issued as hereafter provided.”

Sec. 60, When the judge shall have made an order for the payment of money, the amount shall be recoverable, in default of payment forthwith or at the times thereby directed, by execution against the goods and chattels of the party; and the clerk of the court shall issue a writ of *fiери facias* as a warrant of execution to one of the bailiffs of the court, who shall be empowered to levy, by distress and sale of the goods and chattels of such party within the jurisdiction of the court, such sum of money, and also the costs of the execution.

Sec. 61, If the judge shall have made an order for payment by instalments, execution shall not issue until after default in payment of some instalment; and execution, or successive executions, may then issue for the whole of the said sum and costs remaining unpaid, or for each successive instalment and costs remaining from time to time unpaid, as the judge shall order, either at the time of making the original order or at any subsequent time.

Sec. 62. If it appear to the satisfaction of the judge, by the oath or affirmation of any person or otherwise, that a defendant is unable, from sickness or unavoidable accident, to pay the debt or damages recovered against him, or any instalment thereof, it shall be lawful for the judge, in his discretion, to suspend or stay any judgment, order, or execution for such time as he shall think fit, and so from time to time until it shall appear, by the like proof as aforesaid, that such temporary cause of disability has ceased.

Sec. 63. In or upon every such warrant of execution the clerk of the court shall cause to be inserted or indorsed the sum of money and costs adjudged, with the increased costs allowed for such execution; and if the party shall, before an actual sale of the goods and chattels, pay or cause to be paid or tendered unto the clerk of the court, or to the bailiff holding the warrant of execution, such sum of money and costs, or such part thereof as the person entitled shall agree to accept in full of his debt or damages and costs, together with such fees as have been lawfully incurred by him in the suit, the execution shall be superseded.

But these provisions having been found ineffectual for the protection of creditors, the 8 & 9 Vic. c. 127, intituled "An act for the better securing the payment of small debts," enacts, Sec. 1, "That if any person is or shall be indebted to any other in a sum not exceeding twenty pounds besides costs of suit, by force of any judgment obtained, or of any order for the payment thereof or of any costs, in any court of competent jurisdiction, it shall be lawful for the creditor to obtain a summons from any commissioner of the Court of Bankruptcy for the district in which such debtor shall reside or be, or from any court of requests or conscience or other court for the recovery of small debts within the jurisdiction of which such debtor shall reside or be. And the debtor appearing at the time appointed shall be examined by the said commissioner or court; and shall, if the creditor think fit, be interrogated before such commissioner or court by the creditor summoning him, touching the manner and time of his contracting the debt,—the means or prospect of payment he then had,—the property or means of payment he still hath or may have,—the disposal he may have made of any property since contracting such debt. And such creditor shall also, if such commissioner or court think fit, be examined by the said commissioner or court touching his claim against the said debtor, and shall, if the debtor think fit, be interrogated by the said debtor touching his said claim against him. And it shall be lawful for such commissioner or court to make an order on the said debtor for the payment of his debt by instalments or otherwise. And in case such debtor shall not attend as required by the said summons, and shall not allege a sufficient excuse for not attending,—or shall, if attending, refuse to disclose his property, or his transactions respecting the same, or respecting the contracting of the debt, or shall not make answer thereof to the satisfaction of the commissioner or court,—or shall appear to such commissioner or court to have been guilty of fraud in contracting the debt, or of having wilfully contracted it without reasonable prospect of being able to pay it, or of having concealed or made away with his property in order to defeat

his creditors,—or if he appears to have the means of paying the same by instalments or otherwise, and shall not pay the same at such times as the commissioner or court shall order, or as the court shall have ordered in which the original judgment shall have been obtained or order made,—then, in any of the said cases, it shall be lawful for such commissioner, or the judge of such court, to order such debtor to be committed for any time not exceeding forty days to the common gaol wherein the debtors under judgment and in execution of the superior courts of justice may be confined within the county, city, borough, or place in which such debtor shall be resident, or to any other gaol or debtors prison within the same county, city, borough, or place, which shall by any declaration of one of her majesty's principal secretaries of state be allowed as a place of imprisonment under this act, so long as such declaration shall remain in force and unrevoked.

And by sec. 2, Every bailiff and messenger to whom any such order shall be issued, or who shall be acting as an officer of the high bailiff of Westminster or Southwark in the execution of any such order issued to such high bailiff, shall be thereby empowered to take the body of the person against whom such order shall be made; and all constables and other peace officers within their several jurisdictions shall aid in the execution of every such order. And no protection, or interim or other order issuing out of any court of bankruptcy or for the relief of insolvent debtors, nor any certificate, obtained after such order for imprisonment under this act, shall be available to any debtor imprisoned under such order as aforesaid.

And by sec. 3, No imprisonment under this act shall in any wise operate as a satisfaction or extinguishment of any debt or demand. But any person imprisoned under this act who shall have paid or satisfied the debt or demand, or the instalments thereof payable, and costs remaining due at the time of the order of imprisonment being made, and all subsequent costs, shall, upon entry of such payment indorsed on the order of imprisonment, signed by the plaintiff or his attorney, be discharged out of custody by leave of the commissioner or judge of the court in which the order of imprisonment was made.

Provisions to the same effect are also contained in the New County Courts Act, 9 & 10 Vic. c. 95; the before-mentioned acts being repealed so far as they relate to or affect the jurisdiction and practice of such courts, or give jurisdiction to any court or to any commissioner of the Court of Bankruptcy with respect to orders or judgments obtained in any court so established or ordered to be holden as a county court; but to these we shall refer hereafter.

Another amelioration in the law as to executions, which was effected by one of the acts above referred to, may here also be noticed. The 8 & 9 Vic. c. 127, § 8, reciting that "it is expedient to protect the actual necessities of or belonging to judgment debtors from being seized in execution," enacts, "That from and after the passing of this act the wearing apparel and bedding of any judgment debtor or his family, and the tools and implements of his trade, (such wearing apparel, bedding, tools, and implements not exceeding in the whole the value of five pounds) shall not be liable to seizure under any execution or order of any court against his goods and chattels."

With respect to the *costs* of executions from Small Debts courts, the 7 and 8 Vic. c. 96, § 66, enacts, "That every sale of goods which shall be taken in execution under process issuing from any such court for the recovery of small debts, shall be taken to be within all the provisions of the 7 & 8 Geo. IV. c. 17 (for extending the provisions of the 57 Geo. III. c. 93, regulating the costs of certain distresses);" that is, the costs of the execution shall be the same as a distress for rent not exceeding twenty pounds, under the penalties provided for taking more than the sums allowed in the last-named act. (See *post*, p. 362.)

And to prevent, as far as possible, the executions of creditors being defeated by collusion between debtors and their landlords, it is enacted by sec. 67, "That no landlord of any tenement let at a *weekly* rent shall have any claim or lien upon any goods taken in execution under the process of any court of law for more than four weeks arrears of rent. And if such tenement shall be let for any other term *less than a year*, the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment." A similar provision is contained in the 9 & 10 Vic. cap. 95, as to executions issuing out of the courts established under that act, but restricting the landlord's lien to *two* such terms or times of payment when the tenement is let for any term longer than a week and less than a year.

And with respect to claims on the part of landlords or other parties, in the case of executions from Small-Debt courts, it is further provided by sec. 68, "That if any claim shall be made to or in respect of any goods or chattels taken in execution under the process of any court for the recovery of small debts, or in respect of the proceeds or value thereof, by any landlord for rent, or by any person not being the party against whom such process has issued, it shall be lawful for the clerk of the court out of which such execution issued, upon application of the officer charged with the execution of such process, either before or after any action brought against such officer, to issue a summons calling before the court out of which such execution issued both the party issuing such process and the party making such claim; and thereupon any action which shall have been brought in any of her majesty's superior courts at Westminster, or in the Court of Common Pleas at Lancaster, or in any local or inferior court, in respect of such claim, shall be stayed; and the court in which such action shall have been brought, or any judge thereof, on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party bringing such action to pay the costs of all proceedings had upon such action after the issue of such summons. And the judge of the court for the recovery of small debts out of which such execution issued shall adjudicate upon such claims and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him shall seem fit; and such order shall be enforced in like manner as any order made in any suit brought in such court." This provision also is repeated in the County Courts Act.

Execution of Writs.—All writs (except those to be executed in the county palatine of Lancaster) are directed to the sheriff of the county, or if he be a party, to the coroner, or to the co-sheriff if there are two. The sheriff is a mere ministerial officer in the execution of writs, and must execute them without looking to their legality, unless it is evident that the court issuing them has no jurisdiction. Though the defendant is misnamed, the sheriff should execute the writ, if a *ca. sa.*, but not on mesne process.

The sheriff usually executes the writ by the under-sheriff. As soon as the writ is delivered at the sheriff's office, the under-sheriff makes out a warrant to bailiffs for its execution.

An arrest is constituted by the slightest touch of the officer, or the slightest act of detainer; but not by words alone, unless the party so arrested acquiesce, or in any degree act in conformity therewith. The bailiff need not show his warrant, but ought to declare its contents. The officer to whom the writ is addressed need not himself actually make the arrest, provided he be acting in it. If the defendant be already in custody, he is detained by merely lodging a writ in the hands of the sheriff; and he cannot be discharged, without satisfying the second as well as the first cause of his confinement.

In writs upon *extents* or the like, or on a *capias utlagatum*, or on a writ of seisin or *habere facias possessionem*, the bailiff may break open outer as well as inner doors; but on any other civil process he can only break open inner doors, when he has gained admittance through the outer one. He cannot execute a writ out of the county; nor on a Sunday, except in cases of treason, felony, or breach of the peace. An arrest on a Sunday is absolutely void, and cannot be rendered good by any waiver of the parties. But on an escape, a party may be retaken on a Sunday; though not where the escape has been voluntary.

Ruling the Sheriff to make a Return of the Writ.—Regularly, the sheriff should make his return to every writ, though it is not usual to do so in every case, unless he is *ruled* for that purpose. There must, however, be a return to the writ of *elegit*.

If the sheriff take bail on the execution of the writ, and the plaintiff object to accept the bail, the proceeding can only be against the sheriff, and he may rule him to return the writ; but not where he accepts the bail. The sheriff may be ruled at any time within six lunar months from the time of his being in office; and if he disobey, an attachment will issue against him.—20 Geo. II. c. 27.

The return is made by the under-sheriff in the name of the high sheriff, upon the back of the writ. It must be certain, and a complete answer to the command of the writ; but if informal, may be aided by the appearance of the party, or may in some cases be amended. Sometimes the sheriff is allowed to make an excuse for not returning the writ; as, "*tarde*," when the writ reached him too late for execution before the day of its return; "*languidus*," where the defendant is too ill to be removed; "that the party has privilege of peerage or parliament;" or, that the defendant was rescued." A return is also good, where the defendant resides in a particular franchise, that the sheriff has commanded the bailiff to execute the writ, *mandavi ballivo*.

Sheriff's Duty upon Arrest.—When an arrest has taken place, the sheriff is bound to have the defendant at the return of the writ: he must therefore keep him in close custody, unless sufficient bail be tendered, or he deposit money in lieu of bail.

When the sheriff takes bail, a bond (without stamp) is entered into with two sureties to the sheriff, conditioned for the appearance of the defendant at the return of the writ. This is prepared by the sheriff's officer, who is entitled to a fee in proportion to the amount of the debt. After its execution, and allowing a reasonable time to see that there are no other detainers against him, the defendant, on payment of all fees, of bail bond, &c. must be discharged. The sheriff, on request of the plaintiff, is bound to assign this bond to him, unless the defendant has rendered in discharge of his bail, or the plaintiff has ruled the sheriff to return the writ.

By the assignment the sheriff is altogether discharged, and the plaintiff may sue on the bond in the same manner as the sheriff might have done if the bond had not been assigned, and he had been obliged, by reason of the defendant not being forthcoming, to pay the debt. The action on it must in general be brought in the court out of which the writ in the first instance issued; and the parties cannot be holden to bail. Upon the bond the sureties are liable to pay the whole penalty, though beyond the sum sworn to, but the court will not countenance several actions against each party to it.

Ruling to bring in the Body.—The sheriff having arrested the party, returns *cepi corpus et paratum habeo*; and if the defendant be at large and no bail be put in, or if bail be put in and they have not justified, the sheriff may be ruled to bring in the body, and, on failure within a certain time, may be fixed with debt and costs upon attachment.

Outlawry.

The word *utlagatus*, or *outlan*, is derived from the Saxon *laga*, which signifies *law*; and a person outlawed signifies one that is out of the protection of the law.

At common law, whenever a party was liable to arrest, he was, if the intermediate process was unsuccessful in taking him, liable to be outlawed; but not otherwise. The punishment, for some time after the conquest, was death. A man cannot now be outlawed on an action or indictment originating in any statute, unless it be expressly or impliedly provided for by the statute.

Women are not said to be *outlawed*, but *waived*. An infant under twelve years of age cannot be outlawed. A peer or member of parliament can only be outlawed on indictment.

After *non est inventus* returned upon a *capias*, the first writ is *exigi facias*. This is directed to the sheriff, to cause the defendant to be demanded from county court to county court, to the number of five. In civil causes, before judgment, the processes of *alias* and *pluries capias* issue before the *exigent*. In addition to the *exigent*, a writ of *proclamation* is also issued, having the same teste and return as the *exigent*; and if the defendant reside in a different county from that into which the *exigent* issued, the writ is called a *foreign proclamation*. By this writ the sheriff is required to make three proclamations: *one* in the

open county court; *another* at the general quarter sessions of the peace; and a *third*, one month at the least before the *quinto exactus*, or fifth demand under the writ of exigent, at the church door of the defendant's parish, immediately after divine service. In criminal cases, after conviction, no proclamation is necessary. If the defendant be neither arrested or appear, after being five times demanded, if a man he is *outlawed*, and if a woman she is *waived*, by the judgment of the coroners of the county court, or of the recorder in London, and such judgment is returned by the sheriff upon the exigent.

After the return of the writ of *exigi facias*, the next process is *capias utlagatum*. In executing this, the officer may break open outer as well as inner doors, to take the defendant or his goods. It may be executed in any franchise without a mandate to the sheriff; but in civil cases it cannot be executed on Sundays.

The death of the defendant determines the outlawry. But if a woman is waived, and then marries, the writ must still be executed. If the defendant become bankrupt after outlawry and obtain his certificate, though the debt is barred, yet the writ must proceed; but if he be attending before the commissioners on his examination, he is, for the benefit of his creditors, privileged from arrest, and cannot be arrested during that attendance, even on a *capias utlagatum*.¹

Formerly an outlaw was placed so completely out of the law, that any person might with impunity kill him; but this has long been abolished. However, he is still debarred from being plaintiff in any action or relator in an information in chancery; and, as he can have no property to qualify him, he cannot be a juror; but he may be a witness, which is for the benefit of public justice, not for his own. He may also make a will. Outlawry, however, is no objection to any application by him tending to the reversal of it.²

Habeas Corpus.³—The statutes 21 Car. II. c. 3, and 56 Geo. III. c. 100, give this most highly remedial writ. Under the former act, in criminal proceedings, a prisoner (except in cases of treason or felony) may have this writ issued to the sheriff, commanding him to bring him up to the court issuing the process under which he is committed, in order to ascertain whether the commitment be just or not; and if within 20 miles of town, the sheriff is bound to bring up the party within three days; if above 20 and under 100 miles, within ten days; and if above 100, within twenty days. But the prisoner must tender to the sheriff 12*d.* per mile, and give his bond to pay the charges of his return to prison, in case he should be remanded.

This writ is issuable and returnable in vacation as well as in term time, unless two terms have elapsed since the commitment. In case of disobedience by the sheriff and his officers, heavy penalties are imposed. Persons once liberated are not to be recommitted for the same offence by any person, unless by order of the court. And persons committed for high treason or felony must be indicted during the next term, or let out on bail and tried the term after, or discharged. Prisoners cannot, except in certain cases, be removed from gaol except by this writ.

¹ Exp. Helsby, 1 Dea. & Ch.

² 5 Chit. Burn. J. 238—241; Chit. Eq.

Ind. 726.

³ As to this writ in general, see 2 Chit.

Burn. J. 1077; 1 Chit. Crim. Law. 117—132; Com. Dig. tit. *Hab. Corp.*; Bac. Ab. tit. *Hab. Corp.*; Chit. Eq. Ind. tit. *Prac. tice, Hab. Corp.*, and *Prac. Writ. 7.*

The 56 Geo. III. c. 100 gives power to the judges to issue this writ in other than criminal cases in the vacation, and makes disobedience of it a contempt of court. The judges may, if they see fit, make the writ issued in vacation returnable in the next term; but if issued in term, it must at all events be returnable in the ensuing vacation, if not sooner. And, by § 6, process of contempt may issue in the vacation against persons disobeying the writs under 31 Car. II. Lord Eldon had considerable doubts on this subject.¹

The writ is obtained on affidavits other than the prisoner's, and is discretionary in the court. The application must be in writing, attested and subscribed by two witnesses; and a copy of the warrant of commitment must be produced before the court or judge, or an oath made that such copy was refused.² Ill health is not sufficient ground for the writ.³ Nor can a party committed by order of the House of Commons be brought up on habeas corpus.⁴

In term time it must be moved for by counsel either in the courts of Chancery, Queen's Bench, Common Pleas, or Exchequer; and in vacation, the chancellor, or one of the judges, may be applied to by the party's attorney or counsel. The judge granting the application issues his fiat, and subscribes the writ.⁵

The writ is to be served as directed by the 31 Car. II. c. 2, § 2. The officer to whom the writ is directed then returns the writ, certifying the date and cause of the arrest, and of the detainer or other cause for not bringing up the individual.

In criminal cases, together with this, another writ called the *certiorari* is usually issued, directed to the magistrate who committed the party, whereby the examination and depositions on which the commitment took place are placed in the power of that tribunal which is to judge of the correctness of such commitment. If the commitment were by a court of competent authority, the return should state that fact. The neglect to make a return is punishable by attachment, or by action at the suit of the prisoner, or by indictment.

Upon the return, the prisoner's counsel may move to file it, and to have the prisoner called into court, and the return read, and afterwards may argue for the prisoner's discharge. When the court thinks, upon hearing affidavits, that there is probable cause for his discharge, or being bailed for felony, if he is unable to pay the expence of being brought to London, the court will allow him to be bailed before a magistrate in the country. If the court determines on the release of a party, it requires him to enter into a recognizance to appear at the trial.⁶

In cases of smuggling and offences against the customs, no habeas corpus can be granted unless the objections to the proceedings are stated. 3 & 4 Wm. IV. c. 53, § 90.

This writ also issues at the instance of other parties. Thus, where the defendant is in custody, and, on a bill filed in chancery, it becomes requisite to compel him to answer it, a *habeas corpus ad respondendum*

¹ Crowley's Case, 2 Swan. 1.

² Huntly v. Lucombe, 2 Bos. & P. 530.

³ 1 Stra. 4, 5; 1 Leach, C.L. 117.

⁴ Burdett v. Abbott, 14 East, 1.

⁵ 5 Chit. Burn. J. 1084.

⁶ 2 Chit. Burn. J. 1077—86; and see, as to the amount of this, id. 1085; and id. tit. *Bail*.

issues, in order to bring him into court and turn him over to the Fleet Prison if he persist in refusing to answer; and at common law this was necessary in order to declare against him in one court when he was a prisoner as of another; but this seems no longer requisite. It is also *ad satisfaciendum*, which is used where a judgment in the Queen's Bench has been pronounced against him, and he is in custody of another court, and it is sought to charge him in execution under that judgment; or *ad faciendum et recipiendum*, which is usually called *cum causâ*, and signifies a writ whereby a prisoner in custody of the sheriff or in the prison of an inferior court, may be removed into the custody of the marshal; in which case the cause under which he was first detained is removed into the superior court. There is also another, called *ad testificandum*, which is for the purpose of bringing up a prisoner to act as a witness in any other cause.

Writ of Fieri Facias.—This is a writ issued at the instance of a party who has recovered judgment for a debt, commanding the sheriff to levy the amount of the debt or damages upon the goods and chattels of the defendant. It closely resembles, in execution, the common distress for rent or taxes. In executing it, the sheriff's officer seizes part of the goods in the name of the whole; and he must continue in possession thereof, or else another person may get possession by another writ. To get possession, he cannot break open the outer door of the defendant's house, although he may that of another, if the goods are clandestinely removed there.¹ But once in, he may break open inner doors or chests; and he may do so to detached buildings, as, for instance, a barn door, without even demanding admission previously. In case of excess of duty, the sheriff is liable to an action; but the seizure remains good. He must seize the goods before the return of the writ.

The goods of certain persons are privileged from this seizure, as those within a royal palace; those of an ambassador and his servants, &c. So, in effect, are those of a certificated bankrupt or a discharged insolvent, if the debt is barred by either process; but the sheriff is not bound to take notice of these latter privileges.

The property in the goods passes to the sheriff when the writ is delivered to him, and therefore any subsequent disposition of them, except in market overt, is void. It seems that if an *extent* issue at the suit of the crown against the defendant's goods after the *fi. fa.* is executed, but before they are sold, the extent has the preference.

The sheriff cannot seize the whole wearing apparel of the defendant, but must leave sufficient for his clothing. Nor can he take an estate of freehold; though he may a lease for years, it being but a chattel interest. Neither, until the recent act, 1 & 2 Vict. c. 110, could the sheriff, under this writ, take money, bank notes, bills of exchange, promissory notes, bonds, specialties, &c. But now, by section 12 of this act, it is enacted, "That by virtue of any writ of *fieri facias* to be sued out of any superior or inferior court after the time appointed for the commencement of this act, or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank notes (whether of the Bank of England or of any other bank or bankers), and any cheques, bills of exchange, pro-

missory notes, bonds, specialties, or other securities for money, belonging to the person against whose effects such writ of *fieri facias* shall be sued out; and may and shall pay or deliver to the party suing out such execution any money or bank notes which shall be so seized, or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, as a security for the amount by such writ directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sums secured thereby, when the time of payment thereof shall have arrived. And the payment to such sheriff or other officer by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty, or other security, with or without suit or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty, or other security. And such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied. And if, after satisfaction of the amount so to be levied, together with the sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued. Provided, that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty, or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof; the expence of such bond to be deducted out of any money to be recovered in any such action."

Landlord's fixtures in possession of a tenant cannot be seized; but corn and growing crops (which, as we shall hereafter see, would go to the executors of a party) may be seized, but not artificial grasses growing under corn, as clover or stubble. If, by construction of law, the crop would belong to the landlord, as where the tenant is holding over or is a trespasser, it cannot be seized. If a crop be sold before it is ripe, the person buying it is entitled to a reasonable time for it to ripen before he cuts it. The 56 Geo. III. c. 50 regulates those cases where there are particular covenants as to such crops between the landlord and tenant.

Goods pawned or leased cannot be taken into execution; though, subject to the pawner's or lessee's rights, they may be sold. Neither can an equitable interest be taken; nor goods of a testator in the hands of an executor; nor any other goods in trust. But goods in the hands of a husband as trustee for his wife may, in some instances, be sold. So partnership goods may be sold on a writ against one partner; but then the whole partnership property must be taken. When bankruptcy intervenes before seizure, the seizure cannot be made.

The sheriff, after seizure, sells under authority of the writ *venditioni*

exponas. After seizure, he may accept the debt and costs, and release the goods; or he may take bond, but he is liable to the plaintiff if the bond prove ineffective. It is said, that if the sheriff seize goods after tender to him of debt and costs, he becomes a trespasser.

After seizure of the goods, by 8 Ann. c. 14, § 1, the defendant's landlord has a right to demand from the sheriff one year's rent out of their produce in priority to other creditors; and the same provision is made as to the assessed taxes by 43 Geo. III. c. 99, § 37. But this lien of the landlord is restricted, by 7 & 8 Vic. c. 96, § 67, in the case of *weekly, monthly, or other tenants for a less period than from year to year*, to four weeks, months, or other such terms of payment.¹

The sheriff does not usually make any return to this writ, unless ruled so to do. He then returns according to the fact, either *nulla bona*, that there are no goods to seize; or if he has seized, *fieri fecit*; or both, if the value does not cover the whole debt. If he cannot sell the goods for want of purchasers, or of a fair price being offered, he should return to that effect. Where there are adverse claims to the goods, the court will enlarge the time for the sheriff to make his return, and a jury may be impanelled to try the right.

Writ of Elegit.—This is a writ of execution against the lands, goods, and chattels of the defendant when judgment has been recovered. On this writ the sheriff is in the first instance to take the goods of the defendant, except oxen and beasts of the plough, and deliver them to the plaintiff at the price found by a jury summoned as hereafter mentioned. Whatever may be taken under a *fi. fa.*, and that only, may be taken under the *elegit*; and most of the rules applying to a *fi. fa.* apply to this writ; but it differs in this, that the sheriff is not to sell the goods, but to deliver them to the plaintiff. If these are insufficient, then the defendant's lands &c. are to be extended or seized, to be in like manner valued, set out by metes and bounds, and delivered to the plaintiff.

Formerly, under this writ, a *moiety* only of the defendant's lands were taken, and *copyhold* lands were not liable at all; but now, by 1 & 2 Vic. c. 110, § 11, it is enacted, "That it shall be lawful for the sheriff or other officer to whom any writ of elegit, or precept in pursuance thereof, shall be directed, upon any judgment recovered in any action in any of her majesty's superior courts at Westminster, to make and deliver execution unto the party in that behalf suing of *all* such lands, tenements, rectories, tithes, rents, and hereditaments, *including lands and hereditaments of copyhold or customary tenure*, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment or at any time afterwards, or over which such person shall at the time of entering up such judgment or at any time afterwards have any disposing power which he might without the assent of any other person exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one *moiety* of the lands and tenements of any person against whom a writ of elegit is sued out; which lands, tenements, rectories, tithes, rents, and hereditaments, by force and virtue of such execution, shall accordingly be

¹ On writs of execution from any of the new County Courts established under 9 & 10 Vic. c. 95, the landlord's lien is restricted to four weeks where the tenement is let by the week, and to ~~two~~ terms only where let for any other term less than a year. But as to the execution of these writs, see *post*, tit. COUNTY COURTS.

held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the court out of which such execution shall have been sued out as a tenant by elegit is now subject to in a court of equity. Provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable to make, perform, and render to the lord of the manor or other person entitled all such payments and services as the person against whom such execution shall be issued would have been bound to make in case such execution had not issued; and the party so suing out such execution, and to whom such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied. Provided also, that as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this act, such writ of elegit shall have no greater or other effect than a writ of elegit would have had in case this act had not passed."

On receiving the writ, the sheriff must impanel a jury, who enter, with the sheriff, into the house and grounds of the defendant, if the gates and doors are open (for they cannot use force). The inquisition must then find the value thus seized with certainty, or it is void. The sheriff is to deliver the whole of the goods seized to the plaintiff, and also give him, not actual, but *legal* possession of the lands; for, to gain actual possession, the plaintiff must resort to an ejectment; and when that is obtained, a mere chattel interest, and not a freehold one is acquired by him, which will devolve on his executors. The plaintiff, when in possession of the lands, is called the tenant by *elegit*, and only holds the lands till the debt is levied thereout, or satisfied elsewhere, with interest; upon which the defendant is entitled to restitution.

Writ of Habere Facias Possessionem.—This writ is resorted to in order to give the plaintiff possession when he has recovered in an action of ejectment. On its being delivered to the sheriff, he gives a warrant to his bailiffs to execute it, taking an indemnity from the plaintiff. The officer may break open the outer as well as inner doors to execute this writ, and may raise a *posse comitatús*, if necessary, and all other persons should be turned off the premises. If the sheriff, or the plaintiff after he is put into possession, be disturbed, an attachment will be granted against the intruder. The sheriff should return the writ as in other cases.

Writ of Inquiry.—There are several of these; but the writ of inquiry of damages is the only one much in use at the present day, and is directed to the sheriff in his judicial capacity, commanding him, "because it is unknown to the court what damages the plaintiff hath sustained," to inquire thereof. It issues only in cases of judgment by default or on demurrer, against all defendants. Before executing the writ, the sheriff is to give the defendant eight days notice when the inquiry will take place, and the writ must be executed between any two consecutive hours, and not more, on the day named.

The jurors must be properly qualified according to the 6 Geo. IV. c. 50. When the jury is properly sworn the counsel or attorney for

the plaintiff states his case, and goes into his evidence for damages; and the defendant by his counsel answers in mitigation of the damages; after which the plaintiff replies. If necessary, the inquiry may be adjourned. When the case is fully heard, the sheriff sums up, and the jury deliver their verdict; and the writ is then to be duly returned as others are.

The execution in most real actions is performed by the writ of *habere facias seisinam*, by which the sheriff is commanded to cause the demandant to have possession of the lands which he has recovered. This writ is not usually executed where the lands are certain, but only where they are uncertain. It is executed nearly in the same manner as the writ of *habere facias possessionem*. Real actions, however, are now for the most part abolished; the 3 & 4 Wm. IV. c. 36 having enacted, that no action real or mixed (except a writ of right of dower, or writ of dower *unde nihil habet*, or *quare impedit*, or of ejectment), and no plaint in the nature of such writ or action (except a plaint for free bench or dower) shall be brought after the 31st Dec. 1834.

Sheriff's Duty as to Exchequer Writs.

The only writ of this kind which is necessary to be treated of in this place is the writ of *extent*, which is one of execution against the body, lands, and goods of crown debtors, and is an ancient prerogative writ, on which the lands are liable although there are goods sufficient; but the goods should be first applied.

Extents are *in chief*, that is, where sued out for a debt to the crown; or *in aid*, where sued out by a debtor to the crown for the recovery of a debt due to himself. If the crown debtor die, a writ of *diem clausit extremum* may issue after his death. Upon receipt of the writ the sheriff issues his warrant, under which outer doors may be broken, and any liberty may be entered to execute it. If the defendant be taken, the sheriff cannot take bail. A certificated bankrupt, or an insolvent discharged subsequently to the accruing of the crown debt, are not exempted from arrest under this writ, for the crown is not bound by the bankrupt laws; but a bankrupt is privileged while attending commissioners on his examination.² On seizing the goods, the sheriff is to keep them in his hands until the *venditioni exponas* issues. All goods that are in general liable to an extent become so from the teste of the writ, even though sold afterwards in open market. The queen's claims always have priority before those of private persons, provided the writ is issued before judgment is obtained by the subject. If an extent is tested the same day on which a *fi. fa.* at the suit of a subject is delivered to the sheriff, the extent has the preference; but beyond this the law is unsettled, as in cases where the goods are in the sheriff's hands under the *fi. fa.* when he receives the writ of extent. Goods distrained for rent before the teste of the writ, but not sold, may be seized under the extent, and the landlord is not entitled to a year's rent. So in bankruptcy, if the teste is prior to or on the same day as the assignment (that is, to

² See Exp. Russell, 1 Mon, 273; Exp. Helsby, 1 Dea. & Ch

the appointment of assignees, which now constitutes the assignment), they are subject to the extent; but not goods conveyed away *bond fide* by a trader before the teste.

Under an extent for duties or penalties incurred under the excise laws, the utensils, goods, materials, preparations, and vessels employed in the particular manufactory in which such duties or penalties have arisen may be taken, although the property in them does not belong to the defendant. So if they have been seized under a *fi. fa.* prior to the teste of the extent. So the crown has a lien on malt for duties which were unpaid at the time of the bankruptcy; and that although seized by the assignees in bankruptcy. So also certain freehold property may be seized.¹

Debts due to the crown debtor are also liable to an extent, whether they be specialty or simple contract; and all persons conversant therewith are bound to disclose the particulars thereof. They are bound from the teste of the writ; but payment by the debtor to the crown debtor in ignorance of the extent discharges him, if before taking of the inquisition. Specialties, although not due, money in the debtor's hands, or bills of exchange, may be seized. Under an extent against one partner the joint property may be seized, but the co-partner is entitled to an action in equity against the crown. But the sheriff is not to receive the debts till after the inquisition is returned, upon which a *scire facias* will issue, directing him to receive them. Upon information received that the debtor has *some* property, the sheriff should hold an inquisition in order to find whether he has such property as is liable to the extent. A summons is issued to the defendant, and to all witnesses, which if disobeyed subjects the parties to an attachment. The sheriff has power to adjourn the inquisition; for all receivable evidence should be gone into.

In the finding of the inquest, facts should be stated with precision, and lands and goods particularly described, or the return will be bad. After the return, the Court of Exchequer issues a *venditioni exponas* to sell the goods, an *order* to sell the lands, or a *sci. fa.* to collect the debts.

Of the Sheriff's Duty regarding Juries.

The sheriff is the proper officer for the purpose of summoning juries. When causes are at issue, there is a writ of *venire facias* directed to the sheriff, commanding him to cause a jury to come according to the exigency of the writ. If the sheriff is interested, and the coroner also, then the *venire* is directed to two persons named by the coroner, called *elisors*, or it is a ground to challenge the jury.

In a subsequent part of this work we shall see the qualifications, disqualifications, and exemptions of jurors, and also how the annual juror's book is made up. This book is kept by the sheriff, and from that for the year in which the *venire* is delivered to him, he is to select jurors. By 6 Geo. IV. c. 50, § 12, if there be no book for the year, then the preceding one is to be resorted to. By § 39, he is indemnified for returning any person named, although not qualified or liable

¹ See further, Watson, 254, &c.

to serve; but if done wilfully (excepting grand juries at assizes), he is liable to fine. Persons who have attended may have a certificate thereof from the sheriff, and their names are to be entered in a register for that purpose (§§ 40, 41.) Such also is the duty of the clerk of the peace with respect to persons who have attended sessions, whose names also are to be included in such register. In Middlesex, persons who have served are exempt for two terms and the vacations preceding; in Wales, Hertford, Cambridge, Huntingdon, and Rutland, for one year; in York, for four years; and in all other counties for two years. (§ 42.) Common jurors are to be summoned by leaving a note at their dwelling-house ten days before the day of attendance, and for special juries three days notice is required. (§ 25.) Officers taking rewards for not summoning parties are liable to be fined by the court. (§ 49.) When the jury are selected, the sheriff makes out a panel containing their names alphabetically arranged with their places of abode and other additions. The number selected for counties is not to be less than 48 nor more than 72, unless by order of a judge of assize. The alphabetical list is to be kept for inspection at the sheriff's office seven days before the assize; and the under-sheriff (or the secondary, in London) is to write the name of each juror with his addition. These are put into a balloting box and delivered to the judge's associate, and twelve names are indiscriminately drawn as the jury.

The sheriff has also to summon special juries, and the same forms are observed. By § 22, where justices of assize so direct, sheriffs may summon 144 jurors to serve indiscriminately on the civil or criminal side, to be divided into two sets; one set to attend the first half, and the other the second half of the assizes. The 46th sect. imposes a penalty of 50*l.* on the sheriff, one half to the king and the other to the informer, for breach or neglect of the duties herein mentioned.

Sheriff's Duty at the Assizes.

A sufficient time before the assizes the sheriff receives the assize precepts, and also the precepts to summon juries. On receipt of these, he issues his warrants to the bailiffs of each hundred to summon jurors, not exceeding 144 in number, as the judge of assize shall direct; to make proclamation of the assize by advertisement in the newspapers, to give notice to coroners and constables, &c.

The sheriff's return to the assize precepts consists of four panels, as they are termed, *i.e.* schedules, or rolls of parchment. On the back of the precept the sheriff indorses the reference to the panels, thus:—"The return of this precept appears in certain panels hereunto annexed." These are, 1. The names of the magistrates, mayors, bailiffs of liberties, constables of hundreds, and sheriff's officers of the different hundreds; 2. The names of those summoned as grand jurors; 3. Those of petty jurors; 4. The calendar of prisoners. These are written on parchment, and delivered by the sheriff to the judge, tied up with the precept. The calendar of prisoners must also be printed and circulated. If there be any writs of *capias*, they must be properly returned at the same time, according to the fact. Copies of the *nisi prius* or petty jury must be printed on parchment, and one copy

annexed to each *distringas* as it is called in the Queen's Bench, or *habeas corpora juratorum* in the Common Pleas, which is a writ, returnable at the assizes, commanding the sheriff to have the bodies of the jurors in court, or to distrain them by their lands and goods, that they may appear at the day named. Besides this, the under-sheriff should write the names and additions of each jurymen; and put them into a balloting box, which, with the key, is delivered to the clerk of assize. The sheriff and under-sheriff must be constantly in attendance on the judge, whom they are to provide with suitable lodgings, and also observe all ceremonies usual upon the judge's entry into the town, &c.

Sheriff's Duty at Sessions.

The precept is in this case received from the clerk of the peace, under the hands and seals of the justices of the peace, and the command is pretty similar to that on the precept for assize, *mutatis mutandis*. The sheriff attends sessions, not personally, but by the under-sheriff. The under-sheriff receives all fines paid there. He is to levy all recognizances estreated at the sessions; but he may, instead of taking the body or goods of the party whose recognizance is forfeited, take a bond for their appearance &c. at the next sessions. Where such person is out of his jurisdiction, the sheriff issues his warrant to the sheriff of the county where the party is, to levy the sum forfeited, &c.

A TABLE OF FEES to be taken by Sheriffs, Under-Sheriffs, Deputy Sheriffs, Sheriff's Agents, Bailiffs, and others the Officers or Ministers of Sheriffs, in England and Wales, pursuant to the 1 Vict. c. 55.

	£.	s.	d.
For every Warrant which shall be granted by the Sheriff to his officer upon any writ or process, in London or Middlesex	0	2	6
-- And on Crown and Outlawry process, an additional	0	2	6
In all other counties, where the most distant part of the county shall not exceed 100 miles from London	0	5	0
-- not exceeding 200 miles	0	6	0
-- exceeding 200 miles	0	7	0
Where there are several defendants in a writ of <i>capias</i> , and warrants are issued thereon by the Under-Sheriff against more than one defendant, no more shall be charged in any case for each warrant after the first than 2s. 6d.			
For an Arrest in London	0	10	6
In Middlesex, not exceeding a mile from the General Post Office	0	10	6
-- not exceeding 7 miles from the same place	1	1	0
In other counties, not exceeding a mile from the Officer's residence	0	10	6
-- not exceeding 7 miles	1	1	0
-- exceeding 7 miles	1	11	6
For Conveying Money the Defendant to Gaol from the place of arrest, per mile	0	1	0
For an Undertaking to give a Bail-Bond	0	10	0
For a Bail-Bond:—			
If the debt shall not exceed £50	0	10	6
" " 100	1	1	0
" " 150	1	11	6
" " 300	2	2	0
" " 400	3	3	0
" " 500	4	4	0
If the debt shall exceed £500	5	5	0
For Receiving Money under the statute, for deposit upon arrest, and paying the same into court, if in London or Middlesex	0	6	8
If in any other county	0	10	0

Sheriff's Fees.

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	£.	s.	d.
For Filing the Bail-Bond :—			
If the arrest be made in London or Middlesex	0	2	0
If in any other county	0	4	0
Assignment of Bail or other Bond :—			
If in London or Middlesex	0	5	0
If in any other county	0	7	6
For the Return of any Writ of Habeas Corpus, if one action	0	12	0
And for each action after the first	0	2	6
For the Bailiff to conduct Prisoner to gaol, per diem	0	10	6
And Travelling Expences, per mile	0	1	0
For Searching Office for Detainers	0	1	0
Bailiff's Messenger for that purpose	0	2	6
To the Bailiffs for executing Warrants on Extent, Capias utlagatum, Levavi facias, Fi. fa., Ca. sa., Ne exeat, Attachment, Elegit, Writ of Possession, Forfeited Recognizance, Process from Pipe Office, and other like matters, for each—			
If the distance from the Sheriff's office or the Bailiff's residence do not exceed five miles	1	1	0
If beyond that distance, per mile	0	0	6
On Distringas, in London	0	5	0
In Middlesex, not exceeding five miles from the General Post Office	0	6	0
-- exceeding five miles	0	10	0
In other counties, not exceeding five miles from officer's residence	0	5	0
-- exceeding five miles	0	10	0
For each man left in possession, when absolutely necessary—			
-- if boarded, per diem	0	3	6
-- if not boarded, per diem	0	5	0
For every Sale by Auction, notwithstanding the defendant should become bankrupt or insolvent, where the property sold does not produce more than 300 <i>l.</i> , 5 <i>l.</i> per cent.; 400 <i>l.</i> , 4 <i>l.</i> per cent.; 500 <i>l.</i> , 3 <i>l.</i> per cent.; and where it exceeds 500 <i>l.</i> , 2½ per cent.			
For the Certificate of Sale, to save auction duty	0	2	6
Bond of Indemnity, besides stamps and stationery	0	10	0
Certificate of Execution having issued, for Record	0	5	0
On Writs of Trial and Inquiry :—			
For a Deputation	1	1	0
On lodging Writ, for entering Cause, Warrant for summoning Jury; which fee shall be forfeited in case of countermand of trial	0	4	0
On Trial or Inquisition :—			
Sheriff, for presiding	1	1	0
Bailiff, for summoning Jury, and attendance in Court	0	4	0
And if not held at the office of the Under-Sheriff :—			
For Hire of Room, if actually paid, not exceeding	4	10	0
For Travelling Expences of Under-Sheriff from his office to place where the Trial or Inquisition shall be held, per mile	0	1	0
To the Bailiff, from his residence, per mile	0	0	6
In all cases in which it shall appear to the Master that a saving of expence has accrued to the parties by reason of a Writ of Trial having been executed by Deputation, the fee for such Deputation shall be allowed.			
If more than one Trial or Inquisition be held at the same time and place, the travelling expences of the Under-Sheriff from his office, and of the Bailiff from his residence, to the place where the Trial or Inquisition is held, are to be apportioned rateably to the parties.			
On Writs of Extent, Elegit, Capias utlagatum, and others of the like nature :—			
For summoning the Jury, use of room, presiding at the Inquisition, &c.	2	2	0
Jury	0	12	0
For Travelling Expences of Under-Sheriff from his office to place of inquisition, per mile	0	1	0
For Drawing and Engrossing the Inquisition, per folio	0	1	6
For a Summons for the attendance of a Witness	0	5	0
In Replevin :—			
Bond, if the amount be under 20 <i>l.</i>	0	10	6
If above 20 <i>l.</i>	1	1	0
Precept to Bailiff	0	2	6
Notice for Service on Defendant	0	2	6
Broker, where the sum demanded and due shall exceed 20 <i>l.</i> and shall not exceed 50 <i>l.</i> , for Appraisement and Affidavit of value	0	10	0
-- where it shall exceed 50 <i>l.</i>	1	1	0
-- And his travelling Expences from his residence to the place where the goods are, per mile	0	0	6

	£.	s.	d.
Bailiff, for summoning parties, and delivering goods to Tenant	1	1	0
- - And his Travelling Expences, same as Broker.			
For the Warrant, Record, and return of a Re. Fa. Lo., Accedas ad Curiam, Pone, or Writ of False Judgment	0	16	6
For Writ of Retorno Habendo	0	4	6
For each Summons on a Writ of Scire Facias, or for the service of a Writ of Capias where there is no arrest	0	5	0
And mileage, per mile	0	1	0
For Recording each Demand or Proclamation under Writs of Outlawry	0	2	0
For Bailiff, for making each demand or proclamation on Writs of Outlawry, in London and Middlesex	0	2	6
In other counties	0	5	0
And Travelling Expences, if the distance shall exceed five miles, then for every mile beyond that distance	0	0	6
For any Supersedeas, Writ of Error, Order, Liberate, or Discharge to any writ or process, or for the release of any defendant in custody (unless in the prison of the county), or of any goods taken in execution	0	4	6
For the Return of any writ or process, and Filing the same, exclusive of the fee paid in filing	0	2	6
Jury Process:—			
For Return to Common Venire	0	3	6
The like to Special	0	5	0
The like on Distringas or Habeas Corpora for Common Jury	0	12	0
The like for Special Jury	0	14	0
The like, with a View	1	0	0
The like to a Traverse Venire	0	14	6
For Attendance, naming Special Jury	2	2	0
Twenty-four Warrants to summon Special Jury	1	4	0
For Bailiff, for summoning each Special Juror	0	2	0
Sheriff, attending in Court	1	1	0
For attending a View, the fees as allowed by Rule of Court, Trinity Term, 7 Geo. IV., 1826.			
For any duty not herein provided for, such sum as one of the Masters of the Courts of Queen's Bench or Exchequer, or one of the Prothonotaries of the Court of Common Pleas may, upon special application, allow			

CORONERS.¹

These are very ancient officers at common law, being equal in point of antiquity with sheriffs. They are so called because they deal principally with pleas of the crown. There are a certain number in every county, usually four in each. The court of the coroner is a court of record, to inquire as to the cause of any sudden or violent death, or of the death of a party in prison; and for this purpose he must, together with a jury of twelve men, hold an inquest *upon view* of the corpse, without which it would be void. His duty being partly judicial, cannot be executed by deputy; but the coroner for the admiralty may depute another to execute his office *pro tempore*.

Coroners are of three kinds: one by virtue of office, as the lord chief justice of the court of Queen's Bench (who is principal coroner) and the other judges; another, by charter; and a third, by election, of which kind we proceed more particularly to treat. There are also a coroner to the admiralty, whose jurisdiction extends only to deaths on board ships in certain great rivers and parts of the seas; and a coroner to the verge, that is, over deaths in the royal palace.

¹ Chit. Eq. Ind. 250; 1 Chit. Bla. Com. 346, and notes; Impey's Off. of Sheriff and Coroner, 473 &c.

² But now, by the 6 & 7 Vict. c. 83, to prevent unnecessary expence and delay in

the holding of inquests, a county coroner is empowered to appoint by writing under his hand (subject to the approval of the lord chancellor), a deputy to act for him in case of illness or necessary absence.

Coroners of counties are chosen according to the queen's writ *De coronatore eligendo*, directed to the sheriff. They are chosen by the freeholders, and must be men of substance and credit; and a similar qualification by property is required of them as of the sheriff. The office is held during life; but a coroner becoming incapable of acting, or being guilty of misconduct, may be removed by writ *De coronatore exonerando*; and where he is living out of the county, or is in prison, or he suppresses his inquisition instead of returning it to the next gaol delivery, it is sufficient ground for removal;¹ and, by 25 Geo. II. c. 29, extortion, neglect, or misbehaviour, are also grounds of removal.

The coroner's jurisdiction is limited to the county, liberty, or precinct for which he is chosen; and his jurisdiction cannot be extended by the crown. In many cases his jurisdiction is concurrent with that of the coroner of the admiralty, or coroner of the verge of the royal palace. Where a felony or misdemeanor happens on the borders of two counties, or within 500 yards thereof, or partly in one county and partly in another, or where it is begun in one and completed in another, by the 7 Geo. IV. c. 64, it may be tried in either county; and this applies to the duties of a coroner, so that the coroner of either county may hold the inquest. And by sec. 9 of that act, when one is killed in one county, the coroner may inquire of all accessories and procurers before the fact, though the procurements were in another county.

The 7 & 8 Vic. c. 92, intituled "An act to amend the law respecting the office of county coroner," after reciting that "the regulations for the election of coroners for counties are insufficient, and that such elections are made with much inconvenience, and attended with great and unnecessary expence," repeals the 58 Geo. III. c. 95 (the act previously in force for regulating the election of coroners), and enacts, That it shall be lawful for her majesty, upon a petition from the quarter sessions (or whenever it shall seem fit to her majesty to direct the issue of a writ *De coronatore eligendo* for the election of an additional coroner for any county above the number customarily elected), to order that such county shall be divided into districts, that a coroner may be assigned to each for the purpose of holding inquests therein.²

That every such coroner, though designated as the coroner of a particular district, and chosen only by the electors resident therein, shall be considered as a coroner for the whole county, and have the same jurisdiction as if he had been elected by the freeholders of the county at large. But he is to hold inquests only within his own district, except during the illness or unavoidable absence, or vacancy in the office, of a coroner for another district; and in such case he must certify the cause in his inquisition. And each coroner is required to reside in his own district, or within two miles thereof.

That, upon the election of a coroner, the sheriff shall hold a court within the district, on a day to be appointed by him, not less than seven nor more than fourteen days after the receipt of the writ; and if the election be not then determined, but a poll be demanded, shall adjourn

¹ Exp. Warwick Freeholders, 3 Atk. 184; 1 Chit. Bla. Com. 348; Exp. Parnell, 1 Jac. & W. 451; 1 Keb. 280; 1 Chit. Burn. J. 874.

² Nothing in this act touching the division

of counties into districts, or the election of coroners, extends to the county of Chester, or to any place where the appointment or election takes place otherwise than under the writ *De coronatore eligendo*.—Sec. 27.

the court till the next day but one, when the polling shall continue open for two days, the expences thereof being defrayed by the candidates.

That the coroner may impose a fine not exceeding 40s. for the non-attendance of any person summoned as a juror or witness on an inquest.

That he shall not, under a penalty of 50*l.*, act as an attorney on the trial of any person charged by the inquest with any crime.

That the sessions may order the coroner's travelling expences to be paid, if they see fit, though no inquest has in fact been held.

And that the same poundage fees or other remuneration shall be paid to the coroner for the execution of writs or other process directed to him when the sheriff is a party or otherwise disqualified to act, as the sheriff would have been entitled to in the like case.¹

Coroner's Duty at Inquests on Deaths.

The duty of holding inquests in cases of accidental or sudden death is by far the most important in the office of a coroner. When such a death happens, the township, through a peace officer, should immediately give notice to the coroner, and ought not to bury the body before he come; and if they suffer the body to lie too long without such notice, the township is liable to be fined. After receiving such notice, the coroner issues his precept to the constable of the township to return a jury, or on neglect he may be fined 100*l.*² If the peace officer neglects his duty as to the return and appearance of the jury, he is liable to be fined by a judge of assize; but the coroner has no power to impose such fine. As there are several coroners in a county, the inquest which is first completed is in point of law the perfect one. An inquest ought to be held as soon as possible after discovery of the death; but it cannot be held on a Sunday. It may be held apart from the corpse, if, after the jury are sworn and charged to make the inquiry, the corpse be first viewed by the jury in the presence of the coroner (which is absolutely necessary). If the body has been buried, the coroner should order it to be disinterred.

After this the coroner proceeds to investigate all evidence relating to the death on oath. He may also inquire as to accessories before the fact, but not as to accessories after the fact. At the inquest the whole of the evidence, as nearly as possible in the very words, should be taken down; and the coroner should bind over such witnesses as are necessary, to appear at the trial of the accused party, if any.

The verdict of the jury should be reduced into writing, and signed and attested by the coroner and all the jury.³ The coroner then issues his warrant to apprehend and commit any party charged with the death, and a warrant also for the burial of the body, though this may be done before the verdict if necessary.

It may here be observed, that it is illegal to publish the evidence taken on the inquest, as it may tend to prejudice the case when it comes to trial. And the coroner may exclude any person from being present, and may adjourn the inquest at his discretion.

¹ No coroner of the queen's household and verge of the queen's palaces, or of the admiralty, or of the city of London, borough of Southwark, or any place not contributing to the county rates, is entitled to any fee,

benefit, or recompence under this act.—Sec. 25.

² 3 Hen. VII. c. 1.

³ As to the form, see 1 Chit. Burn. J. 879. 3 Id. 324.

By the 7 Geo. IV. c. 64, the inquisition must be returned to the proper officer of the court in which the trial is to take place, or the coroner is liable to be fined; and he is also liable to a fine if he is not present at the assizes when the trial comes on. If there are any defects in the inquisition, they may be fatal to the whole proceeding; for section 20 of that act, which cures many trifling defects in indictments, does not extend to coroners' inquests; but formal defects may be amended at the discretion of the court of Queen's Bench. The inquisition is equal to a finding by a grand jury, and a party accused may be tried on it without indictment; though it is usual also to prefer an indictment, and the party is tried on both at once.

The 7 W. IV. & 1 Vic. c. 68 directs, that a schedule of fees payable on holding inquests shall be made by the justices at quarter sessions for counties, and by the town council for boroughs; that, at the conclusion of every inquest, the coroner shall advance and pay all the expences incurred, according to such schedule; and that within four months he lay an account thereof before the quarter sessions or council, which shall make an order for the repayment, together with 6s. 8d. for every inquest holden by him, over and above all other fees to which he is by law entitled, on the county or borough treasurer.¹

Coroner's Duty and Powers in other Matters.

Coroners are also to inquire as to treasure trove (which, as we have before seen, belongs to the crown), and as to wrecks and royal fish. He is also the person to execute process when there is sufficient objection to the sheriffs doing it; and sometimes the queen's special writ is directed to him. He is bound to be present in the county court, to pronounce judgment of outlawry, as we have before seen. He is also a conservator of the peace in relation to all felonies, and may suppress affrays by arresting the parties.

His *privileges* are, that he is exempt from serving offices inconsistent with his duties, as attending as a juror; nor can he be arrested while in execution of his office. If he neglect his duty, or abuse his office, very severe penalties are inflicted.

¹ Before the passing of the 6 & 7 Wm. IV. c. 89, much difficulty frequently arose respecting the attendance and remuneration of medical witnesses at coroners' inquests. But that act empowers the coroner to summon the medical practitioner who attended the deceased at or immediately before his death, if he were attended by any such, or otherwise any legally qualified medical practitioner in actual practice at or near the place where the death happened, and to direct, if he think proper, a post mortem examination of the body, either with or without an analysis of the contents of the stomach or intestines; and a disobedience of such summons or order incurs a forfeiture of 5*l*. If the jury are not satisfied with the evidence of such medical witness, a majority of them may, in writing, require the coroner to summon any other whom they may name; and a refusal of the coroner to issue his summons accordingly is a misdemeanor. And if any

person shall state on oath before the coroner that in his belief the death of the deceased was occasioned by the improper treatment or neglect of any medical practitioner, such practitioner shall not be allowed to assist at the post mortem examination. For his attendance at any inquest in obedience to the order of the coroner, every medical practitioner is entitled to a fee or remuneration of one guinea, or, if he has also made a post-mortem examination of the body, of two guineas; which fee the coroner is required, by the 7 Wm. IV. & 1 Vict. c. 68, to pay to him at the close of the inquest, and he may obtain repayment from the county rate. No such fee, however, is to be paid for any post-mortem examination made without the previous direction of the coroner, nor to the medical officer of any hospital or public institution whose duty it was to attend the deceased.

JUSTICES OF PEACE.

Justices of peace are usually appointed by special commission under the great seal; though some hold the office by act of parliament, and others by grant or charter, as the mayors or other chief officers in corporate towns.

By stat. 1 Mary, sess. 2. c. 8, § 2, no sheriff can be a justice of peace; nor can a coroner; and by 5 Geo. II. c. 18, § 2, no practising attorney, solicitor, or proctor. But this does not extend to justices by charter, &c.; nor to peers of parliament, or the eldest sons of such, or persons qualified to serve as knights of the shire; nor to the heads of colleges or halls in either of the universities; and all esquires and gentlemen of the law, and persons of higher degree, are eligible.

A mayor is not of necessity a justice of the peace, yet in many cases, by statute, he has equal power with justices, as with regard to the customs, alehouses, the Lord's day, swearing, gaming, weights and measures, &c.

Justices of peace, on their first appointment, take a certain oath, to be administered by the clerk of the peace for the county, &c. In order to be *qualified*, they must have an estate in lands of the clear yearly value of 100*l.* in possession, or of 300*l.* in immediate reversion or remainder; and of this they must make oath.¹ The oath is to be subscribed and kept by the clerk of the peace, who, on demand and payment of 2*s.*, is to deliver a copy to any person requiring the same.²

Their Jurisdiction.—Although, generally, justices have no jurisdiction out of their county, yet in many cases the presence of an offender in their county gives them jurisdiction, though the offence were committed in another, as in cases of felony, or of an offender coming from off the high seas, or of tenants fraudulently removing goods. By 9 Geo. I. c. 7, § 3, although a justice's house is out of the county, he may there grant warrants &c. as to offences within the county; and by 15 Geo. II. c. 24, justices of liberties or corporations may commit offenders to the house of correction of the county in which the liberty &c. is situate; and by 16 Geo. II. c. 18, they may enforce rates, though they are themselves also chargeable therewith.

By 24 Geo. II. c. 55, § 1, where an offender escapes from one county into another, the justice's warrant of the former must be indorsed by a justice of the latter in order to be executed; and the 13 Geo. III. c. 31, and 54 Geo. III. c. 186, § 2, regulate as to escapes to Scotland or Ireland. By the 7 Geo. IV. c. 38, they have authority over offences committed upon the sea, and places where the admiralty has jurisdiction; and there are many places where they have a partial and concurrent jurisdiction.³

The duties of justices are *ministerial* or *judicial*, or both.

By the 45 Geo. III. c. 48, § 3, they are, by virtue of their office, commissioners of land tax. They are also, by 3 Geo. IV. c. 126, § 61, and 4 Geo. IV. c. 95, trustees for the turnpike roads in their county.

¹ 5 Geo. II. c. 18, and 18 Geo. II. c. 20.

² Steer's Parish Law, 283—8.

³ Steer's Parish Law, 278—83.

It has been held, that where they are personally concerned in any case, they ought not to act as magistrates; but if they are assaulted or grossly insulted in their office, no other justice being present, they may commit the offender.

In most cases, unless an act of parliament direct otherwise, the justices should in the first instance issue a *summons* instead of a warrant, in which the hour and day are fixed for appearance. The service of the summons should be personal, unless that is dispensed with by statute.

But in cases of felony, larcenies, breaches of the peace, and generally where the proceeding is in the name of the queen, and also in cases between party and party where the body of the offender is liable, a *warrant* is the regular process. Wherever a statute gives a justice jurisdiction over an offence, it impliedly gives him power to apprehend any person charged therewith by warrant; especially after a summons has been neglected. So libellers may be brought up by warrant, and, in default of bail, committed to prison.

Although *two* justices be required by statute to "hear and determine," yet *one* alone may issue the warrant.

It is still doubtful whether justices have power to administer oaths, unless where it is expressly given by statute. As to voluntary oaths, in extra-judicial matters, they ought not to be administered, although it is frequently done; as, for instance, by dealers who, wishing to puff off their goods to the public, go before a magistrate and make oath as to their quality.¹

On the taking of depositions, they are to be put down in writing by the magistrate's clerk at the time, as nearly in the words spoken as possible.² A magistrate may commit or remand a party accused for further examination, if necessary; but it should only be for a reasonable time, or he may render himself liable to an action.³

The law as to taking bail in cases of felony is much improved by the 7 Geo. IV. c. 64, which provides that where a strong presumption of guilt does not prevail against the party accused from the evidence adduced, justices may take bail from the party, and discharge him *pro tem.*; and they must certify such bailment, and bind over witnesses &c. to appear at the trial. The same is provided as to misdemeanors; and magistrates are liable to fine for any breach of their duty therein mentioned.

The *judicial* authority of magistrates is derived partly from their commission, and partly from acts of parliament. In some proceedings they assume the character of a civil tribunal, as in disputes between masters and servants, &c., and in enforcing the payment of rates, fines, &c. In others they act as criminal judges, either acting on their own judgment, or by the assistance of a jury at the sessions. Where by act of parliament two are required to hear and determine any offence, or do any other judicial act, they should both be present to hear the evidence and consult together. And where a special authority is given to them out of sessions, it ought to appear in their orders that such

¹ See 4 Chit. Bla. Com. 137, and notes; *Steer* 292.

² *Mills v. Collet* 6 B.ing. 32.

³ *Davis v. Capper*, 9 B. & C., 3 Man & Ry.

authority was exactly followed. To a certain extent, in matters done in their judicial capacity, they are judges of record. If, upon conviction, the offender is to be fined to the queen, they are to estreat the fine, and send the estreat (*i. e.* an extract of the record) into the Exchequer; and in all cases they should return the conviction to the next sessions.

It is the duty of magistrates to take notes of the evidence, in order, if necessary, that they should be enabled to set forth the evidence upon the record of conviction with accuracy;¹ and if the party accused do not appear before them, still greater care should be taken, that justice be done him.² It is doubtful whether parties have a right to employ professional agents before magistrates upon a *ministerial* investigation; but where they are exercising a *judicial* function, it seems that the accused has a right to such assistance. The former may, by the determination of the magistrate, be altogether private, and therefore it is not strictly lawful to publish an account of the investigation; for it is not conclusive, as the latter is.

The magistrate's duties with regard to disputes between masters and workmen will be seen under the title of MASTER AND SERVANT.

In cases of riot, by the 41 Geo. III. c. 76, § 2, two justices may order an allowance to high constables for extraordinary expences; and by 33 Geo. III. c. 55, § 1, they may fine officers, such as constables, overseers, or other peace or parish officers, not exceeding 40*s.*, for neglect or breach of duty, subject to appeal to the quarter sessions. So, out of sessions, they may award costs, by the 18 Geo. III. c. 19; and, by sec. 2, where a penalty of 5*l.* is imposed, the magistrate in certain cases may order the costs to come out of it.

The 3 Geo. IV. c. 43 provides the form of a conviction; and, with regard to the recovery of penalties, the 5 Geo. IV. c. 18 provides that it shall be by distress on the offender's goods, or he may be detained till the return of the warrant, unless he give security for his appearance; and if he has not sufficient goods, he may be committed to prison. If persons use threats to another, or excite reasonable alarm of serious bodily injury, they may be bound in recognizances to keep the peace for any time in the magistrate's discretion.³

Their commission enumerates all the various classes of offences, and gives them cognizance thereof; and although it does not mention murder or manslaughter, yet under the general word *felony* they have jurisdiction in those matters. However, in practice, they abstain from trying homicide or capital offences; and it has been held, they have no jurisdiction over forgery or perjury.

They are amply protected in the execution of their office; and slander and abuse addressed to a justice of peace is punishable by indictment. It is different with regard to words spoken of him; but all words which by law amount to slander are, of course, punishable in the usual mode as between private individuals. The power to commit for such offences is questionable, and at all events it must be on warrant, and for a time certain.

¹ R. v. Warnford, 4 D. & R. 489.

² Steer, 309; Willes v. Bridges, 2 Barn.

³ Paley on Convictions, by Dowling, 26. & A. 278.

The office of **JUSTICE OF THE PEACE FOR THE METROPOLIS** is specially provided for by the establishment of stipendiary police magistrates, who are invested with all the powers, and execute the duties (except as to the business at sessions) of a justice of the peace within the Metropolitan Police District. The act now in force for their regulation is the 2 & 3 Vict. c. 71, by which their number is limited to twenty-seven; and, for the execution of their duties, nine police courts are established in different parts of the metropolis, including the public office in Bow-street. They are magistrates of the said courts, and justices of the counties of Middlesex, Surrey, Kent, Essex, and Hertford, city and liberty of Westminster, and liberty of the Tower of London. They are appointed by the crown, and must have been practising barristers of seven years standing; but do not require the qualification by estate which is necessary in the case of other justices of the peace.

One magistrate at least is required to attend at each of the said police courts on every day (except Sunday, Christmas-day, Good Friday, or any public fast or thanksgiving day) from ten o'clock in the morning till five in the afternoon, and at such other times as necessity may require, or the secretary of state shall direct. Although they have concurrent jurisdiction, the magistrates of each office act independently, and confine themselves to a particular local district, unless particular circumstances require general co-operation. The secretary of state is empowered to direct at which court each of them shall attend, and also to make rules for regulating the manner of conducting the business.

A single magistrate sitting at any of the said courts is empowered to do any act which is by law authorized to be done by one or more justices of the peace. But they are not competent to act, either alone or with other justices, in any thing which is to be done at a special or petty sessions, or at any general or quarter sessions.

A warrant of any of the said magistrates, in respect of any matter arising within the Metropolitan Police District, may be served out of the said district by the constable to whom it is directed without being indorsed by a justice of the county where it is executed.

And every summons or warrant issued by any justice of peace of the counties of Middlesex, Surrey, Kent, Essex, or Hertford, requiring any person residing within the Metropolitan Police District to appear at any place without the said district to answer any information or complaint touching any matter arising within the said district, is utterly void, except for the purpose of enforcing any rates or taxes levied within any parish or place, part only of which is within the Metropolitan Police District.

The magistrates, clerks, ushers, doorkeepers, and messengers of the said courts are, while in office, or within six months afterwards, incapable of voting at any election of a member of parliament for the counties of Middlesex or Surrey, the cities of London or Westminster, or the boroughs of Marylebone, Finsbury, Tower Hamlets, Southwark, Lambeth, or Greenwich; and if they should endeavour to persuade any voter to give or withhold his vote, or otherwise interfere therein, except in the discharge of their duty, they are liable to a penalty of 100*l*. They are also exempt from serving on any juries or inquests whatever.

CONSTABLES.

Constables are of two kinds: high constables and petty constables.

HIGH CONSTABLES.—The office of high constable extends generally over a hundred or other large division of a county, and is of much higher dignity than that of petty constables, whose duties are confined to the parish, borough, or liberty for which they are chosen, and over whom the high constable has the general superintendence, and is to a certain extent responsible for their conduct.

The appointment of high constables is as old as the 13 Edw. I. c. 6, at least. In those days, when every man was bound to possess certain arms for the general defence of the land, the high constable was appointed to inspect all matters relating thereto. Now, the greater part of his duty, as an officer, is to execute the precepts of the justices of the peace. The other usual branches of his office, such as surveying bridges, issuing precepts concerning the appointment of overseers of the poor, surveyors of highways, assessors and collectors of the land and assessed taxes, alehouse licences, levying of county rates, returning lists of jurors, &c., are vested in him merely as a matter of public convenience. His office is partly *ministerial* and partly *judicial*.¹

Anciently, both high and special constables, where there was a feudal lord, were chosen by such lord, his steward, or the suitors, in the *leet*; or, where there was no feudal lord, by the sheriff in his *turn*.

The high constable is now usually chosen by a majority of the justices of the division in which the hundred lies, or by the county justices at their quarter sessions. None but such as reside within the hundred are liable to be appointed. In Westminster, by 29 Geo. II. c. 25, a high constable is elected annually by the dean, or high steward, or his deputy, at a court leet.

A high constable cannot be called upon to act as an overseer of the poor.

PETTY CONSTABLES.—The constable of the vill or parish, or petty constable, as he is called, to distinguish him from the high constable, is he who is generally understood by the term "constable" when used without any addition. His duty is, to prevent offences against the laws, to detect and apprehend offenders, and generally to preserve the peace of the district in which he resides. He is the proper officer of the justice of peace, and bound to execute his warrants. It is also his duty to attend on coroners in order to execute their warrants, as well as on the justices of assize at the gaol delivery, and the justices of peace at the general and special sessions.

Formerly the petty constable was appointed for a vill, township, or tithing, and not for a parish; and the number depended upon the custom of the place. He was elected by the jury, and appointed by the lord or steward of the court leet of the manor in which his pre-

¹ By the 35 Geo. III. c. 51, § 19, high constables employed in collecting county rates might be required by the justices to give security; and by 1 Geo. I. st. 2, c. 13, high constables were required to take the oaths of allegiance and supremacy, besides the common oath of office. But now, by

7 & 8 Vic. c. 33, high constables chosen after the 1st October, 1845, are relieved from the collection of county rates, attendance at quarter sessions, and certain other duties, and are not required to take any other than the oath of office.

cinet lay; and in some places, by custom, the officer of the leet appointed without any election by the jury. But as a constable is a principal officer of the peace, the justices of the peace have, ever since the institution of their office, taken upon them to nominate and swear in constables, whenever they were neglected to be appointed by the leet, as also in *all cases of necessity*; and whenever unable or unfit persons have been chosen, they have interfered to remove them.

It being settled, however, that the election of the constable is in the people, it had long been customary in many parishes for the inhabitants to elect their officer in vestry, who was afterwards sworn in before a justice of the peace. And now, by a recent act, 5 & 6 Vict. c. 109, it is enacted, that no petty constable, headborough, borsholder, tithingman, or peace officer of the like description, shall be appointed for any parish, township, or vill, within the limits of that act, *at any court leet or torn*, except for the performance of duties unconnected with the preservation of the peace, or with the execution of that act, nor otherwise than under the provisions of that act or of the 2 & 3 Vict. c. 33 (Rural Police Act).

And by the same act it is further enacted, that the justices of the peace of every county in England shall, on some day after the 24th of March and before the 9th of April in every year, hold a *special petty session* in their several divisions for the appointment of parochial constables; and the manner of proceeding with respect to such appointment is laid down in the subsequent sections as follows.

Within the first seven days of the month of February in each year, the justices of the peace are to issue a precept to the overseers of each parish in their division, requiring them to make out and return, before the 24th day of March, a list in writing of a competent number of men within their respective parishes qualified and liable to serve as constables, and, with such precept, a notice of the time and place of holding the said special session. The overseers are then to summon a meeting of the inhabitants in vestry, to be holden within fourteen days after the receipt of such precept, for the purpose of making out such list; and the vestry may annex to such return the names of any number of men willing to serve the office of constable, and whom they will recommend to be appointed, although not having the qualification hereafter mentioned. True copies of the list so agreed to in vestry are to be made out and signed by the overseers; and where any of the persons named therein shall have served the office of constable in the said parish, in person or by substitute, they are to set against his name the date of the year of such service. A copy is to be affixed to the principal door of every church, chapel, and other public place of religious worship in the parish, on the first three Sundays in the month of March, with a notice subjoined, stating when and where objections to the list will be heard by the justices; and the original

Nothing in this act is to apply to the city of London, the Metropolitan Police District, or any municipal borough within the 5 & 6 Wm. IV. c. 76, nor to any place in which rates are levied for the payment of constables under the General Watching and Lighting Act (3 & 4 Wm. IV. c. 20) or any local act, nor to the county palatine of Chester. By 7 & 8 Vic. c. 52, the provi-

sions are extended to every liberty having a separate commission of the peace, and not being an incorporated borough. No turnpike toll to be taken for any horse, police van, carriage or cart in the service of the superintendent constable, provided he produce the certificate of his appointment, or have on police dress. Persons fraudulently claiming this exemption incur a penalty of 5*l*.

list, or a copy thereof, is to be kept by the overseers, for the purpose of being perused by any of the inhabitants, at any reasonable time during the first three weeks of the month of March, without fee or reward; and on or before the day limited for making their return, the overseers shall sign and return the original list to the justices, as required by the precept. Overseers neglecting to return such list, or to publish such copies, or leaving out the name of any person who ought to be included therein, or knowingly making a false return, are liable, on conviction before two justices, to forfeit for every such offence a sum not exceeding 5*l*.

The overseers are then required to attend the special session for the appointment of constables, to verify the said list, and answer such questions touching it as shall be put to them by the justices. The justices may strike out the names of any persons who shall be proved to their satisfaction, either by the oath of the party complaining or upon other proof, not to be qualified or liable to serve; and the list, when duly corrected, shall be allowed and signed by the justices present, or any two of them. And, from the list so allowed, the justices shall choose the names of such number of persons as they shall deem necessary (having regard to the extent and population of the parish) to act as constables within the parish during the year then next following, and until other constables shall be chosen and sworn to act in their stead; and shall cause the persons so chosen to be summoned before them in order to be sworn in.

As to the *qualification* and *liability* of persons to serve the office of constable, it is enacted by section 5 of the same act, that every able-bodied man within the parish, between the ages of 25 and 55, rated to the relief of the poor or to the county rate on any tenement of the net yearly value of 4*l*. or upwards, shall be qualified and liable to serve, except the following:

Exemptions.—All peers; members of the House of Commons; judges; justices of the peace; deputy lieutenants; clergymen in holy orders; Roman Catholic priests who have duly taken and subscribed the oaths and declarations required by law; Protestant Dissenting teachers or preachers in a congregation whose place of meeting is duly registered, and following no secular occupation except that of a schoolmaster, and producing a certificate of some justice of the peace of their having taken the oaths and subscribed the declarations required by law; schoolmasters; serjeants and barristers; attorneys, solicitors, and proctors; conveyancers and special pleaders; officers of courts; coroners, gaolers, and keepers of houses of correction; physicians, surgeons, and apothecaries; officers in the navy or army on full pay; persons enrolled and serving in any corps of yeomanry; licensed pilots; masters of vessels in the buoy and light service; household servants of her majesty; officers of customs and excise; sheriffs, and sheriff's officers; high constables; clerks to boards of guardians; masters of union workhouses; county or district constables; parish clerks; registrars and superintendent registrars of births, deaths, and marriages; churchwardens, overseers, and relieving officers, are exempt from serving the office of constable under this act.

Disqualifications.—All licensed victuallers, and persons licensed to deal in any excisable liquor, or to sell beer by retail; all gamekeepers; and all persons who have been attainted of any treason or felony, or convicted of any infamous crime, are disqualified.

And where any person shall have served the office of constable, either in person or by substitute, he shall not be liable to be again chosen until every other person in the parish liable and qualified shall have also served.

If any qualified person chosen as aforesaid shall be unwilling to serve the office of constable in person, and shall find a substitute, he shall attend with his substitute at the time and place appointed for swearing in constables; and if the justices approve of such substitute, they shall cause the oath to be administered to him instead of the person so chosen and unwilling to serve. But the service of such substitute shall not be reckoned as his own service, so as to exempt him from being sooner chosen to serve in his own person than otherwise he would have been liable to.

Any person chosen by the justices and duly summoned to be sworn, who shall refuse, or (without reasonable cause, to be allowed by the said justices) shall neglect to attend and be sworn in, or to find a qualified substitute to be sworn in his stead, shall, upon conviction before two justices, forfeit not exceeding 10*l*. And any person who, after being sworn as constable, shall refuse or wilfully neglect to act in the execution of his office, shall, upon conviction before two justices, forfeit for every such offence a sum not more than 5*l*.

The vestry assembled for the purpose of making such return as aforesaid may, if they think proper, resolve that one or more *paid constables* shall be appointed for their parish; and in such case a copy of the resolution, and of the amount of salary proposed, shall be sent by the overseers to the justices with the return before mentioned. And the justices of peace, if satisfied with the amount of salary agreed to be paid, shall appoint so many paid constables to act for that parish as shall be agreed to by the resolution; or if the same resolution shall have been agreed to by more parishes than one, adjoining to each other, they may, if they think fit, appoint the same paid constables to act conjointly for all such parishes. And in every parish in which a paid constable shall be so appointed, the justices, if they think fit, need not appoint any unpaid constable; or may appoint a smaller number of unpaid constables than they had otherwise resolved on appointing. And the salary of every such paid constable shall be paid by the overseers out of the poor rate.

Within fourteen days after the swearing in of constables, the clerk to the justices shall send to every justice within the division, and also to the clerk of the peace, for the purpose of being laid before the next court of general or quarter sessions, a list of all the constables appointed in the division, and the parishes for which they have been appointed; and the overseers shall affix to the door of their respective parish churches a list of the constables appointed in their respective parishes.

And the said constables shall have within the whole county, and also within all liberties and franchises and detached parts of other counties

situated therein, and also in every adjoining county, all the powers, privileges, and immunities, and shall be liable to all the duties and responsibilities, of a constable within his constableness; but shall not be bound to act as a constable beyond the parish for which they are appointed, without the special warrant of a justice of the peace. Provided, that in those counties in which a chief constable or superintendent shall have been appointed under the 2 & 3 Vict. c. 93 (Rural Police Act), the constables appointed under this act for any parish within the district for which he is appointed shall be subject to his authority.

Vacancies occasioned by the death or disqualification of any constable during his year of office, or otherwise, are to be filled up at the next petty session of the peace; and in the mean time the person who last served, if not disqualified or exempt, shall be bound to act. If the constable making the vacancy was serving as a substitute, the justices shall summon the person originally chosen to attend and be sworn, or to find another substitute, for the remainder of the year; but otherwise they shall choose another out of the allowed list then in force; and if less than two hundred days shall have elapsed since the first appointment of constables for that year, the service of the person so appointed to act shall be reckoned to him as service for the year.

Duties and Powers.—A constable is not justified in arresting for a mere insult, though he may admonish the parties; but if either party strike the other, or offer to do so, and threaten personal violence, he may be taken and detained, or carried before a magistrate. It is common, if the affray be at night, to take bail for appearance before the magistrate in the morning. When a private person delivers another in charge for an affray committed in his presence, the constable is bound to receive him. But if called in after the affray is over, a warrant to arrest is necessary, unless a dangerous wound has been given, or a felony may ensue. Persons obstructing a constable in the discharge of his duty may be arrested, but may not be struck by him. But if a party in an affray fly, he may be pursued and taken.

If there is an affray in a house, or a great noise, or disorderly drinking, at an unseasonable hour of the night, a constable, after declaring the cause of his coming, and demanding admission in vain, may break open doors. But where felony is being committed, as exposing infants, or cheating by false dice, any person may arrest or pursue and take the offender, although there be no breach of the peace. So may any person to prevent murder, and it is their duty to do so; and if hue and cry is raised, every person is bound to assist, on pain of fine and imprisonment. And so may any person arrest a suspected felon; but he does it at the risk of an action, if the suspected person be innocent.

Constables, after notice to the other inhabitants of the house, may break open doors to arrest a fugitive felon, and, if necessary, may use force; and if death ensue, it is not murder. But private persons cannot do this without a warrant. So, if a dangerous wound be given, the constable, though not present, is bound, on complaint, to arrest the party and carry him before a magistrate. So on a direct charge of felony, however false it prove ultimately to be, unless such falsity is reasonably apparent to him. So on reasonable suspicion, merely of

felony he may arrest; but not so a private person, unless he can prove the actual commission of the crime. By the 7 & 8 Geo. IV. c. 29, § 63, (Malicious Trespass Act), persons found committing any of the offences enumerated in that act (except angling) may be apprehended by a peace officer, or by the owner of the property injured or his servant, without a warrant; and the person to whom any property is offered to be sold, pawned, or delivered, having reasonable cause to suspect that any such offence (as those enumerated in the other sections of the act) has been committed, may apprehend and carry the party offering the same before a magistrate. And similar enactments are contained in 7 & 8 Geo. IV. c. 30, § 28 (Malicious Injuries Act). These offences are enumerated in the statutes, and will be more particularly referred to hereafter.

The 12 Geo. II. c. 29, § 8, and 55 Geo. III. c. 31, § 12, provide how the constables shall account for money received by them in respect of the county rate. Where actions are brought against the hundred for riots &c., by the 7 & 8 Geo. IV. c. 4, § 31, process is to be served on the high constable, who is to give notice to two justices, and he may conduct the defence to the action as he shall be advised. Where the damage does not exceed 30*l.*, the party damnified is not to bring an action; but, in seven days after the damage, is to give notice of his claim to the high constable, who within seven days is to exhibit it to two justices, and they shall appoint a special petty sessions for deciding the matter; and the high constable is to give the claimant notice of the time and place. The same duties and powers may be imposed on or exercised by petty constables.

By 6 Ann. c. 31, § 5, they are to be on duty in cases of fire, and apprehend persons suspected of stealing goods therefrom. And by 6 Geo. IV. c. 80, and 3 & 4 Wm. IV. c. 53, § 38, they are to aid excise and custom-house officers, and that even beyond the limits of their particular district. They may not, however, enter a house in search of smuggled goods without a probable cause.¹

By 11 Geo. II. c. 19, § 7, they are to assist landlords in the recovery of property unlawfully removed to avoid a distress for rent. And by 2 W. & M. st. 1, c. 5, § 2, they are to aid in the appraisement of goods distrained, and to administer oaths to the appraisers.² So by 19 Geo. II. c. 21, §§ 3, 7, they are to arrest swearers and take them before a justice. By 50 Geo. III. c. 41, § 21, they are to aid in carrying persons hawking without a licence before a justice of peace, under penalty of 10*l.*

They may also arrest night-walkers and other suspicious persons found loitering or wandering about at unseasonable hours.

They are bound to execute every warrant addressed to them either by name or otherwise. And by 5 Geo. IV. c. 18, § 6, any officer (out of, as well as in, his own district) may execute a warrant within the jurisdiction of the magistrate granting or indorsing the warrant; but he is not *compellable* to do so out of his own jurisdiction.³ Where a party is arrested on an indorsed warrant according to 24 Geo. II. c. 55, § 1,⁴ or 13 Geo. III. c. 31, and 54 Geo. III. c. 186, § 2, the officer

¹ *Rex v. Watts*, 1 Barn. & Adolph. 166.

² See also *Walter v. Rumball*, 1 Lord Raym. 53, § 3, 7.

³ *Gimbert v. Coyney*, 1 M'Clel. & Y. 469.

⁴ See *ante*, tit. JUSTICES OF PEACE.

originally authorized is to take the party to the justice granting the warrant, unless the offence is bailable; and under similar circumstances, by 33 Geo. III. c. 55, § 3, and 5 Geo. IV. c. 18, § 1, in levying fines, the officer originally authorized is to levy them.

The warrant is generally a protection to the officer against an action; and the 24 Geo. II. c. 44 provides, that no action shall be brought till a copy of the warrant has been refused to the party complaining. If it be given, then the action lies against the justice granting it; but this is not necessary where he executes it beyond the jurisdiction of the justice. An overseer executing a warrant of distress for poor's rates, and constables assisting him, are within this act, and the overseers are liable. But if the constable go beyond what the warrant would authorize under any circumstances, then he is not justified. In executing a warrant the constable should take care to have it about him at the time. A verbal warrant is only sufficient if the justice is present.

A constable may, after he has declared his business, break open outer doors, if refused admission, either where he seeks to execute a warrant to compel a man to find sureties of the peace or for good behaviour, or on a charge of felony, or on a *capias* on indictment; but not if the warrant is merely to search for stolen goods; nor on a distress warrant for poor's rates or church rates, or to require a person to take oaths prescribed by a statute. He should always show his warrant, but should not part with the possession of it.

With regard to the treatment of a person apprehended, the constable is in general to take him before a magistrate; but, in case of a trivial affray, he may, after the heat of it is over, set him free. He must not keep him an unreasonable time, or treat him with unnecessary harshness; but he cannot release on bail. He may also confine a prisoner if necessary, or commit him to temporary imprisonment, till he can carry him before a justice. By 23 Geo. II. c. 29, § 2, he may, in the route to his own precinct or county, take a prisoner arrested through an intermediate county. Having suffered a prisoner to escape, he cannot retake him on the same warrant, except on a voluntary surrender.

Privileges and Exemptions.—Constables are generally exempt from serving any other office, but not from being impressed in the navy. Every one is bound in the day time to recognize a constable as such; but otherwise in the night, when he must show his authority. By 9 Geo. IV. c. 31, § 25, persons assaulting peace officers in the execution of their duty are subject to imprisonment. In resisting an officer after he shows his warrant, if death ensue to the officer, it is murder; but if he refuse to show it, it amounts to manslaughter only.

CONSTABULARY POLICE.—Under the 10 Geo. IV. c. 44, a new and efficient system of police was established, in the year 1829, for the metropolis and its vicinity, in the room of the former local establishments of nightly watch and police, which had been found inadequate to the prevention and detection of crime, by reason principally of their want of connexion and co-operation with each other. Two commissioners of police were appointed, with a police office in Westminster, and a numerous body of able men under their control, as a police force for the Metropolitan Police District; which district, by the 2 & 3 Vict. c. 47, may be extended to any place (the city of London excepted)

within the distance of fifteen miles from Charing Cross. This force is one connected body, under the direction of the secretary of state. The commissioners are justices of peace for the counties of Middlesex, Surrey, Hertford, Essex, and Kent; and the men have, throughout the whole of the same counties as well as within the Metropolitan Police District, all the powers, and are liable to the duties and responsibilities of a constable within his constablewick. The observations therefore already made with reference to constables apply to this body; and there are, besides, many special enactments referable to them, not only in the act already mentioned, 10 Geo. IV. c. 44, by which they were constituted, but in the 2 & 3 Vict. cc. 47 and 71, the whole of which are to be construed together as one act.

The same causes which led to the establishment of the Metropolitan Police, and the success which attended it, have suggested the extension of the system to other parts of the kingdom. Accordingly by the 2 & 3 Vict. c. 92 provision is made for the appointment of a constabulary police in any county or district where it may be deemed desirable, upon a representation to the secretary of state to that effect from a majority of the justices assembled in general or quarter sessions. The plan has been carried into effect in many counties; but the great expence attending it has prevented its more general adoption; and it is generally considered, that the recent act for the appointment of parochial constables, which we have already detailed, will in a great measure supersede it.

For the provisions as to the appointment of paid constables on canals and navigable rivers, see 3 & 4 Vict. c. 50.

SPECIAL CONSTABLES.—By 1 Geo. IV. c. 37, in case of riot &c. being apprehended, justices are empowered to appoint as *special constables* any householders not legally exempt from the office of constable, who are to be sworn in and be subject to the same laws as ordinary constables are.

WATCHMEN duly appointed and sworn in by parishes &c. are a kind of special constable for the protection of property &c. during the night time, having nearly the same powers and protection as constables. They are not bound to execute the warrants of justices, as constables are; and, if they do, are to be looked upon as private persons in the performance of such act.

SURVEYORS OF HIGHWAYS.

Every parish is bound, of common right, to keep the high roads that go through it in good and sufficient repair; and the ministerial officer to whom this duty is more particularly entrusted is the surveyor of the highways.

A *highway* is a right of passage for the public in general, without distinction. There are three kinds of highways: 1st, a footway; 2dly, a foot and horse way; and 3dly, a carriage, horse, and foot road; which last is either the queen's highway, open to all men, or belongs to a city or town, or to private persons. The better opinion seems to be, that, unless there is a thoroughfare, there

cannot be a public highway.¹ A public street or passage, no matter what the breadth; an open river; a bridge; or a railway, may be a public highway.

A passage from one part of a street to another, made originally for private convenience, may become a public highway, notwithstanding it is circuitous, or only occasionally used by the public, and though it do not terminate in a town or in any other public road.² So, on the contrary, it is not necessarily a highway, although it lead from one market town to another, and might be advantageously used by the public, or used by them under certain restrictions.³

A highway may exist by prescription (that is, constant use beyond the legal memory of man), or it may be created by dedication of a road to public use. Thus, if one build a street on his land, and place no bar across the road, it is a dedication to the public. But where such bar is put up, although generally the public may pass through, it is no dedication; nor if such bar be knocked down and not replaced, does the presumption of dedication arise. Neither will the circumstance of the building forming a *cul de sac* (that is, a court or alley with no more than the outlet by which it is entered) favour the presumption. Where a street which had been forming for six years, leading from an old public street to a new road across fields, over which the way had been used for five or six years, was unfinished (one half only being lighted, the other half being neither lighted nor paved, but the inhabitants had paid the highway and paving rates), it was held to be sufficient evidence to go to a jury of a dedication of the street to the public. The act of dedication must be by the owner of the estate of inheritance; therefore a leaseholder or tenant for life cannot devote any portion of the land to the public, so as to bind the reversioner,⁴ although Lord Ellenborough has held the contrary.⁵ However, it is clearly settled, from that case and others, that, by acquiescence on the part of the owner of the inheritance, after a lapse of time dedication may be presumed; but *what length* of time, has never been settled. Neither has it been settled whether there can be a partial dedication. And though the common law imposes on a parish the duty of repairing all highways within it, it does not follow that because a road is dedicated by the owner of the soil to the public use, that therefore the parish is bound to repair it; for the owner retains his right to the soil with all trees and mines thereon and thereunder; therefore it must be shown that the parish have acquiesced in that dedication.

Highways may also be created by act of parliament, or by necessity. Thus, if a highway become impassable, the public have a right of way over the adjoining land, even though it be sown with grain.

In regard to the *ownership* of the soil of *waste lands adjoining to the highway* it is to be observed, they are presumed in the first instance to belong to the owner of the adjoining land, and not to the lord of the manor; and where strips of land lie between a highway and an

¹ Wood v. Beal, 5 B. & A. 454; Wood-
yer v. Haddow, 5 Taunt. 125. Wellbeloved
on Highways, 7—19.

² Rex v. Lloyd, 1 Campb. 260; Rev. v.
Wandsworth, 1 Barn. & Ald. 68.

³ Rugby Charity v. Merryweather, 11
East, 376.

⁴ Wood v. Beal, 5 B. & A. 454.

⁵ Rex. v. Barr, 4 Camp. 16.

adjoining inclosure, they are presumed to belong to the owner of the inclosure. But if they are contiguous to or communicate with open commons or larger portions of land, the presumption is in a great measure done away, and *prima facie* they belong to the lord of the manor. These presumptions arise, whether the owner of the adjoining inclosure be a freeholder, copyholder, or leaseholder.

The parish, as before observed, is generally liable to the repair of all the highways and roads that run through it; and although turnpike roads are formed and regulated by acts of parliament, which provide funds for their repair by tolls to be taken at the turnpikes, yet if the funds fall short, the parish is still bound to repair.

But a particular part of a parish may, by prescription or otherwise, be exempt from the burthen of repairs. Individuals may become solely bound to repair a highway; as where a man, being owner of the soil of an open track of land over which there is a public right of way, incloses the land on both sides leaving a road, he must repair the road, since before the inclosure the public had a right, if the beaten track became impassable, to diverge over the land so inclosed; and if he neglect so to repair it, the public or any person is justified in breaking his hedges in order to go upon a better track. If he incloses one side, or if the other side of the road has been inclosed time immemorially, he is bound to repair only to the centre of the road from the side near to that lately inclosed. So where a footpath runs through different inclosures, all stiles and gates must be kept in good and passable condition; or, it should seem, any person, in order to pursue his right of way, may justify removing the obstacle. This does not, however, apply to inclosures under acts of parliament.

Individuals may also be liable solely to the repairs by prescription; and in this case justices may compel them to repair such highways.

The general law relating to highways is now contained in the 5 & 6 Wm. IV. c. 50; which act came into operation on the 20th March, 1836, and repealed all former statutes on the subject.¹ It does not, however, apply to turnpike roads, except where these are expressly mentioned, nor to roads paved under any local act. Some alterations were effected by this act, which seem to have been long and much desired; especially the abolition of statute duty, which, variously modified, had existed for three centuries, having been first imposed in the reign of Philip and Mary. As an objection, however, prevailed against the entire abolition of team work, from its being supposed that farmers can in many cases better contribute to the repair of the highways in that mode than by a money payment, a power is conferred on the rate-payers of directing such work to be done, if they think proper, in the manner described in the act. To the former law it was frequently objected, that too much of the expence of repairing the highways was thrown on the land,—that a burthen which ought to be general was, in fact, partial. This act, therefore, renders subject to the highway rate *all property rateable to the poor*, as well as some other species particularly described in it. In return, the rate-payers are now invested with the power of appointing their own surveyor;

¹ The provisions of this act were extended by the 8 & 9 Vic. c. 71 to all lands belonging to parishes or to the surveyor of highways, lawfully used for the purpose of ob-

taining materials for the repair of the highways in such parish, the materials in which lands have been or may be exhausted.

a privilege which, practically speaking, was previously in the hands of the magistrates. If they please, they may appoint a permanent and salaried surveyor; or several parishes may unite together for the purpose of appointing such a surveyor for a district. In large parishes, a board for the repairs of the highways, with an assistant surveyor, clerk, &c. may be formed. These, however, as well as the other intentions of the act, will more fully appear from the following abstract of it.

Special Sessions for the Highways.—The justices of the peace within their respective divisions, or any two or more of them, shall hold not less than eight nor more than twelve special sessions in every year for executing the purposes of this act: the days of holding the same to be appointed at a special sessions held within fourteen days after the 25th of March.

At the said special sessions held next after the 25th March, the surveyor of each of the parishes within the division shall verify his accounts, and shall make a return in writing of the state of all the roads, common highways, bridges, causeways, hedges, ditches, and water-courses appertaining thereto, and of all nuisances and encroachments (if any) made upon the several highways, as well as of the extent or the different highways which the parish is liable to repair, what part thereof has been repaired, with what materials, and at what expence, and the amount of rate levied during the time he was surveyor.

Surveyor of the Highways.—Every parish maintaining its own highways shall, at their first meeting in vestry for the nomination of overseers, elect one or more persons for the office of surveyor for the year, to keep in repair the highways to be repaired by the parish. Where there is no such vestry meeting, the inhabitants shall meet on or within fourteen days after the 25th of March.

Any person living in the parish, or in an adjoining one, and having an estate in houses, lands, tenements, or hereditaments within the parish, in his own right or in right of his wife, of the value of 10*l.* a year, or a personal estate of the value of 100*l.* (such person if not living within the parish being willing to serve), or being an occupier or tenant of houses &c. of the yearly value of 20*l.* whether residing in the parish or in an adjoining one, is eligible to be elected. But no person now exempted by law from serving the office of overseer shall be compellable to serve as surveyor. And any person elected may provide a deputy, to be approved of by the justices at a special sessions.

Any person elected and refusing to serve or provide a deputy shall forfeit 20*l.* on conviction before two justices.

Instead of electing such surveyor, the inhabitants may appoint any person of skill and experience to act as a surveyor with a salary.

If the inhabitants neglect to appoint a surveyor, the justices at a special sessions may appoint one till the next annual meeting, with or without a salary, as shall seem fit.

District Surveyor.—As it is expedient in many cases that parishes should be formed into districts for the purpose of having a district surveyor, a vestry may direct one of the churchwardens, or the chairman of the vestry, to apply to the quarter sessions (or if in a division, to the special sessions) to be united with other parishes as a

district, and to nominate a person as district surveyor with a salary; which application is to be forwarded to the clerk of the peace. The justices are accordingly authorized to unite and appoint; and such parishes shall form a district for three years, and afterwards until the churchwarden or the chairman of the vestry of any one shall give twelve months notice to the churchwardens and surveyor of each of the others, and to the district surveyor and the clerk of the peace, of their intention to discontinue the union, at the expiration of which notice the union shall cease. In each of such parishes, however, a surveyor is to be elected as hereinbefore mentioned, whose only duty will be to assess and levy the rates, and pay over the money to the district surveyor.

The powers, duties, and liabilities of the district surveyor, where applicable, are similar to those of the surveyor before mentioned, except as to making and levying of the rates. He is to have the laying out and application of all the funds raised under the act; but the expenditure of the money levied in each parish must be confined thereto, unless the parish consent to its being applied for the benefit of the union.

Board of Directors and Assistant Surveyor.—In any parish where the population exceeds 5000, two-thirds of the vestry may determine that a board of direction shall be formed for carrying the act into effect; and for that purpose may elect not more than twenty nor less than five householders, resident and assessed to the highway and poor rates, as surveyor for the year. The powers of the vestry and surveyor will then be vested in such board; and they may appoint a *collector* or *collectors* of the rates, an *assistant surveyor*, and *clerk*, with salaries, and a *treasurer*. At the end of the year, and before the day of election, they are to present to the vestry copies of their accounts and minutes of their proceedings.

Such board may rent, or (with consent of vestry) purchase premises for keeping the implements and materials for repair of the highways, and may direct in what manner the highways shall be curbed or paved.

Highway Rates.—In order to raise money for carrying the purposes of the act into execution, a rate is to be made and levied by the surveyor upon all property liable to the poor rates, and also upon such woods, mines, and quarries of stone, or other hereditaments, as have heretofore been usually rated to the highway rate. The rate must be signed by the surveyor, allowed by two justices, and published in the same way as the poor rates. It is not to exceed 10*d.* in the pound at any one time, or 2*s.*6*d.* in the pound in any one year, except with the consent of four-fifths of the inhabitants at a special meeting.

The rate may be recovered by the surveyor in the same manner as the poor rate by overseers; and where the latter are empowered by local acts to compound with the landlords of certain houses &c., or to rate them as occupiers, the same power is given to the surveyor as to the highway rate. Persons unable to pay through poverty may be excused by the justices at a special sessions. Property legally exempt before the passing of the act is still exempted.

Surveyors, with consent of vestry, may appoint collectors, with full power of levying, and allow what the vestry think reasonable.

Every surveyor, assistant, and district surveyor, is to keep an account of all moneys received and paid, and of all tools, materials, &c. provided by him; which accounts shall, at all reasonable times, be open to the inspection of every rated inhabitant, who may take copies thereof. Any surveyor &c. neglecting to make such entry, or refusing such inspection, shall forfeit 5*l*. And, within fourteen days after his leaving office, he shall deliver such books and accounts, together with all moneys in his hands, to his successor, under a penalty of not exceeding 5*l*. and double the amount of any money due from him and not paid over.

Within fourteen days after the appointment of his successor, the surveyor's accounts for the year must be laid before the vestry; and within one month after such appointment they must be signed and laid before a special sessions, to which any person may appeal against them.

Team Work.—Within six days after the appointment of the surveyor, any two rate-payers may require him to call a meeting of the rate-payers; and, if a majority consent, the rate-payers keeping a team of two or more cattle may divide among themselves, in proportion to their assessment, the carriage of the materials required for repairs, and shall be paid for such work within one month at the rate per cubic yard of material per mile fixed by the special sessions at their first meeting after the 25th March. But the work must be performed at the times and places and in the manner the surveyor may direct (except in spring, seed-time, and harvest); and if he does not approve of it, the special sessions may hear the complaint, and impose any forfeiture they think reasonable.

Repair of Highways.—The term *highways* in this act means all roads, bridges (not being county bridges), carriageways, cartways, horseways, bridleways, footways, causeways, churchways, and pavements.

No road or occupation way made at the expence of any person &c., nor any road set out as a private driftway or horsepath in any award under an inclosure act, shall be deemed a highway repairable by the parish, unless the person proposing to dedicate it to the public use shall give three months notice in writing to the surveyor of his intention, describing its situation and extent, and shall make it in a substantial manner, of the required width, and to the satisfaction of the surveyor and two justices of the division, who are to view and certify at the expence of the party (such certificate to be enrolled at the quarter sessions); and after such highway has been used by the public, and repaired by the person &c. making it for twelve months, it shall ever after be repaired by the parish. On receipt of the notice, the surveyor is to summon a vestry; and if they object to its repair, any justice may summon the person &c. making it to the next special sessions, when the question of its utility shall be determined.

Any person liable to repair a highway by reason of the tenure of lands or otherwise, or the surveyor (with consent of the vestry), may apply to a justice to make such highway a parish one, who shall summon the surveyor or party liable to the next special sessions. And if they decide it to be a parish highway, they shall by order fix the proportion of expence to be annually paid by such person; or, instead, they may award a sum in full discharge of all future claims.

When the boundaries of two parishes lie in the middle of a common highway, a special sessions may determine what part of such highway shall be repaired wholly by one parish, and what part by the other. The same proceedings may be had when the repairs of any part of a highway belong to any person &c. by reason of the tenure of lands or otherwise.

If any bridge be hereafter built liable to be repaired by the county, all highways to, over, and next adjoining such bridge shall be repaired by the parish, person, &c., who was before its erection by law bound to repair them. But the county shall repair the walls, banks, or fences of the raised causeways and approaches to such bridge, and the land arches thereof; and the powers vested in the surveyor of highways for getting materials and removing nuisances are vested in the surveyor of county bridges and the roads at the ends; and the provisions relating to highways shall, as far as applicable, refer to such bridges and roads.

The surveyor is required to make and maintain every public cartway to a market town twenty feet wide, and every horseway eight feet, and every footway by the side of a carriageway three feet, if the ground will allow. But he must not make a footway without the consent of the vestry.

If any gate across a cartway be less than ten feet, or across a highway less than five feet, on notice from the surveyor in writing left at the dwelling of the owner or his agent, it must be removed or enlarged (as required) under a penalty of not exceeding 10s. a day.

The surveyor may make a road through grounds adjoining any ruinous or narrow part of a highway (not being the site of any house, nor a garden, lawn, yard, court, park, paddock, plantation, planted walk, or avenue, nor inclosed for building, nor a nursery for trees), to be used as a public highway whilst the old road is being repaired, on making such recompence to the proprietor &c. as the justices in special sessions may think reasonable.

The surveyor of every parish (not within three miles of the General Post Office) shall, with the consent of vestry, or by the direction of a special sessions, cause to be erected, where two ways meet, a stone or post, with an inscription in large letters (not less than an inch in height) containing the name of the next town or place whereto they lead; and shall also mark the boundaries of the highway with the name of the parish. And, at the approaches to parts subject to floods, shall cause to be erected graduated stones or posts for guiding travellers. And shall secure causeways, by stones or banks of earth, from being injured by waggons, &c.

The surveyor may make, scour, cleanse, and keep open all ditches &c. or watercourses, and lay trunks &c. or bridges in and through any lands (except commons) adjoining the highways, upon paying the owner &c. Damages to be settled as damages for materials. And if any person interfere with such ditches, trunks, &c. without consent of the surveyor, he shall reimburse the charges thereby occasioned, and forfeit not exceeding thrice the amount.

Proceedings to compel Repairs.—After the commencement of this act, proceedings by *presentment* against the inhabitants of any parish

or person on account of any highway or turnpike road being out of repair, are abolished.

If any highway be out of repair, and information on oath by one witness be given to a justice, he must summon the surveyor or other person liable to a special sessions of the division, who shall appoint a person to view and report, or they shall themselves view; and, either on such report or their own view, they may convict in not exceeding 5*l.*, and shall order the repairs, and limit the time, and for default impose a fine equal to the amount requisite for repairs, and divide the proportions among the parties, if several are liable. If the road be part of a *turnpike* road, the treasurer or surveyor of the trust may in like manner be summoned and fined.

But the justices are not to make any such order where the *duty* of repairing comes into question. But in such case they must direct an *indictment* to be preferred, and the witnesses to be subpoenaed, at the next assizes or quarter sessions. And the costs shall be directed by the judge or justices out of the county rate. The indictment, however, may be removed by the defendant by certiorari into the Queen's Bench.

Fines for not repairing, or not appearing to an indictment, instead of being returned into the Exchequer, are to be applied to the repair of the highways. If any fine be levied on an inhabitant, he may appeal to the special sessions, who may order the same to be paid out of the rate.

Procuring Materials for Repair of Highways.—The surveyor may, with the consent of the vestry, contract for materials. But he must not, directly or indirectly, have any share in any such contract, or let any team (unless a licence in writing for such purpose be first obtained from two justices in special sessions), under a penalty of 10*l.* and being disqualified as a salaried surveyor.

The surveyor may, with the consent of vestry and of the justices at a special sessions, sell lands allotted to parishes for getting materials, and from which such materials have been exhausted, for the price the justices may deem reasonable, and with the produce purchase other land.

The surveyor may take materials from any *waste land* or *brook* &c. in his own parish, or in any other if enough cannot be procured in his own, and a sufficiency be left for such other parish. But he must not prejudice any river &c., nor dig within 150 feet above or below any bridge or dam. And stones must not be taken from the beach where they protect the adjoining land.

If sufficient materials cannot be had on *waste* lands, the surveyor may, by licence from special sessions, get them from the inclosed lands of any person (not being a garden, yard, lawn, paddock, &c., or a wood not exceeding 100 acres) within the parish (or in any adjoining one, if enough cannot be had there) making satisfaction to the owners, to be settled by order. But he must not take materials from any inclosed land¹ till one month's notice has been given to the owner or his agent and the occupier to appear at a special sessions, and an order obtained for getting such materials.

¹ Under the term "inclosed land" in this place, and also in the analogous provision of the General Turnpike Act (8 Geo. IV. c. 126), are included lands occupied for agricultural purposes, though not separated from the ad-

joining lands by any fence or other inclosure; consequently materials cannot be taken from such lands without previous notice to the owners or occupiers, and authority from a special sessions. 4 & 5 Vict. c. 51.

If, in getting materials, the surveyor open a pit, it must be fenced round and filled up in *three* days where no materials are found, and in *fourteen* after having got sufficient therefrom.

And every surveyor, within twenty-one days after his appointment, must fill up all pits not likely to be useful, or fence them round, under a penalty of 10*s.* for each default, and 10*l.* for a neglect of six days after notice from a justice or the proprietor, proved on oath at special sessions; to be laid out in repairs.

If, in getting materials, he damage any bridge, road, works, &c., he shall forfeit not exceeding 5*l.*, and be moreover liable to a civil action.

If any person shall, without the surveyor's consent, take away materials to be used for repairs, or out of any quarry, before the surveyor shall have discontinued working for six weeks (except the owner of private grounds, and persons authorized by him to get materials for his private use), he shall forfeit 10*l.*

Widening Highways.—If a road appear, on the view of two justices, not of sufficient breadth, they are empowered to order it to be widened, so that it shall not exceed thirty feet. But they must not pull down any building, nor invade any garden &c., avenues &c., or nursery.

When a road is ordered to be widened, the surveyor, under the direction of the justices, may agree for the recompence of the ground, and for making new ditches and fences.

If no agreement can be come to, the quarter sessions, on the certificate of such justices, and fourteen days notice given by the surveyor to such persons of his intention to apply to the sessions, may impanel a jury to assess the damages, not exceeding forty years purchase. The amount is thereupon to be levied by rate, as directed by justices in quarter sessions; which must not exceed in any one year one-third of the rate levied in addition to the highway rate. The costs to be borne by the surveyor if the jury assess *more* than he offered, and by the other party if *less*.

On payment of the sum assessed to the person entitled (or, if he cannot be found or refuses to accept it, to the clerk of the peace), his right shall be divested, and the ground be thenceforth a public highway. But all minerals &c. are reserved, if they can be procured without breaking the surface of the highway; and all timber &c., to be felled within one month after the order, or in default by the surveyor.

Diverting or Stopping up Highways.—When the vestry shall deem it expedient for any highway to be stopped up or diverted, either entirely or reserving a bridleway or footway along the whole or any part, the chairman shall direct the surveyor to apply to two justices to view the same, authorizing him to pay all expences. But if any other party desire such stopping up &c., he shall by notice require the surveyor to give notice to the churchwardens to summon the vestry; and if they agree, the surveyor shall apply to the justices as above, and the expences shall be paid by such party to the surveyor.

And when it shall appear to the two justices, on view required by the surveyor as before directed, that any public highway may be diverted commodiously, and the owner of the lands shall consent in writing, or if it appear upon any such view that any public highway is unnecessary, the justices shall direct the surveyor to affix a notice where it is pro-

posed to be diverted or stopped up, and insert it in a county newspaper for four successive weeks, and fix it on the door of every parish church on four successive Sundays; and on proof thereof to the justices, and delivery to them of a plan verified by some surveyor, they shall certify their view, and the commodiousness of the new highway, and the reasons thereof, and the distance saved; and if the road be considered unnecessary, the reasons thereof also. And the certificate, proof, and plan shall be lodged with the clerk of the peace, and shall be read in open court at the quarter sessions in four weeks thereafter, and enrolled thereat.

Persons aggrieved by any such certificate of justices for diverting or stopping up highways may appeal to the quarter sessions on giving ten days notice in writing, with a statement of the grounds thereof; and the surveyor, within forty-eight hours, must deliver a copy to the party, requiring him to apply to the justices to view. But where the vestry have required him, he need not deliver such notice. No appellant can be heard unless notice has been given, nor on any grounds not set forth therein.

If there be no appeal, or if it be dismissed, the quarter sessions shall order the diversion or stopping up and the purchase of ground (as in widening highways), and the new highway shall be a public one. But no old highway (except a useless one) shall be stopped until the new one be made and certified by two justices; such certificate to be enrolled with the clerk of the peace.

And the parish or party liable to repair the old highway shall repair the new one, without reference to its locality.

The above provisions are applicable to highways repaired by parties by reason of the tenure of lands, &c. And such roads, when so diverted or widened, may, by order of a special sessions be placed under care of the surveyor of the parish, and be thereafter repaired by him. But two justices must view and report to the special sessions, who are to fix the annual payment, or sum in lieu thereof, to be paid by the parties liable.

Obstructions, Encroachments, Nuisances, &c.—If any impediment or obstruction arise in any highway from the accumulation of snow, or from the falling down of the banks on the sides, or from any other cause, the surveyor shall, within twenty-four hours notice thereof from any justice of the county, cause the same to be removed.

If any surveyor or district surveyor shall cause any heap of stone &c. to be laid on any highway, and shall allow the same to remain at night to the danger of passengers, due caution not being given, he shall forfeit 5*l*.

No tree, bush, or shrub shall be planted on any carriageway or cartway, or within fifteen feet from the centre; but the same shall be cut down, grubbed up, and carried away by the owner or occupier of the land within twenty-one days after notice by the surveyor, on pain of forfeiting 10*s*. for every neglect.

If the surveyor shall think any carriageway or cartway injured or obstructed by hedges or trees (unless planted for ornament or shelter to any hop-ground, house, building, or court-yard) any justice, on his application, may summon the owner of the lands to a special sessions,

when the question as to their removal shall be determined, whether the owner attend or not (after proof of service of notice); and he must comply with the order within ten days after a copy has been left at the abode of himself or his agent, under a penalty of 40s. And if the order be not complied with, the surveyor shall remove the same, and be reimbursed the charges by such owner, which the justices may levy by distress and sale as other forfeitures.

But no surveyor is to cut hedges, except between the last day of September and the last day of March. And no person shall be obliged to cut any timber in hedges, except when the highway is to be enlarged; and oaks only in April, May, or June, and ash, elm, or other trees in December, January, February, or March.

If any person shall make any building, hedge, ditch, or fence on any carriage or cartway within fifteen feet of the centre, he shall forfeit not exceeding 40s., and the surveyor shall cause it to be taken down or filled up at the owner's expense.

No person shall sink any pit or shaft, or erect any steam-engine or machinery, within twenty-five yards, nor windmill within fifty yards, from any carriage or cartway, unless such pit, machinery, &c. be so screened as not to be dangerous to passengers or cattle; nor make any fire for calcining iron-stone &c., burning clay &c., or making coke, within fifteen yards, unless screened, under a penalty of 5*l*. But engines &c. existing at the passing of the act may be repaired.

Proprietors of railroads are to erect gates, and keep persons to attend to them, where such railroads cross the highway, or on complaint within one month¹ before one justice may be fined not exceeding 5*l*.

If any person shall wilfully ride on any footpath or causeway; or drive any horse, cattle, carriage, or sledge thereon; or tether any cattle on any highway; or cause any injury thereto, or to the hedges &c. thereof; or obstruct the passage of a footway; or injure the surface of a highway; or damage posts &c. erected by the surveyor; or dig the banks; or throw down the stones &c. from the parapets of bridges; or deface any milestone or direction post; or play at any game on the highways and annoy passengers; or if any hawker &c. or gipsy shall encamp &c. on the highway; or if any one shall assist in making a fire, or let off any gun or fireworks &c., within fifty feet of the centre of the highway; or bait any bull near the highway; or lay any timber, rubbish, &c., on the highway, to the injury thereof or of the passengers; or suffer any filth &c. to flow thereon from adjacent premises; or obstruct the free passage thereof; for each of such offences a penalty is imposed of not exceeding 40s. over and above the damages.

If any timber, stones, rubbish, or other thing, be laid on a highway so as to be a nuisance, and shall not, after notice by the surveyor, or assistant or district surveyor, be forthwith removed, he may, by order of a justice, clear the highway of the same, and dispose of it, and apply the proceeds to repairs. If it be not sufficient to defray the expenses of removal, the owner must reimburse the surveyor, or the same may be levied as a forfeiture.

If any horse &c. or other cattle is straying or depasturing on any highway without a keeper (except on parts crossing over commons &c.), the surveyor may seize and impound it in the common pound of the

¹ 2 & 3 Vict. c. 45.

parish or other place, till the owner pay one shilling and the expences, to be settled by two justices and applied to the repairs; and if not paid in five days, they may order them to be sold (unless such cattle appear to have strayed without any default of the owner). The overplus to be paid to the owner; but if not claimed within one month, shall be applied to repairs. But no more than 20s. shall be paid by any such owner. And nothing herein shall take away any right of pasturage on the side of any highway.

Any person guilty of pound breach shall forfeit not exceeding 20*l.*, or in default of payment be committed with hard labour for not exceeding three months.

Driving Carts, &c.—The owner of every waggon, cart, &c. shall paint, in straight lines, on the off side of the waggon &c., or on the off side shafts, his name or title, and the place of trade or abode of himself or partner, in full length, in legible letters, in black and white, and not less than an inch in height, under a penalty of not exceeding 40s.

No person shall act as the driver of more than two waggons &c.; and when two are under the care of a single person, they must be drawn by only one horse each, and the horse of the hinder one must be attached to the back of the foremost, under a penalty of 20s.

If any driver ride on any carriage or the horse drawing it, not having some other person to guide it (except carriages driven with reins); or if the driver of any carriage shall cause any hurt to any person or goods conveyed, or shall quit the same, or be at such a distance as not to be able to direct the horses; or shall leave the carriage &c. so as to obstruct the highway; or shall drive any carriage not having the owner's name as before required, and refuse to tell his name; or shall not keep the left side of the road on meeting another carriage &c., or shall interrupt the free passage thereof; or shall drive furiously; for each of these offences, on conviction before two justices, in addition to the civil liability, a forfeiture is imposed of not exceeding 10*l.*, or commitment for not more than six weeks.

Any driver may be apprehended without warrant by any person seeing the offence committed; and if he refuse to discover his name, may be proceeded against by a description only of his person and offence, and be committed for not exceeding three months.

Fees.—The following fees only shall be taken by the clerk of the peace and others:—For every information, 6*d.* Summons or warrant, 1*s.*; and 6*d.* for serving. Notice, 6*d.*; and 6*d.* for serving. Order, 1*s.*; and 6*d.* for serving. Warrant of distress, 2*s.* Appointment, 1*s.* Conviction, 2*s.* When the fees directed under local acts are less than the above-mentioned, they are still to be continued.

Turnpike Roads.—The foregoing observations in most cases apply in like manner to turnpike roads; and for more particular information, the acts of parliament creating the trust, and the General Turnpike acts (3 Geo. IV. c. 126, 4 Geo. IV. c. 16, ss. 35, 95, 5 Geo. IV. c. 69, 7 & 8 Geo. c. 24, 9 Geo. IV. c. 77, and 3 & 4 Wm. IV. c. 8), must be referred to.

THE POOR LAWS.

1. OF THE OFFICERS CONCERNED IN THE ADMINISTRATION OF THE POOR LAWS.

1. THE POOR LAW COMMISSIONERS.—These are appointed by the crown, and removable at pleasure. They are, by 4 & 5 Wm. IV. c. 76, three in number,¹ any two of whom may sit as a board; and they have power to appoint a secretary, assistant secretaries, clerks, messengers, and other officers. They may also appoint *assistant commissioners*, of whom we shall speak hereafter.

The whole administration of relief to the poor according to the existing laws is subjected to the discretion and control of the Board of Commissioners; and for this purpose they are authorized to make rules, orders, and regulations, for the management of the poor,—for the government of workhouses,—for the education of children therein,—for the management of poor parish children under the 7 Geo. III. c. 39, and the superintending, inspecting, and regulating the houses in which they are kept and maintained,—for apprenticing the children of the poor,—for the guidance and control of all guardians, vestries, and parish officers, so far as relates to the management or relief of the poor, the making and entering into contracts in all matters relating to the same, and the keeping, examining, auditing, and allowing of accounts,—and generally for carrying the act into execution in other respects, as they shall think proper. But they are not to interfere in any individual case for the purpose of ordering relief; and they can make no rule which shall have the effect of compelling the inmates of workhouses to attend a mode of worship contrary to their religious principles, or of causing children to be educated therein in any religious creed to which their parents may object.

The rules, orders, and regulations of the commissioners are of two kinds: *general* rules, intended to affect all the parishes or unions in the kingdom, or at least some two or more of them; and *particular* orders, applicable to a single parish or union.

All *general rules* are to be submitted to the secretary of state forty days before they come into operation, within which time, or at any time afterwards, they may be disallowed by the privy council; they are also to be laid before parliament, by the secretary of state, at the commencement of the next session. These provisions do not apply to *particular* rules or orders, addressed to a single parish or union; but by 5 & 6 Vict. c. 57 it is enacted, that no general rule or order shall be rescinded or suspended by any particular rule, without the previous approval of the secretary of state.

Fourteen days before any rule, order, or regulation of the commissioners shall come into operation in any parish or union, copies are

¹ By the 1 & 2 Vict. c. 56 (for the relief of the poor in Ireland) her majesty is empowered to appoint a fourth commissioner; and the style of the Board is changed, from "Poor Law Commissioners for England and

Wales," to "The Poor Law Commissioners." Their functions are by that act extended to Ireland, and they are enabled to sit either in England and Wales or in Ireland, and to have a duplicate seal.

to be sent to the overseers or guardians of the poor, and to the clerk of the petty sessions for the division in which it is situate, who shall give publicity to them in such manner as the commissioners direct, allow them to be inspected, and give copies when required. And no rule, order, or regulation of the commissioners is to be in force until the expiration of such fourteen days, except orders made in answer to reports of overseers or guardians, and except orders for suspending or dismissing any paid officer, when the commissioners shall declare that the urgency of the case requires it. The disallowance or revocation of rules is to be notified &c. in the same manner. Overseers, guardians, clerks, or the clerk to the justices, &c., neglecting to give publicity to rules, or refusing inspection or copies, are liable to a penalty of not exceeding 10*l.* nor less than 40*s.*

To secure their conformity to law, the rules of the commissioners may be removed by certiorari into the Court of Queen's Bench ; but, until declared illegal by that court, they are to be obeyed. Neglect or disobedience of the rules or orders of the commissioners, or any contempt of the board, subjects the offender, on conviction before two justices, for a first offence to a forfeiture of any sum not exceeding 5*l.*, for a second offence from 5*l.* to 20*l.*, and a third or subsequent offence is a misdemeanor punishable by a fine not less than 20*l.* and such imprisonment, with or without hard labour, as the court may award.

The powers of the commissioners are still further extended by various special provisions for the effectuation of alterations as to the local divisions in which relief is given, the appointment of paid agents, and the establishment and preparation of workhouses.

Where unions already exist, the commissioners may, with the consent of two-thirds of the guardians, either add to, take away from, or dissolve them. Where none exist, they may declare such and so many parishes as they think fit to be united for the administration of the laws for the relief of the poor, and to have a workhouse or workhouses for their common use ; each parish paying separately for its own poor, whether relieved in or out of the workhouse, and contributing to a common fund for the support of the workhouse establishment in proportion to the average amount of the expences incurred by it for the relief of its poor for the three years preceding the formation of such union. And the commissioners may vary such proportions according to fresh averages to be taken for that purpose at any subsequent period when they see fit, not only in unions formed under this act, but in unions previously existing under the 22 Geo. III. c. 83 (generally known as Gilbert's Act), or any local act. No union is hereafter to be formed under the 22 Geo. III. c. 83, without the consent of the commissioners ; and so much of that act as restrained parishes from contributing to workhouses at a greater distance than ten miles is repealed.

In unions, the workhouses are to be governed and the relief of the poor administered by a board of guardians, elected annually by the rate-payers and the owners of property, but whose number, duties, and qualifications are to be prescribed by the commissioners.

In unions already incorporated under the 22 Geo. III. c. 83, or any local act, the commissioners may direct that the election of guardians,

visitors, and other officers, shall be conducted according to this act; and, with the consent of the owners and ratepayers, they may make such alterations as may seem to them expedient in the number, mode of appointment, removal, and period of service, of the guardians of any parish or of any union now existing or hereafter to be formed.

The commissioners may direct that the laws for the relief of the poor shall be administered by a board of guardians in any single parish; in which case such board shall be elected and act in like manner as is provided for united parishes.

The commissioners may make rules specially for such unions, and may alter or rescind the bye-laws or rules of existing unions, whether those bye-laws are contained or not in any act of parliament. And no rules or bye-laws can be made or altered by guardians under any previous act of parliament without the consent of the commissioners. By the 22 Geo. III. c. 83 certain rules were made, to be observed at every poorhouse or workhouse established under that act; and additional rules (not contradictory thereto) might be made by justices of the peace; but this act provides that no such rules shall be made without the sanction of the commissioners; and that when rules are made by them, no justice shall have power to alter or repeal them.

The commissioners also are empowered to order the appointment of paid officers, either for a single parish or union, or for any number of parishes or unions, to fix the qualifications of these officers, to prescribe their duties, their districts, the security to be required from them, the period of their continuance, and the causes of their dismissal from office, to regulate their salaries, and to prescribe in what proportion such salaries shall be paid by the different parishes or unions.

All existing powers relating to building or altering workhouses are placed under the control and direction of the commissioners, and are not to be exercised without their consent and approbation. In any parish or union not having a workhouse, they may, with the consent of a majority of the guardians of the union, or of the ratepayers and owners of property in the parish, order the overseers or guardians to build a workhouse or workhouses, or to purchase or hire buildings for the purpose. And where there is a workhouse, they may, with the like consent, order them to enlarge or alter the same, or to build, hire, or purchase additional workhouses. And, *without such consent*, they may order the enlargement or alteration of any workhouse, or building capable of being converted into one, where the expence shall not exceed 50*l.*, or one-tenth of the average amount of the rates.

The commissioners may summon any persons before them, and examine them upon oath on matters connected with or relating to the administration of the laws for the relief of the poor, and may enforce the production of books, accounts, contracts, &c., but not of papers relating to the title of lands &c. not being the property of any parish or union. They may require all persons in whom property is vested in trust for the poor of any parish, or who are in the receipt of the rents and profits thereof, to give detailed particulars of the same, and of the manner in which it is appropriated; which statement shall, under the regulations of the commissioners, be open for the inspection of the owners and ratepayers. But this provision does not apply to

unds raised by the voluntary contributions of the inhabitants. They may allow the expences of witnesses, and all other expences incidental to such inquiries. Persons corruptly giving false evidence before them are guilty of perjury; and wilfully refusing to attend their summons, to give evidence, or to produce papers, is a misdemeanor. But they cannot act as a court of record, and consequently cannot commit for contempt; and no person is compellable to travel more than ten miles from his place of abode in obedience to their summons.

The commissioners are required to keep a record of their proceedings, and once a year make a general report; both of these to be submitted to the secretary of state, and the latter laid before parliament.

2. ASSISTANT COMMISSIONERS.—The commissioners are empowered to appoint assistant commissioners (not exceeding *nine*), to whom they may delegate all the powers which themselves possess, except the power of making general rules. Besides the powers thus possessed by delegation, the act empowers the assistant commissioners to exercise powers of inquiry respecting poor law matters similar to those given to the commissioners; and disobedience to their summons, or refusal to answer their inquiries, is equally a misdemeanor. They may attend at all local boards and vestries, and take part in the discussions, but are not to vote. They may also make orders or regulations for single parishes or unions; but these are not to be in force until adopted by and sealed with the seal of the commissioners.

Besides the assistant commissioners above mentioned, temporary *special* commissioners may be appointed for the purpose of inquiring into particular charges of misconduct in matters relating to the administration of relief to the poor. The 5 & 6 Vict. c. 57 enacts, that whenever it may seem fitting to them, or they may be required by the secretary of state, the said commissioners, with the consent of the Treasury, shall appoint some person (being a doctor in medicine, a barrister-at-law, or a member of the Royal College of Surgeons of London or Dublin, an architect, or surveyor, and not being one of the assistant commissioners as aforesaid), or some two or more of such persons, to act either in England or Ireland as an assistant commissioner or assistant commissioners, for the purpose of conducting any *special inquiry*, for a period not exceeding thirty days; and the commissioners shall delegate to every person so appointed all such of their powers as they may deem necessary or expedient for summoning witnesses and conducting such inquiry. Every such appointment to be subject to the approval of the secretary of state, to be published in the London Gazette, and signified, under seal of the commissioners, to the clerk of the peace of the county within which the inquiry is made. And it is provided, that if any person be charged with any misconduct in any matter relating to the administration of the laws for the relief of the poor, and if any such *special inquiry* be directed to be made into such charge, the person bringing such charge shall be entitled to make his defence by counsel or attorney: but nothing herein shall release any person charged with any misconduct, or bringing any charge of misconduct, from the liability to be himself examined at any such inquiry in the matter of such charge, in the same manner and subject to the same penalties as under the 4 & 5 Wm. IV. c. 76.

3. CHURCHWARDENS AND OVERSEERS OF THE POOR.—Overseers of the poor were first directed to be appointed by the 43 Eliz. c. 2. That statute directs, that the churchwardens of every parish,¹ and *four, three, or two* substantial householders (having respect to the proportion and greatness thereof), shall in every year be nominated under the hand and seal of two or more justices of the peace of the same county, and shall be called *overseers of the poor*. And if no nomination be made, every justice of the peace within the division is liable to a forfeiture of 5*l*.

Churchwardens are thus overseers *ex officio*; and their duties in that respect are the same as the other overseers. Of their appointment and other duties we shall have occasion to speak hereafter.

The statute of Elizabeth directed the appointment of overseers to be made in Easter week, or within one month after. But inconvenience being found to arise from the time being regulated by a moveable feast, the 54 Geo. III. c. 91 provides, that the appointment shall be made on the 25th of March, or within fourteen days after. An appointment is not bad, though made after that time; but the justices are liable to the penalty, and a mandamus will lie to oblige them to make the appointment.

In corporate towns, officers of the corporation being justices of the peace have the same authority as to the appointment of overseers within their jurisdiction as justices of the peace in counties; and in London, one alderman has the same authority as two justices elsewhere. And where a parish lies partly within a corporation and partly without, the appointment must be by four justices, *viz.* by two corporation justices for that part which lies within the corporation, and by two justices of the county for that part which lies without it.

The persons appointed must be *substantial householders*, and must be so described in the order of appointment. But by 59 Geo. III. c. 12, § 6, persons who are not householders *within* the parish may be appointed, with their consent, provided they be assessed to the relief of the poor, and be householders resident within two miles from the parish church or chapel, or, where there is no church or chapel, within one mile from the parish boundary. The usual practice is, for the existing overseers to provide the justices with a list of proper and substantial householders; or else the justices issue to the high constable a precept to return a list.

Not more than *four*, nor less than *two*, can be appointed for any place.

When an overseer dies or is removed before the expiration of the allotted time, the justices may (on oath thereof made) appoint another, who is to continue in office until new overseers are chosen.²

There are several ways in which the order may be avoided, though it cannot be revoked by the justices who made it. It may be impeached on an appeal to the sessions; and the parishioners may appeal,

¹ The statute of Elizabeth directed the appointment to be made in parishes only; but it was extended by the 13 & 14 Car. II. c. 12 to villages and townships. It has been held that no place comes within the meaning of the statute that is not a parish

or vill at least by reputation; and to make a place a reputed parish within the 43 Eliz., it must have had a parochial chapel, chapelwardens, and sacramentalia at the time that statute was made.

² 17 Geo. II. c. 38, s. 3.

as well as the persons who are appointed. It may be removed into the Court of Queen's Bench by a writ of certiorari; or it may be impugned on an application to that court for a writ of mandamus. It may be avoided on an indictment against the party appointed, for not taking upon himself the office. It may be invalidated on an appeal against an order of removal, on the ground that the place from which the removal is made is not entitled to separate overseers; or on an appeal against an assessment made for the relief of the poor, for the assessment can be made only by the overseers. Or it may be defeated by a party who is liable to the assessment bringing an action of trespass against the justices who grant a warrant of distress for non-payment; and if the appointment should prove to be illegal, he will recover the amount and damages.

The following classes of persons are exempt from serving the office of overseer:—Peers, and members of parliament; aldermen of London; justices of peace; practising barristers and attorneys; clergymen, though not having a cure of souls; dissenting ministers, taking the oaths and subscribing the declaration and articles prescribed by the 1 W. & M. c. 18; Roman Catholic priests taking and subscribing the oaths of allegiance, abjuration, and declaration prescribed by the 31 Geo. III. c. 32; the president, fellows, and commons of the College of Physicians, within the city of London and its suburbs; freemen of the Company and Corporation of Surgeons, so long as they exercise surgery; apothecaries in the city of London and within seven miles thereof, being freemen of the Company of Apothecaries, so long as they exercise the art; officers of the customs, tide-waiters, and all revenue officers; officers of the army, navy, or marines, whether on whole or half-pay; serjeants, corporals, drummers, and privates in the militia.

In unions formed under the 22 Geo. III. c. 83, and in many single parishes governed by local acts, the overseers had, before the passing of the 4 & 5 Wm. IV. c. 76, no power of interfering in the care and management of the poor, except under the direction of the board of guardians. This arrangement is now, by that act, extended to all places where there is either a select vestry, a vestry under the 1 & 2 Wm. IV. c. 80, or a board of guardians: for, by the 54th section it is enacted, that in all such places the ordering, giving, and directing of all relief (subject to the powers of the commissioners) shall belong exclusively to such vestries or guardians; and it shall not be lawful for any overseer to give any further or other relief or allowance from the poor rate than such as shall be ordered by such guardians or select vestry, *except in cases of sudden and urgent necessity*, when, whether the applicant be settled in the parish or not, he is required to give such temporary relief as each case shall require, in articles of absolute necessity, but not in money. In the places, also, in which justices are empowered to order relief, the overseers are bound to obey their order. But otherwise, in all such places, their duty is principally confined to making and collecting the poor's rate, and paying over to the guardians or treasurer of the union, from time to time, such sums as they may require for the maintenance of the poor, subject to the control of the commissioners.

In parishes not under guardians or a select vestry, the whole management of the poor, as well as the making and collecting of the rates, devolves upon the overseers, subject of course to the control and direction of the commissioners.

The 4 & 5 Wm. IV. c. 76 has imposed on overseers some duties to which they were not previously liable. They are required to enter in the rate-books the names of the owners, or their proxies, who wish to avail themselves of the privilege of voting for guardians, &c. They are to preserve and give publicity to, and allow inspection of the rules and orders of the commissioners. They must, once in every quarter at least, and oftener if the rules and orders of the commissioners shall require it, render an account to the guardians, auditors, or other persons appointed for that purpose; and upon going out of office they must pass their accounts for the entire year, and deliver over to their successors whatever balance or property, belonging to the parish, remains in their hands.

By sec. 95, any overseer or other officer of any parish or union who shall wilfully disobey the legal and reasonable orders of justices or guardians in carrying the rules of the commissioners or other provisions of that act into execution, is subject to a penalty of 5*l*.

And by sec. 97, if he shall purloin or misapply &c. any of the moneys, goods, or chattels belonging to any parish, he shall (independently of any punishment which he may be subject to by any other act) be liable to a penalty of 20*l*. and to pay treble the amount or value of the money or goods so purloined or misapplied.

By sec. 98, in case he wilfully neglect or disobey any of the rules or regulations of the commissioners, he shall for the first offence be liable to a penalty of 5*l*., for a second offence 20*l*., and for every subsequent offence he may be indicted as for a misdemeanor, and on conviction shall pay a fine not less than 20*l*., and suffer imprisonment at the discretion of the court.

4. GUARDIANS OF THE POOR.—The first general statutory provision respecting the appointment of guardians was the 22 Geo. III. c. 83, which authorized parishes to elect guardians under certain regulations, who should receive salaries, and be invested with all the powers and authorities of overseers, except the making and collecting of rates, and be subject to the same liabilities. Other provisions respecting them are contained in the 38 Geo. III. c. 36, and 41 Geo. III. c. 9. But these it is unnecessary to notice, for the 4 & 5 Wm. IV. c. 76 enacts, that the election of guardians shall be (where the commissioners so direct) according to the provisions of that act.

By sect. 38 of that act, where there is a union of parishes, the work-houses are to be governed, and the relief of the poor administered, by a board of guardians, elected annually by the ratepayers and owners of property, but whose number, duties, and qualifications are to be prescribed by the commissioners. The qualification is to consist in being rated to the poor-rate, but not so as to require a higher rental than 40*l*.; and one guardian at the least is to be elected for every parish included in the union. Justices of peace for the county, residing in any part of the union, are guardians *ex officio*. No guardian can act but at a meeting of the board; and no act of any meeting is valid unless three members are present and concur therein.

The election of guardians was directed by that act to be made within fourteen days after the 25th March in each year ; but the 7 & 8 Vic. c. 101 has now extended the time to *forty* days from that date. The same act has also made a considerable change in the qualification of the voters. Previously rate-payers had one vote if rated upon a rental under 200*l.*, two votes if under 400*l.*, and three votes if above that sum ; owners of property had one vote for the first 50*l.*, and one other vote for every 25*l.* above that sum, up to six votes. But now the number and proportion of votes are the same for each class ; namely, one vote if the property in respect of which the voter is entitled, either as owner or rate-payer, be less than 50*l.*, two votes if amounting to 50*l.* and less than 100*l.*, and an additional vote for every 50*l.* up to *six* votes.

Where an owner is a *bonâ fide* occupier, he is entitled to vote as well in respect of his occupation as of his ownership ; so that an owner, if he be an occupier also, may now have *twelve* votes.

An owner, to be entitled to vote, must give to the overseers a statement in writing of his claim previous to the 1st of February in each year, in order that it may be *registered* by them. Such statement must contain, besides his name and address, a description of the property as owner whereof he claims to vote, of the interest or estate he has therein, and of the amount of all rent-service (if any) which he may receive or pay in respect thereof, and the persons from whom he may receive or to whom he may pay the same. Provisions are made by the 7 & 8 Vic. c. 101 for the *revision* of such registers in parishes containing more than 2000 persons.

Owners may vote by proxy, but not rate-payers. But no owner can vote by proxy until fourteen days after he has made his claim.

Rate-payers, to be entitled to vote, must have been rated to the relief of the poor for the year immediately preceding, and have paid all poor rates due, except only such as shall have been made or become due within the six months immediately preceding.

The Poor Law Commissioners are empowered to alter the number of guardians ; to divide parishes into wards for the purpose of electing guardians ; to add parishes to or separate them from unions, and constitute boards of guardians for the parishes so separated.

No assistant overseer, nor any paid officer engaged in the administration of the laws for the relief of the poor, nor any person having been a paid officer and dismissed within five years previously under the provisions of the 4 & 5 Wm. IV. c. 76, nor any person receiving any fixed salary or emolument from the poor rates, is capable of serving as a guardian.—5 & 6 Vict. c. 57, § 14.

If any question arise as to the right of any person to act as an elected guardian, the commissioners may inquire into the circumstances, and issue such orders as they may deem requisite.—§ 8.

If any person put in nomination tender to the officer conducting the election his refusal in writing to serve, the election, as regards such person, shall be no further proceeded with.—§ 9.

If no person be elected in any parish at the annual election, the persons elected for the previous year may continue to act.—§ 10.

The commissioners may accept the resignation of any person elected ; and in case of any omission to elect, or of a vacancy, may order a new election.—§ 11.

In case the full number of guardians be not elected, or in case of any vacancy by the death, removal, resignation, refusal, or disqualification to act of any elected guardian, the remaining members (being not less than three) shall be competent to act until the next election, or until the completion of the board.—§ 12.

No defect in the qualification or election of any person acting as a guardian, the majority of the board being entitled to act as guardians, shall vitiate any proceedings of the board, if the majority of the persons present be entitled to act.—§ 13.

No justice of the peace shall be disabled from acting as such justice at any petty or special or general or quarter sessions in any matter merely on the ground that he is an *ex officio* member of the board of guardians complaining, interested, or concerned in the matter, or as acting as such at any meeting of the board.—§ 15.

The duties of guardians consist in administering the poor laws according to the rules and regulations prescribed by the commissioners. Subject to such rules, they are the governors of the workhouses and the administrators of relief; and they have so far the control in this respect, that no overseer can give any relief other than what they prescribe, except in one or two cases, as we shall see hereafter.

They are to preserve, give publicity to, and allow inspection and copies of the rules and orders of the commissioners. They may appoint paid officers for the management of the poor, under the direction of the commissioners. Their consent is necessary to build workhouses, or to add to, take from, or dissolve a union. By agreement among the guardians, subject to the approbation of the commissioners, united parishes may be one for the purposes of settlement and of rating; and in case of such agreement the guardians are required to assess the value of the property in the several parishes for the purpose of rating.

Guardians are liable to the same penalties and forfeitures for neglect of duty as overseers of the poor. And by sect. 21 of the 22 Geo. III. c. 83, if any guardian or other person shall entice, remove, &c. any poor person from one parish to another, in order to ease the one and burden the other, without an order of removal from justices, he shall forfeit a sum not exceeding 20*l*.

Whenever the whole of any parish or parishes is situated at a greater distance than four miles from the place of meeting of the board of guardians of the union, it shall be lawful for the commissioners, on the application of the board, to form such parish or parishes into a district, and to direct the said guardians from time to time to appoint a committee of their members to receive applications of poor persons requiring relief in such district, to examine into the cases of such poor persons, and to report to the said guardians thereon.—5 & 6 Vict. c. 57, § 7.

Every board of guardians constituted under the 4 & 5 Wm. IV. c. 76, may accept, take, and hold, on behalf of the union or parish respectively for which they may act, any lands, buildings, goods, effects, or other property as a corporation, and in all cases may sue and be sued in their corporate name.—§ 16.

If a board of guardians resolve to make any order, or to prefer any complaint, claim, or application, before justices or otherwise, a copy

of the minute of such resolution, signed by the chairman, sealed with their seal, and countersigned by their clerk, shall be sufficient proof of the making of such order, or of the preferring of such complaint, claim, or application. And whenever, either for the purpose of making an order for the removal of a pauper, or on the trial of an appeal against such order, or for any other purpose, it shall be necessary to prove to what parish a pauper has become chargeable, a certificate signed, sealed, and countersigned as aforesaid shall be sufficient proof to what parish and at what time such pauper became chargeable, unless the contrary be proved by other legal evidence. And in all cases in which the guardians may be empowered to make any application or complaint, or to take any proceedings before justices at petty or special or general or quarter sessions, it shall be lawful for any officer empowered by the board by an order in writing under the hand of the presiding chairman, and sealed with their seal, to make such application or complaint, or to take such proceedings on behalf of such guardians, as effectually as if the same were made or taken by such guardians in person.—§ 17.

PAID OFFICERS.—By the 4 & 5 Wm. IV. c. 76, sect. 46, the commissioners may direct the overseers or guardians to appoint paid officers, with such qualifications as they shall think necessary, for superintending or assisting in the administration of the relief and employment of the poor, and for the examining and auditing of accounts, and otherwise carrying the provisions of the act into execution. And the commissioners may specify the duties of such officers, and the places or limits within which they shall be performed—the mode of their appointment—the nature of the security to be given by them—the amount of their salaries—the time and mode of payment—and the proportions in which the respective parishes shall contribute thereto.

The commissioners may remove any master of a workhouse, assistant overseer, or other paid officer whom they shall deem unfit, and require the persons competent to appoint another fit person in his room. And any person so removed shall not be appointed to any other paid office without the consent of the commissioners.

No person shall be eligible to hold any parish office who shall have been convicted of felony, fraud, or perjury.

Masters of workhouses, or such other paid officers as the commissioners direct, are required to register the names of all persons relieved at or in the workhouse, together with such particulars respecting their family, settlement, relief, or employment, as the commissioners direct.

Any master of a workhouse who shall introduce or permit the introduction of spirituous liquors into a workhouse (except for his own domestic use), unless ordered by a surgeon, or allowed by the rules of the commissioners; or who shall inflict any corporal punishment on any adult person, or confine any person more than twenty-four hours, or be guilty of misconduct towards any poor person, shall, on conviction thereof before two justices, forfeit not more than 20*l.*, or in default of payment of the penalty be imprisoned for any period not exceeding six calendar months; and the justices may order his salary to be applied towards the payment of such penalty.

For purloining or wilfully wasting or misapplying the goods &c. of the parish, they are liable to 20*l.* penalty and treble the value of the goods.

II. OF THE POOR RATE.

The 43 Eliz. c. 43 enacts, that the churchwardens and overseers of every parish shall, by and with the consent of two or more justices, raise weekly or otherwise, by taxation of every *inhabitant, parson, vicar, and other*, and of every *occupier* of lands, houses, tithes, coal mines, and valuable underwoods within the parish, &c.

The word *inhabitant* here means a person resident in the parish, and is to be considered with reference to personal property only; for the occupier of lands, houses, &c. is rateable, whether resident or not.

The personal property which has been most usually made the subject of a rate is *stock in trade* and *ships*. Stock in trade, however, is now expressly exempted from liability to the rate by 3 & 4 Vict. c. 89. Ships are rateable only when the parish in which their owner resides is locally and visibly their home, that is, where they terminate their voyage, and are laid up when unemployed; in such case their owner is rateable for the profits thereof, even though they be absent at the time the rate is made. The difficulties, however, attending the ascertaining what personal property is liable to the poor rate are so great, that most parishes have confined the rate to real property, and the judges have seemed inclined to approve their conduct. The courts have always been extremely cautious in delivering any express opinion upon the general question, deciding each case according to its own peculiar circumstances, and giving force to the usages of particular places. In one case¹ Lord Mansfield observed that "mankind had, as it were with common consent, refrained from rating personal property, the difficulties attending it were so great."

Not only lands and houses, but all real property which produces an annual revenue is subject to the rate; and although the tax is laid on the land or house, it is in respect of the revenue or annual profits which issue from them, whether produced by nature or by means wholly artificial. Things very distinct from the natural profits of lands are rateable; the land being considered the principal, the profits of which are augmented by the annexation of the accessories. Thus, not only natural productions connected with the land, as a mineral spring, &c.; but artificial profits, as of a towing path, a dock, or a waggon-way, have been deemed objects to be rated. So pipes for gas, under ground, are rateable.

The vicar and parson of the parish, whether resident or not, are liable to be rated by reason of their tithes in the parish, although they let the tithes to their parishioners respectively; and they are also liable for oblations and other offerings. So in respect of property in their possession or occupation, they are liable as other persons are.

By the 54 Geo. III. c. 170, § 11, justices in petty sessions, with the consent of parish officers, may discharge persons from payment of the rates, on proof of their inability to pay them.

An *occupier* under the act is a person who occupies that which produces profit to himself or to the person under whom he holds. The occupancy must be a beneficial one; and therefore neither the trustees

¹ R. v. Ringwood, 1 Cowp. 326. See also R. v. Andover, 2 Cowp. 564; and Rex v. White, 4 Term Rep. 475.

of alms-houses, hospitals, or other charitable institutions, nor persons who reside in them merely as servants, are liable. But an officer of such institution is liable in respect of the rooms he separately occupies.

The tenant is the occupier within the act, and liable to pay the rate, and not the landlord, unless he occupy by his servants merely. But by 59 Geo. III. c. 12, § 19, the vestry may direct that the landlords shall pay the poor rates for houses let at a rent not exceeding 20*l.* nor less than 6*l.* for a shorter term than a year, or on any agreement by which the rent is made payable at a shorter period than three months. But the goods of the occupier may be distrained upon to the amount of the rent actually due, and the occupier may deduct the amount paid for the rates from his rent.

Corporations may be rated, whether they occupy by themselves or by their servants.

Royal palaces, and lands in the occupation of her majesty or any of the royal family, are not rateable; but servants occupying houses and lands belonging thereto are so.

The churchwardens and overseers are empowered to make the rate, and the concurrence of the inhabitants is not necessary, though it is usual and advisable to call a vestry to consult on a rate, and to take the opinion of the inhabitants as to its immediate necessity and particular amount. If the overseers refuse to make a rate, the Court of Queen's Bench will grant a mandamus to compel them.

When the rate is made, it is to be submitted to two justices dwelling in or near the parish or division for their *allowance*; which is a mere ministerial act on their part, for they are bound to allow it, if the place for which it is made be within their jurisdiction; and if they refuse, a mandamus will lie to compel them.

When the rate has been allowed by the justices, the churchwardens and overseers should cause public notice to be given in the church on the next Sunday after such allowance.

The rate must show upon the face of it in respect of what property the assessment is made upon each individual charged thereby. And the 17 Geo. II. c. 3, § 2 enacts, that the churchwardens and overseers shall permit any of the inhabitants to inspect such rate at all reasonable times, paying 1*s.* for the same, and shall on demand forthwith give copies of the same or any part thereof to any inhabitant &c. paying at the rate of 6*d.* for every 24 names, on penalty of 20*l.*

Persons who feel themselves aggrieved by any rate or assessment, may, on giving reasonable notice to the churchwardens and overseers, appeal to the next general or quarter sessions. All notices of appeal against a rate for relief of the poor must be in writing, and signed by the person giving the same, or his attorney on his behalf. The notice is to be delivered to or left at the places of abode of the churchwardens and overseers, or any two of them. The particular causes or grounds of appeal are to be specified in the notice; and no other cause or ground of appeal is to be inquired into than such as are so detailed. But if the overseers, by themselves or their attorneys, signify their consent, the quarter sessions may proceed to hear and determine such appeal without a preliminary notice having been given, or may, by consent, inquire into matters not included in the notice.

If several parties have a joint grievance, they may join in giving notice of appeal, and that though the circumstances of each individual case may be different. Thus, if several persons be rated for things which are not properly the subject of a rate, the grievance is joint, for they are aggrieved by the rate; and yet the property, in respect of which the rate is imposed, may be entirely different as to each. The sessions may award reasonable costs to the party in whose favour the appeal is determined; but their authority, in this respect, is limited to the case where an appeal has been entered and determined.

The appeal must be to the next sessions. By the act of Eliz. there was no limit as to time; but the stat. 17 Geo. II. c. 48 has been held to repeal the former statute in that particular. "The next sessions" means "the next practicable sessions."

On appeals against poor rates, inhabitants may be witnesses, notwithstanding their liability to be rated to the relief of the poor in the parish out of which the appeal arises.

Where persons fail or refuse to contribute to the poor consistently with the terms of the assessment, the churchwardens and overseers, by warrant from two justices of the peace, may levy the amount by distress and sale of the defendant's goods. Property may be taken, not only in the place for which the assessment is made, but within any other place in the same county or precinct; and if sufficient distress cannot be found, they may be levied in another county, on oath being made of the fact. Persons aggrieved by such distress may either support an action of trespass, or appeal to the next sessions.

Rate in aid.—Where it shall appear that the inhabitants of any parish are not able to raise among themselves sufficient sums for the maintenance of the poor, two justices are empowered, by the 43 Eliz. c. 2, to tax and assess any other in the same hundred. The rate may be imposed on any of the inhabitants of the neighbouring parishes, without imposing a general tax on the entire parish. And the sessions may make an order on parishes out of the hundred, if no parish within the hundred is able to contribute.

III. OF RELIEF TO THE POOR.

It is the intention of the recent Poor Law Amendment Act to restrict the relief of the poor, as much as possible, to that which is administered in well-regulated workhouses. Previous to the passing of this act, as recited by the 52d section, a practice had obtained of giving relief to persons or their families who, at the time of receiving such relief, were wholly or partially in the employment of individuals, and the relief of the able-bodied and their families was in many places administered in modes productive of evil in other respects; but as difficulty might arise in case any immediate and universal remedy were attempted to be applied in such matters, it is enacted, that the commissioners may, by their rules and orders, declare to what extent and for what period the relief to be given to able-bodied persons or to their families in any particular parish or union may be administered out of the workhouse, by payments in money, or with food or clothing in kind, or partly in kind and partly in money, and in what proportions, to what persons or class of persons, at what times and places, on what

conditions, and in what manner such out-door relief may be afforded ; and that all relief which shall be given by any overseer, guardian, or other person having the control or distribution of the funds of such parish or union, contrary to such orders or regulations, shall be unlawful and be disallowed in his accounts, subject to the exceptions hereinafter mentioned.

But it is provided, that in case the overseers or guardians upon consideration of the *special circumstances* of the parish or union, or of any person or class of persons therein, shall be of opinion that the enforcing of such orders or regulations, or of any part thereof, at the time or in the manner prescribed, would be inexpedient, they may defer their operation for any period not exceeding the space of thirty days, making a statement and report of such special circumstances to the commissioners twenty days before the expiration of such thirty days ; and any relief given by such overseers or guardians before an answer to such report shall have been returned by the commissioners, if otherwise lawful, shall not be deemed unlawful, although contrary to such orders or regulations. In case, however, the commissioners disapprove of such delay, or think that for the future such orders or regulations ought to come into operation notwithstanding the special circumstances alleged, they may by a peremptory order direct that from a day to be fixed such orders and regulations, or such parts or modifications thereof as they may think expedient, shall be enforced ; and if any allowance be made or relief given after the last-mentioned period contrary to such last-mentioned order, the amount shall be disallowed in the accounts. A quarterly report of all such cases is to be laid by the commissioners before the secretary of state.

And in case the overseers or guardians of any parish or union depart from the orders or regulations in any *particular instance of emergency*, and shall, within fifteen days, report the same and the grounds thereof to the commissioners, and they approve of such departure, or if the relief shall have been given in food, temporary lodging, or medicine, and shall have been so reported, then the relief shall not be subject to be disallowed.

And as this practice of giving relief to the able-bodied and their families out of the workhouse had been chiefly the effect of certain discretionary powers vested in churchwardens and overseers, but more particularly in justices of peace, by 36 Geo. III. c. 23, the 55 Geo. III. c. 137, §§ 3, 4, and 59 Geo. III. c. 12, §§ 2, 5, in contravention of and indeed to the virtual repeal of the 9 Geo. I. c. 7, § 4, by which it had been enacted, " that poor persons refusing to be lodged, kept, or maintained in the parish house should not be entitled to receive relief from the churchwardens and overseers," these several enactments are now repealed by the 53d section of the 4 & 5 Wm. IV. c. 76 ; the effect of which is, that the said provision of the 9 Geo. I. is revived in its full force. And the 54th section expressly enacts, that after the passing of this act, the ordering, giving, and directing of all relief to the poor of any parish under the government of guardians or a select vestry or a vestry under the 1 & 2 Wm. IV. c. 80, whether forming part of any union or not, shall (subject in all cases to the powers of the commissioners) belong *exclusively* to such vestry or guardians.

The powers formerly exercised by justices of peace in ordering relief are by this act not merely abridged, but almost entirely taken away, except in certain special cases, which are—

1. In any unions formed under this act, relief may be ordered by two justices to any adult person who, to the personal knowledge of one of them, is unable from old age or infirmity to work, without requiring such person to reside in the workhouse.

2. In cases of *sudden and urgent necessity*, overseers are required, even in places under the government of a board of guardians or a select vestry, to give such temporary relief as the case may require, in articles of absolute necessity, but not in money, whether the applicant be settled in the parish or not; and the justices may order such relief if the overseers refuse it.

3. In case of *sudden and dangerous illness*, any justice may give a similar order for *medical relief* only, to any parishioner as well as out-parishioner; and an overseer is liable to the same penalty for disobeying such order.

By 5 & 6 Vict. c. 57, § 5, it shall be lawful for the guardians of any parish or union, subject always to the powers of the Poor Law Commissioners, to prescribe a task of work to be done by any person relieved in any workhouse, in return for the food and lodging afforded to such person; but it shall not be lawful to detain any person against his will for the performance of such task of work for any time exceeding four hours from the hour of breakfast in the morning succeeding the admission of such person into the workhouse. And if any such person, while in such workhouse, refuse or neglect to perform such task or work suited to his age, strength, and capacity, or wilfully destroy or injure his own clothes, or damage any of the property of the board of guardians, he shall be deemed an idle and disorderly person within the meaning of the 5 Geo. IV. c. 83 (Vagrant Act).

Maintenance of the Poor by their own Relations.—There are some cases in which the parish may be relieved, either wholly or partially, from the burden of relief; as, in the first place, where the relations of the pauper are of sufficient ability, they may be compelled to contribute towards his maintenance.

The 43 Eliz. c. 2, § 7 provides, that the father and grandfather, the mother and grandmother, and the children, of every poor, old, blind, lame, and impotent person, and other persons not able to work, being of sufficient ability, shall relieve every such poor person according to such rate as a general quarter sessions shall assess, upon pain of 20s. a month, to be levied by distress. But inconvenience having been occasioned by the application being required to be made to the quarter sessions, the 59 Geo. III. c. 12, § 36 provides, that two or more justices in petty sessions may make the assessment. And the 4 & 5 Wm. IV. c. 76, § 78 enacts, that all sums so assessed by justices of the peace shall be recoverable in like manner as forfeitures under that act, namely, by distress and sale of the goods of the party, or, if there be no sufficient distress, by imprisonment for not exceeding three months.

This statute has been held only to extend to natural relations, and to such as are particularly enumerated. A father, therefore, is not obliged, under it, to maintain his son's wife or widow; nor a husband his wife's children by a former marriage, or his wife's mother

But the 4 & 5 Wm. IV. c. 76, § 57 enacts, that every man who, after the passing of that act, shall marry a woman having a child or children at the time of such marriage, whether legitimate or illegitimate, shall be liable to maintain such children as part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to them or on their account until such children shall attain the age of sixteen, or until the death of the mother.

And by sect. 56, relief given to a wife, or to children under the age of sixteen (not being blind, or deaf and dumb), shall be considered as given to the husband or father; and if the mother of the children be a widow, relief to them shall be considered as given to her.

And by sect. 58, any relief, or the cost price thereof, given to or on account of any poor person above the age of twenty-one, or to his wife or any other part of his family under the age of sixteen, and which the commissioners shall by any rule, order, or regulation declare or direct to be given or considered as given by way of loan (whether any receipt or engagement to repay the same be taken or not) shall be considered as a loan to such persons. And in such cases it shall be lawful for any justice to issue a summons requiring such person, as well as his master or employer, to appear before two justices to show cause why any wages due or which may become due to him should not be paid over, in whole or in part, to the overseers or guardians; and the justices may direct the master or employer to pay, either in one sum or by weekly instalments, as they shall think fit, taking into consideration the circumstances of such poor person and his family, out of such wages, the amount of such relief, or so much as shall be due; and the receipt of the overseers shall be a sufficient discharge to the master for so much wages as shall be so paid; and if any master or employer shall refuse or neglect to pay to the overseer or guardian producing any such order the money thereby directed to be paid, the same may be levied in like manner as penalties are recoverable under this act.

It has been said that an order cannot be made on a husband to maintain his wife. But if the wife be relieved, and the relief be considered a loan by the orders or rules of the commissioners, the husband's wages may be attached in the hands of his employer. Or if he desert his family and leave property behind him, it may be seized by the parish officers, and made available in indemnifying the parish for their support. Or he may be punished criminally under the 5 Geo. IV. c. 83 (Vagrant Act) for refusing to support his wife or family. But if a wife be guilty of adultery, a husband may legally refuse to maintain her. So a widow is obliged to maintain her children, and if she desert them, leaving property behind her, it may be made available for their support.

Soldiers' and Seamen's Pensions.—Persons entitled to a pension or other allowance in respect of their services in the army, navy, marines, or ordnance, and who shall apply for parish relief for themselves or families, may be required to assign such pension &c. before any relief is granted. And the wages of seamen in the merchant service, or serving under the smuggling laws, whose families become chargeable during their absence, may be received by parish officers towards the repayment of such sums as shall have been necessarily expended by them in the maintenance or relief of their families.

Relief to Widows Non-resident. — By the 7 & 8 Vic. c. 101, a discretionary power is given to guardians to grant relief, under certain circumstances, to widows not resident in the parish or union. By sec. 26, "In the case of any person being a widow having a legitimate child dependent on her for support, and no illegitimate child born after the commencement of her widowhood, and who at the time of her husband's death was resident with him in some place other than the parish of her legal settlement, and not situated in any union in which such parish is comprised, it shall be lawful for the guardians of the parish or union, if they see fit, to grant relief to such widow, although not residing in such parish or union. Provided always, that notwithstanding anything herein contained, the guardians of any union or parish, and the overseers of any parish, in which such widow may be resident or may require relief, shall be and remain liable to relieve such widow, in the same manner as any other person requiring relief in such union or parish."

The object of this clause appears to be, to avoid the disturbance of those connexions and mode of life, at a distance from the union, to which the family may have been accustomed, and which existed at the time of the husband's death. The power is entrusted to boards of guardians only: overseers acquire no authority under this provision to administer non-resident relief to the class of widows described. And where all the conditions exist which would enable the guardians to grant non-resident relief, they are still to use their discretion as to whether such relief is in the particular case desirable. It will be observed also, that guardians and their officers are in no wise exempted from their previous obligation to relieve any widow who may be in their parish or union requiring relief, by the power thus given to the guardians of the place of her settlement to afford her non-resident relief. And even when that power is exerted, if, notwithstanding the relief sent to her by her parish, she or her children require additional or further relief, the officers of the place where she is are still bound to afford her the relief which the circumstances require.

Relief to Married Women and their Children. — We have seen that by the Poor Law Amendment Act (4 & 5 Wm. IV. c. 76, § 58) relief given to the children of *widows* is considered as relief given to themselves, and they are liable to the like conditions and consequences on account thereof as the fathers of legitimate children are. But this was not the case with *married women*; who, before the passing of the 7 & 8 Vic. c. 101, were not liable to any conditions in respect of relief granted to them or their children, and in the absence of their husbands from home under certain circumstances could throw their children upon the parish, however well they might be able to maintain them, or to contribute to their maintenance. But now, by the last-mentioned act, relief may be afforded to such married women or their children as a *loan*, repayable by them, notwithstanding the ordinary exemption of married women from similar liabilities. By sec. 25, "So long as it may appear that the husband of any woman is beyond the seas, or in custody of the law, or in confinement in a licensed house or asylum as a lunatic or idiot, all relief given to such woman or to her child or children shall, notwithstanding her cover-

ture, be given to such woman in the same manner and subject to the same conditions as if she was a widow. But nothing herein contained shall diminish or affect the obligations or liabilities of such husband in respect of such relief."

Insane Persons and Idiots.—The estates of insane persons and idiots were formerly liable only in a very imperfect manner to the repayment of relief afforded to them. Now, by the 7 & 8 Vic. c. 101, to the extent to which their property may be more than sufficient to maintain their families, such property is made liable generally to repay the costs incurred by parishes in respect of such persons, and trustees and other persons in possession of property belonging to them are indemnified for any payments they may make to guardians or overseers.

And by sec. 28, "The guardians of every parish or union appointed under any local act, and their officers appointed to act in the relief of the poor, and their clerks, shall, from and after the passing of this act, have the like powers, and shall be liable to perform the same duties, with respect to insane persons, as are provided in the case of guardians appointed under the provisions of the said first-recited act, their relieving officers and their clerks respectively.

Bastardy.—This subject, so far as it relates to the liabilities of the putative fathers of bastards, may now be considered as wholly withdrawn from any connexion with the poor laws. The powers of guardians and overseers of the poor for the enforcement of such liabilities are entirely taken away by the 7 & 8 Vic. c. 101, and their interference in the matter is even rendered criminal.

The proceedings for obtaining an order on the putative father of a bastard child to contribute to its maintenance belong to another part of the work ; it is here sufficient to observe, that the mother alone is entitled to apply for such an order. No officer of any parish or union may conduct any application to make or enforce any such order, or in any way interfere in causing such an application to be made, or in procuring evidence to support such application, or in receiving money under such an order. If he does so, he is subject to a penalty of 40s. But after the death of the mother, or when she becomes legally incapable of receiving the money under an order, if a child for whose maintenance an order has been made becomes chargeable to a parish or union through the neglect of the putative father to make the payments due from him under the order, in such case the guardians (or if there are no guardians, the overseers) may so far interfere as is necessary to compel a compliance with the order. But even in this case they are not to receive the money, but it must be paid to some person appointed to have the custody of the child, who is to receive it on condition that the child shall cease to be chargeable.

And by sec. 8, any officer of a union or parish who endeavours to induce any man to contract marriage by means of threats or promise respecting any application for an order, or enforcement of an order, is declared guilty of a misdemeanor.

But these changes in the law of bastardy make no difference in the legal obligation on parishes to relieve bastard children whenever their necessities require relief.

IV. OF SETTLEMENT.

A settlement may be defined a right to participate in the benefit of the poor laws in a parish or district which provides for its own poor, and to which persons become removable for the purpose of obtaining relief. The methods whereby it may be now acquired are—

1. *By Birth and Parentage*.—A *legitimate* child follows the settlement of its father, if it be known; if not, it takes that of its mother. If the settlement of neither can be ascertained, the settlement of the child is in its birth-place; and if that cannot be discovered, it must be provided for in the place where it may happen to be, as casual poor.

The first settlement of an *illegitimate* child was, before the passing of the 4 & 5 Wm. IV. c. 76, in the place of its birth; but the 71st section of that act enacts, that every child which shall be born a bastard after the passing of the act shall have and follow the settlement of its mother until it shall attain the age of sixteen, or shall acquire a settlement in its own right. If the mother, however, have no settlement, or her place of settlement cannot be ascertained, then the child's settlement will be as formerly, which is generally in the place of its birth.

2. *By Marriage*.—If a woman marries a man who has a known settlement, she *instantly* acquires his settlement, and takes every subsequent settlement which he may obtain till he dies. If he has none, then she retains her own settlement. If the husband deserts her, he having no settlement, she may be removed to her maiden settlement.

3. *By Apprenticeship*.—This settlement arises from the binding and a residence of forty days in the parish as an apprentice. It matters not whether such days be consecutive or at intervals. If the places of residence be several, the last place regulates the settlement. The apprentice need not continue in the actual service of the first master during the whole time; for if he be assigned over, or continue, with his privity and consent, in the service of another, he may gain a settlement by serving the second master forty days.

By the 4 & 5 Wm. IV. c. 76, § 67, no settlement can be thereafter acquired by being apprenticed in the sea service, or to a householder exercising the trade of the seas as a fisherman or otherwise, nor by any person then being such an apprentice in respect of such apprenticeship.

4. *By Estate*.—Any estate in lands, whether freehold or copyhold, or whether held in fee simple, fee tail, for life, or even for term of years, or from year to year, if the party in possession is not the original lessee, but comes in by act of law, will, with a residence of forty days in the parish, suffice to confer a settlement. The 9 Geo. I. c. 7 has introduced a modification of this general right, by providing that no settlement shall be gained by land purchased unless the purchase money amount to 30*l*.

And the 4 & 5 Wm. IV. c. 76, § 68 enacts, that no person shall retain any settlement gained by virtue of the possession of any estate or interest in any parish for any longer time than such person shall inhabit within ten miles thereof; and in case such person cease to inhabit within such distance, and thereafter become chargeable, he shall be liable to be removed to the parish wherein previously to such

inhabiting he may have been legally settled, or in case he may have, subsequently to such inhabiting, gained a legal settlement in some other parish, then to such other parish.

5. *By Renting a Tenement, &c.*—The 6 Geo. IV. c. 57 (explained by 1 & 2 Wm. IV. c. 18) requires that the tenement consist of a separate and distinct dwelling-house or building, or of land, or of both, *bonâ fide* rented by such person in the parish at 10*l.* per annum at least, for the term of one whole year; that it be occupied by the party hiring it for a whole year under such yearly hiring; and that the rent for the same, to the amount of 10*l.* at least, be actually paid by the party hiring. And the 4 & 5 Wm. IV. c. 76 also requires that the person occupying the same shall have been assessed to the poor rate, and have paid the same in respect of such tenement for one year.

6. *By Payment of Taxes.*—The provisions of the 6 Geo. IV. c. 57 do not in terms take away the settlement by paying public taxes, yet they would seem to do so in effect by requiring a concurrence of all the circumstances which are necessary to confer a settlement by renting a tenement.

Before the passing of the 4 & 5 Wm. IV. c. 76 there were two other modes of acquiring a settlement, namely, by *hiring and service*, and by *serving an office*; but these are now abolished by that act, though settlements by either of these means previously completed are not affected thereby.

V. OF REMOVING THE POOR.

By the 13 & 14 Car. II. c. 2, two justices, on the complaint of the churchwardens and overseers, were empowered to remove to the place of his last legal settlement any person within forty days after his coming to reside in any parish, on his being *likely to become chargeable*. But this is altered by the 35 Geo. III. c. 101, which enacts that no person shall be removed until he becomes *actually chargeable*; and by sec. 67, and also by the 5 Geo. IV. c. 83, § 20, it is declared, that every person convicted of felony, or adjudged an idle or disorderly person, or a reputed thief, or a rogue and vagabond, shall be deemed *actually chargeable* and be liable to be removed. Every unmarried woman with child was also by the same act declared chargeable, and might be removed; but this has been repealed by 4 & 5 Wm. IV. c. 76, § 69.

By the 79th section of the last-mentioned act, no pauper shall be removed until twenty-one days after a notice in writing of his being chargeable, with a copy of the order of removal and of the examination upon which the order was made, shall have been sent to the overseers or guardians of the parish to whom the order is directed, unless the latter agree to receive the pauper, in which case the removal may take place immediately. Nor is the pauper to be removed at the end of the twenty-one days, if a notice of appeal be previously received, but the order is to remain in abeyance till either the appeal be determined or the time for prosecuting it be expired.

By the 9 & 10 Vic. c. 66, "No person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have *resided for five years* next before the application for the warrant. Provided always, that the time during

which such person shall be a prisoner in a prison, or shall be serving her majesty as a soldier, marine, or sailor, or reside as an in-pensioner in Greenwich or Chelsea Hospitals, or shall be confined in a lunatic asylum, or house duly licensed or hospital registered for the reception of lunatics, or as a patient in a hospital, or during which any such person shall receive relief from any parish, or shall be wholly or in part maintained by any rate or subscription raised in a parish in which such person does not reside, not being a *bonâ fide* charitable gift, shall be excluded in the computation of such time; and that the removal of a pauper lunatic to a lunatic asylum, under the provisions of any act relating to the maintenance and care of pauper lunatics, shall not be deemed a removal within the meaning of this act. Provided always, that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removable whenever he or she is removable, and shall not be removable when he or she is not removable.—§ 1.

And no woman residing in any parish with her husband at the time of his death shall be removed from such parish for twelve calendar months next after his death, if she so long continue a widow.—§ 2.

And no child under the age of sixteen years, whether legitimate or illegitimate, residing in any parish with his or her father or mother, stepfather or stepmother, or reputed father, shall be removed from such parish, in any case where such father, mother, stepfather, stepmother, or reputed father may not lawfully be removed from such parish.—§ 3.

And no warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices shall state in such warrant that they are satisfied that the sickness or accident will produce permanent disability.—§ 4.

Provided, that no person hereby exempted from liability to be removed shall by reason of such exemption acquire any settlement in any parish.—§ 5.

And if any officer of any parish or union do, contrary to law, with intent to cause any poor person to become chargeable to any parish, convey any poor person out of the parish for which such officer acts, or cause or procure any poor person to be so conveyed, or give directly or indirectly any money, relief, or assistance, or afford or procure to be afforded any facility for such conveyance, or make any offer or promise, or use any threat, to induce any poor person to depart from such parish, and if, in consequence of such conveyance or departure, any poor person become chargeable to any parish to which he was not then chargeable, such officer, on conviction thereof before two justices, shall forfeit and pay for every such offence any sum not exceeding 5*l.* nor less than 40*s.*—§ 6.

The delivery of a pauper, under any warrant of removal directed to the overseers of any parish, at the workhouse of such parish or of the union to which such parish belongs, to any officer of the workhouse, shall be deemed the delivery of such pauper to the overseers of such parish.—§ 7.

CHAPTER VI.

Of the People,

AS NATURAL-BORN SUBJECTS, DENIZENS, AND ALIENS.

THE first and most obvious division of the people is into—1. Natural-born subjects; and 2. Aliens.

Natural-born subjects are such as are born within the dominions of the crown of Great Britain and Ireland; and *aliens*, generally speaking, are such as are born out of those dominions. But this must be understood with some restrictions, as—

By several statutes, all children born in foreign countries, whose father or grandfather by the father's side was a natural-born subject, are deemed themselves natural-born subjects, unless the ancestor was attainted or banished for treason, or was in the service of a foreign prince at enmity with this country.¹

By 7 & 8 Vict. c. 66, § 3, every person born out of her majesty's dominions, of a mother being a natural-born subject, shall be capable of taking, to him, his heirs, executors, or administrators, any estate real or personal, by devise, purchase, or inheritance of succession.

And by § 16, any woman married to a natural-born subject or person naturalized shall be deemed to be herself naturalized, and have all the rights and privileges of a natural-born subject.

Children of aliens, born in England, are generally natural-born subjects.

Natural-born subjects are said to owe *allegiance* to the crown, meaning those duties and engagements which are due from a people to a sovereign. Allegiance has been divided into *natural* and *local*; the first, or *natural* allegiance, being such as is perpetually due from all men born within the queen's dominions immediately upon their birth, and which exists wherever the subject may dwell; and the other, or *local* allegiance, being such temporary duty as an alien or stranger owes while he continues within the queen's dominions and protection.²

ALIENS acquire certain rights while they continue to reside in the queen's dominions; but they are also liable to certain disabilities. An alien may purchase lands &c., but not for his own use, for the crown would be entitled thereto;³ but this would not affect the vendor, who, having received an adequate compensation for the same, could not take any advantage thereof. But an alien may acquire a property in goods, money, or other personal estate to his own use, and may hire a house for habitation, &c. So he may bring actions for personal property; and may make a will of personal estate.

Aliens may now carry on trade as freely as other persons. Formerly higher duties were laid upon goods imported or exported by aliens, whether in British or foreign ships, than on similar goods when imported or exported by natives. But as sounder and more enlarged

¹ 29 Car. II. c. 6; 7 Ann. c. 5; 4 Geo. II. c. 21; 13 Geo. III. c. 21.

7 Rep. 18.

² 1 Chit. Bla. Com. 367, &c.

³ Co. Litt. 2.

principles prevailed, this illiberal distinction was gradually modified, and at length wholly abolished (so far at least as it was of a public character) by 24 Geo. III. c. 16, which repealed the duties commonly called "the petty customs," imposed by 12 Car. II., and all other additional duties imposed upon the goods of aliens above those payable by natural-born subjects, except only the duties upon goods imported or exported in *foreign* ships, and those of *package* and *scavage*, or duties granted by charter to the city of London. The duties thus preserved to the city were not very heavy; but the principle on which they were imposed being exceedingly objectionable, they were at length abolished by the 3 & 4 Wm. IV. c. 66.

By 7 & 8 Vic. c. 66, the laws respecting aliens have been still further modified; the full enjoyment of all personal property is secured to them, except of chattels real; their capacity of enjoying the latter description of property is extended; and provision is made for enabling her majesty to grant to them, under certain regulations, all the rights and capacities of British subjects, except of becoming of the privy council or a member of either house of parliament.

By sec. 4, "Every alien being the subject of a friendly state shall and may take and hold, by purchase, gift, bequest, representation, or otherwise, every species of personal property, except chattels real, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions, privileges, and capacities, as if he were a natural-born subject of the United Kingdom."

And by sec. 5, "Every alien now residing, or who shall hereafter come to reside in, any part of the United Kingdom, and being the subject of a friendly state, may, by grant, lease, demise, assignment, bequest, representation, or otherwise, take and hold any lands, houses or other tenements, for the purpose of residence or of occupation by him or her, or his or her servants, or for the purpose of any business, trade, or manufacture, for any term of years not exceeding twenty-one years, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions, and privileges, except the right to vote at elections for members of parliament, as if he were a natural-born subject of the United Kingdom."

The act then provides that, upon obtaining a certificate from the secretary of state, and taking an oath prescribed by the act, every alien now residing in, or who shall hereafter come to reside in, any part of Great Britain or Ireland, with intent to settle therein, shall enjoy all the rights and capacities which a natural-born subject of the United Kingdom can enjoy or transmit, except that such alien shall not be capable of becoming of her majesty's privy council, or a member of either house of parliament, or any other right or capacity (it any) which may be specially excepted in and by the certificate.

Persons naturalized before the passing of the act, and who have resided in the United Kingdom five successive years, are entitled to all such rights and capacities of British subjects as may be conferred on aliens by the provisions of this act.—§ 13.

The act is not to prejudice any rights or interests in law or equity, whether vested or contingent, under any will, deed, or settlement executed before the passing of it, or under any descent or representation

from or under a natural-born subject who shall have died before the passing of it; nor to take away or diminish any right, privilege, or capacity heretofore lawfully possessed by aliens residing in Great Britain or Ireland, so far as relates to the possession or enjoyment of any real or personal property.

A **DENIZEN** is one who, being born an alien, has obtained *denization*, or letters patent from the crown to make him an English subject. He is in a kind of middle state between an alien and a natural-born subject. He may take lands by purchase or devise, which an alien may not; but cannot take by inheritance, for his parent, through whom he must claim, being an alien, had no inheritable blood, and therefore could convey none to his son. For a like reason the issue of a denizen born *before* denization cannot inherit to him, but his issue born *after* may. No denizen can be of the privy council or either house of parliament, or have any office of trust, civil or military, or be capable of a grant from the crown.¹

Naturalization, which can only be performed by an act of parliament (except as undermentioned), places an alien in precisely the same situation in all respects as a natural-born subject; though, before the passing of the 7 & 8 Vic. c. 66, he could not be a member of the privy council or parliament, nor hold any public office of trust, civil or military,² (so that he could not be even a constable,³) or take any grant of lands &c. from the crown to himself or any other person in trust for him; for, by the 1 Geo. I. c. 4, no bill of naturalization could be received in either house of parliament without such disabling clause in it. But this provision is now repealed by the 7 & 8 Vic. c. 66; as are also such other parts of that act, and of the 12 & 13 Wm. III. c. 2, and 14 Geo. III. c. 84, as are inconsistent with the provisions of this act.

Every foreign seaman serving two years in time of war by virtue of the royal proclamation is *ipso facto* naturalized, and after three years service is deemed a British mariner. And all persons serving here in a military capacity, or being three years employed in the whale fishery, without afterwards being more than two years absent, and not falling within the restrictions in 4 Geo. II. c. 21, are, on taking the oath of allegiance &c., naturalized, with the same disqualifications as aforesaid.

CHAPTER VII.

Of the Clergy.

THE whole body of the people, whether natural-born subjects, denizens, or aliens, are divisible into—1. The clergy; and 2. The Laity.

The *clergy* comprehends all persons in holy orders and in ecclesiastical offices of the established church.

¹ 12 Wm. III. c. 2.

² 12 Wm. III. c. 2. See 1 Geo. I. c. 4;

14 Geo. III. c. 84.

³ 5 Burr. 2788.

⁴ 13 Geo. II. c. 3.

⁵ 13 Geo. II. c. 7; 29 Geo. II. c. 44;

22 Geo. II. c. 45; 2 Geo. III. c. 25;

13 Geo. III. c. 25.

This venerable body of men, says Blackstone, being separated and set apart from the rest of the people in order to attend more closely to the service of Almighty God, have thereupon large privileges allowed them by our municipal laws, and had formerly much greater, but they were abridged at the time of the Reformation, on account of the ill use which the Popish clergy had endeavoured to make of them. For, the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie. But, it is observed by Sir Edward Coke, as the overflowing of waters doth make the river to lose its proper channel; so, in times past, ecclesiastical persons, seeking to extend their liberties beyond their true bounds, either lost or enjoyed not those which of right belonged to them.

The clergy enjoy several personal exemptions. Thus, they cannot be compelled to serve on a jury, appear at a court leet or frank-pledge; nor can they be chosen to any temporal office, as bailiff, constable, &c. During his attendance on divine service, a clergyman cannot be arrested in civil suits; and this privilege extends to his going to and returning from church, and while staying there, unless he stay with the view to elude process. But the arrest is so far valid on any day but Sunday, that if the officer discharge him, he is liable on the escape. At the suit of the crown, however, the privilege cannot be claimed. Neither can their goods be taken on a *fi. fa.* or *levari facias* in the ordinary mode; for the writ must be directed to the bishop of the diocese, and executed in a particular mode.

The clergy have also their disabilities. Thus, they cannot sit in the House of Commons.¹ They are not, without licence from the bishop, allowed to take more than eighty acres to farm, under the penalty of 40s. a year for every exceeding acre; nor to engage in any trading or merchandize, under penalty of forfeiting the value of the goods.² But they may buy and sell corn and cattle the produce of their farms, or such as is necessary for use, provided they do it not in person in any fair, public market, &c. Yet if they do engage in trade, their contracts are binding, and they are, like other traders, liable to be made bankrupts,³ because a man cannot take advantage of his own wrong.

The clergy are exempted from personal service in war; but they are in general liable to all public charges imposed by act of parliament. Thus, they are chargeable under the highway acts;⁴ they are also liable to poor rates for their glebe and tithe;⁵ and they are liable to take parish apprentices, or at least to pay towards putting them out.⁶

The exemptions from the duty on horses imposed by the 43 Geo. III. c. 161, extend to any rector, vicar, or curate, actually doing duty in the church or chapel of which he is rector &c., not possessed of 60*l.* per annum, whether arising from ecclesiastical preferment or otherwise, and not keeping more than one horse &c. for the purpose of riding, which would otherwise be chargeable within the act, except such persons who shall occasionally perform the duty without being the regular officiating

¹ 4 Geo. III. c. 73; Comm. Journ. 15th October, 1553.

² 1 & 2 Vict. c. 106, ss. 28—31.

³ 1 Atk. 196; Cowp. 745.

⁴ Hawk. 61, c. 76, § 15; 13 Geo. III. c. 78, § 34, 35, 45, 46.

⁵ 43 Eliz. c. 2; and *ante*.

⁶ Bott. 608, pl. 841; 2 Nol. P. L. 346, 4th Edit.

minister. And, by 48 Geo. III. c. 55, and 52 Geo. III. c. 93, every ecclesiastical person not possessed of 100*l.* annual income, from preferment or otherwise, is exempted from duty on any horse used only for drawing a two-wheeled taxed cart.

There are divers ranks and degrees among ecclesiastical persons; as, 1. Archbishops; 2. Bishops; 3. Deans, Canons, and Prebendaries; 4. Archdeacons; 5 Rural Deans; 6. Parsons and Vicars; 7. Curates; 8. Churchwardens; and 9. Parish Clerks and Sextons.

1. **ARCHBISHOPS**.—England and Wales contain two archbishoprics, or *provinces* as they are called, namely, Canterbury and York. The archbishop of Canterbury is called *Metropolitanus et Primus totius Angliæ*, and hath under him nineteen bishoprics. The archbishop of York is called *Primus et Metropolitanus Angliæ*, and hath under him six bishoprics. The archbishop of Canterbury hath precedence.

An archbishop is nominally elected by the chapter of his cathedral church, but in effect is nominated by the king. He is head of, and has the superintendence of all the clergy of his province, and may deprive them for sufficient and notorious cause, as for simony; but infirmity of body &c. is no cause of removal, for the bishop may appoint co-adjutors. On receipt of the queen's writ, he convokes the bishops and clergy in convocation.¹ Appeals lie to him from the decisions of the bishops, and from the consistory courts of each diocese or bishopric. During the vacancy of any see in his province, he is guardian of the temporalities, and is entitled to present to all livings in the disposal of his bishops, if not filled within six months. The archbishop of Canterbury crowns the king or queen. He can also grant dispensations, in any case not contrary to divine or human laws, where the pope used formerly to grant them, which is the foundation of special licences to marry at any time or place, to hold two livings, and the like; and on this is founded the right of conferring degrees in prejudice to the two universities. Archbishoprics become void by death, deprivation for notorious crime, or resignation.

2. **BISHOPS** are nominally elected by the chapters of their respective cathedral churches, but in effect are nominated by the crown. There are twenty-five bishoprics in England. The power and authority of a bishop, besides the administration of certain holy offices peculiar to that sacred order, as consecration of churches, ordination &c. of priests, confirmation, excommunication, granting licences for marriage, making probates of wills &c., consists principally in inspecting the manners of the people and clergy, and punishing them, in order to reformation, by ecclesiastical censures. He has power to ordain, that is, confer holy orders, all over the world. He institutes and inducts to all ecclesiastical livings in his diocese; he has several courts under him, mostly held by his deputy, called a chancellor. Bishoprics also become void by death, deprivation for notorious crimes, or resignation.

3. The **DEAN** and **CHAPTER**² are the council of the bishop in affairs of religion and the temporal concerns of the see.³ They perform service in the cathedral, the head or chief being termed *decanus* or *dean*. Deans are nominally elected by the chapter, but in fact are nominated

¹ 4 Inst. 322.

² See Hargrave Co. Litt. 95.

³ 3 Rep. 75. Co. Litt. 101, 300.

by the crown. The chapter, consisting of canons and prebendaries, are sometimes appointed by the crown, sometimes by the bishop, and sometimes by each other. Deaneries and prebends also become void by death, deprivation, or resignation.

4. **ARCHDEACONS** have jurisdiction immediately subordinate to the bishop, either throughout the whole see, or some parts thereof. An archdeacon is usually appointed by the bishop, and has a kind of episcopal authority, now independent of the bishop. Thus, he visits the clergy; holds separate ecclesiastical courts; and grants letters of administration.¹

5. **RURAL DEANS** are very ancient offices of the church, now almost grown out of use, though deaneries still subsist as an ecclesiastical division of the diocese or archdeaconry. They appear to have been deputies of the bishop, planted round his diocese, the better to inspect the conduct of the parochial clergy, to inquire and report concerning dilapidations, to examine the candidates for confirmation; and they were armed, in minuter matters, with an inferior degree of judicial and coercive authority.

Ordinary.—It is needful in this place to explain, that the term *ordinary* is a civil law term for any judge who hath authority to take cognizance of causes in his own right, and not by deputation; by the common law, it is taken for him who hath ordinary or exempt and immediate jurisdiction in causes ecclesiastical.²

This name is applied to a bishop who hath original jurisdiction; and an archbishop is the ordinary of the whole province, to visit and receive appeals from inferior jurisdictions, &c.³

6. **PARSONS AND VICARS.**—The distinction between a parson and a vicar is this: the parson has, for the most part, the whole right to all the ecclesiastical dues in his parish; but a vicar has generally an appropriator over him, entitled to the best part of the profits, to whom he is in effect perpetual curate with a standing salary. In some places, however, the vicarage has been considerably augmented by a large share of the great tithes; which augmentations were greatly assisted by the 29 Car. II. c. 8, enacted in favour of poor vicars and curates, which rendered such temporary augmentations (when made by the appropriator) perpetual. A parson represents the body of the church; and he is *per se* a corporate body, in order to protect and defend the rights of the church which he personates. He has during his life the freehold of the parsonage house, the glebe, the tithes, and other dues; but these are sometimes *appropriated*, that is, the benefice is perpetually annexed to some spiritual corporation. He may make a lease of the church and churchyard, and is the only person who can give a licence for burying in the church, neither the ordinary nor the churchwardens having any authority for that purpose.

The method of becoming a parson or vicar is much the same. To both there are four requisites; holy orders, presentation, institution, and induction. At common law, a deacon of any age might be instituted and inducted to a parsonage or vicarage; but by the 13 Eliz. c. 12 it was enacted, that no person unless twenty-three years of age and in

¹ Cro. Jac. 556; Lev. 192.

² Co. Lit. 354; stat. West. II. 13 Ed. I. st. 1 c. 19.

³ Inst. 398; 9 Rep. 41. Wood's Inst. 25.

deacon's orders should be presented to any benefice with cure, and that if he were not ordained a priest within a year after his induction he should be *ipso facto* deprived; and by 13 & 14 Car. II. c. 4, no person is capable of being admitted to any benefice unless he hath been first ordained a priest, when he is, in the language of the law, a clerk in orders; and for that purpose he must be twenty-four years of age. If he obtain orders, or a licence to preach, by money or corrupt practices (which is the true notion of *simony*), the person giving such orders forfeits 40*l.*, and the person receiving them 10*l.* and is incapable of any ecclesiastical preferment for seven years afterwards.

Any person who has been ordained, that is, a clerk in holy orders, may be *presented* to a parsonage or vicarage by the patron to whom the advowson belongs; but the bishop may refuse him on many accounts: as, if the patron is excommunicated and remains in contempt forty days; or if the clerk is unfit, as if an outlaw, an excommunicate, an alien, or if he is under the proper age, or is an heretic, or has any vice that is *malum in se*, or does not possess sufficient learning, and some others. But the bishop must in general give the patron notice of the objection, before he can present by lapse.

Institution is a kind of investiture of the spiritual part of the benefice; on which occasion he takes the oath of perpetual residence on the living.

Induction is performed by a mandate from the bishop to the arch-deacon. It is done by giving corporeal possession of the church, &c., as by ringing the church bell, the surrender of the keys, or the like.

When these four ceremonies are performed, the clerk is in full possession of the church, except that by law he must, unless prevented by sickness &c., read himself in, that is, read the morning and evening prayers at the proper times within two months of his induction, and also, within the same time, read the Thirty-nine Articles, with his assent thereto, and the ordinary's certificate of his having subscribed the declaration of conformity to the liturgy; and, within six months, he must, in one of the courts at Westminster, or at the general or quarter sessions, take the oaths of allegiance, supremacy, and abjuration.

It has been before observed, that he must take an oath to reside perpetually on his living. In case of non-residence above three months in the year, he is liable to certain penalties; but there are many exemptions, such as sinecure rectories, royal chaplains, certain public officers and students at the universities, &c.; and the bishop may grant licences for non-residence on account of the illness of the incumbent, his wife or family, or where there is not a fit parsonage house.¹

7. CURATES are not entitled to the cure of souls, but exercise their spiritual office under the rector and vicar; and they are either *temporary* as assistants or substitutes in his absence, or *perpetual*, where there is neither vicar nor rector, but a clerk is employed to officiate by the impropiator.

Temporary curates must be appointed by the nomination of the incumbent under hand and seal to the bishop, setting forth the stipend for his maintenance, and humbly beseeching the bishop to license him to serve the cure. The right of the appointment of a curate to a chapel

¹ See the recent statute 1 & 2 Vict. c. 106, by which the whole law as to pluralities and the residence of the clergy has been consolidated and amended.

of ease is also in the incumbent of the mother church, he having the cure of souls throughout the whole parish.

As all parochial duties are *primâ facie* imposed upon the rector or vicar, therefore all fees &c. belong to him; and no part of them can be granted to the chapel, except by composition with the patron and incumbent of the parish, and the ordinary, making some compensation to future incumbents if any thing is taken from the living.

Perpetual curates are sometimes nominated by the parishioners by custom, which must be strictly followed in its terms, and sometimes by other parties. It is not necessary, in order to prevent a lapse, that the appointment be within six months, unless so directed by the founder, or the curacy has been augmented by Queen Anne's Bounty. But the bishop may compel the patron by ecclesiastical censures to make the appointment. In certain cases the bishop may call upon the incumbent to nominate a curate with a stipend, and in case of default may himself make the appointment.

It has been decided, that the perpetual curate to an augmented parochial chapelry has a sufficient possession whereon to maintain trespass for breaking and entering the chapel and destroying the pews, and the chapelwarden cannot remove the pews without his consent.¹

LECTURERS form another class of ministers of the established religion, whose situation in the church presents somewhat of an anomaly, as they are in many cases, though subordinate, not subject to the control of the rector or minister of the church; and in other instances, though they have not the enjoyment of all the privileges which usually belong to the person filling the place of chief minister of the church or chapel, they are of an independent foundation. They are generally provided for by the pecuniary contributions of the parish, or by the charity of some benevolent individual, appropriated thereto by deed or will. They must in general qualify themselves as other clergymen; and the only parish duty they perform, as such, is that of preaching.²

OF THE BENEFIT OF CLERGY.

We shall take this opportunity of saying a few words on the subject of *benefit of clergy*, which originally applied only to this class of persons;³ and although the privilege itself is now totally abolished by the 7 & 8 Geo. IV. c. 28, § 6, yet as it formed till recently so very prominent a feature in our laws, some account of its origin and effect will naturally be expected.

Anciently Christian princes and states, for the encouragement of the clergy in their offices and employments, and that they might not be entangled in suits, granted to them many privileges and exemptions, and particularly an exemption of their persons from process in criminal proceedings, in some capital cases, before the secular judges; which was the true origin of the benefit of clergy.

As the clergy afterwards increased in wealth and power, they endeavoured to set up for themselves, and what they had obtained at first by the favour of princes and states, they began to claim as their right, and that by a title of the highest nature, namely by the law of

¹ Jones v. Ellis, 2 Younge & J. 265.

² Steer. 78—82.

³ 1 Chit. Bla. Com. 377, note.

God. By their canons and constitutions they aimed at, and in some places obtained, vast extensions of these exemptions, both with regard to the persons concerned (extending them not only to persons in holy orders, but to all who had any kind of subordinate ministration relative to the church), and likewise in respect of the causes, exempting, as far as they could, all causes of clergymen, as well civil as criminal, from the jurisdiction of the secular power, and wholly subordinating them immediately and only to the ecclesiastical jurisdiction. This jurisdiction they supposed to be lodged in the pope by divine right and investiture from Christ, and from the pope to be shed abroad into all subordinate and ecclesiastical jurisdictions. By this means it happened, that in some kingdoms, and for some ages, there was a double supreme power—the one ecclesiastical, absolute and independent of any but the pope, over ecclesiastical men and canons; and the other secular, residing in the king or civil magistrate.

But this claim of exemption, although it was never thoroughly effected in this kingdom, grew so burdensome, that it was from time to time qualified and abridged by the civil power, sometimes by acts of parliament taking it away in some cases, sometimes by the interpretation and construction of the judges, and sometimes by the contrary usage of the kingdom; for ecclesiastical canons never bound in England farther than they were received, having their authority not from their own strength and obligation, but from the usages and customs of the kingdom that admitted them, and only so far as they were so admitted. Therefore, if ecclesiastical persons were indicted in cases criminal, but not capital, or wherein they were to lose life or limb, then the privilege of clergy was not allowed; and therefore not in indictments of trespass or petit larceny. Nor was it allowed them in high treason. But, at the common law, in all cases of felony or of petit treason clergy was allowed, except in two, lying in wait and burning of houses, which were looked upon as hostile acts, and the authors of them therefore not entitled to the common privileges of subjects.

The 25 Edw. III. c. 4, ordained that all manner of clerks, as well secular as religious, should thenceforth enjoy the privilege of holy church; and by a favourable interpretation of this statute (nearly coeval with its enactment) not only those actually admitted into some inferior order of the clergy, but all persons qualified to be so admitted (which was tried by putting them to read a verse), were deemed entitled to this privilege without further question.

By stat. 4 Hen. VII. c. 13, every person (not being within orders) who had once been admitted to his clergy, should not be admitted to the same a second time. And, by the same statute, if he was convicted of murder he should be marked (unless he was a peer) with an M on the brawn of the left thumb; and for any other felony, with a T. But he should not be ousted of his clergy by the bare mark in his hand, or by a parol averment, without the record testifying it, or a transcript thereof. This distinction between learned laymen and real clerks was abolished for a time by 28 Hen. VIII. c. 1, and 32 Hen. VIII. c. 3, but was held to have been virtually restored by 1 Edw. VI. c. 12.

By the common law, a woman could not have the benefit of

clergy; out by the statute 3 Wm. III. c. 9, a woman convicted or waived for any felony for which a man might have his clergy, should, upon praying the benefit of that statute, be subject only to such punishment as a man would be in a like case.

Finally, by stat. 5 Anne, c. 6, which abolished the ceremony of reading, the wall of partition (as Sir Michael Foster expresses it) between subject and subject under one and the same degree of guilt was taken away; and from this period the measure of punishment was governed by the degree of real guilt, and not by the function or abilities of the offender.

This privilege is now, however, as before observed, entirely abolished. The 7 & 8 Geo. IV. c. 28, § 6, enacts, "that benefit of clergy with respect to persons convicted of felony shall be abolished; but that nothing therein contained shall prevent the joinder in any indictment of any counts which might have been joined before the passing of the act."

The benefit of clergy had the same effect in restoring a party to his competency as a statute pardon; and, the benefit of clergy being abolished, it was at least doubtful whether a person convicted of felony was a competent witness, although he had undergone the punishment. But this is now remedied by the 9 Geo. IV. c. 32, § 3, which enacts, "that where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted; provided always, that nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony."

By the 7 Geo. IV. c. 64, § 7, felonies without benefit of clergy, and by § 8, felonies within benefit of clergy, are provided for under all circumstances consequent on the indictment.

OF CHURCHES.

Before proceeding further in considering the officers of the church, we shall here say a few words of the church itself.

And first, of the *chancel*. This is a part formerly, and in some churches still, separated from the body of the church by a lattice work (from whence its name is supposed to be derived), so as to prevent general access thereto, though not so as to intercept the sound or sight; for in this part the service was usually performed prior to the Reformation, and from this cause the vicar has always had a right to a pew or seat therein. The repairs of this part in general fall on the impropiator, rector, or vicar of the church, and not upon the parish; which, therefore, usually exempts the impropiator, rector, or vicar, from rates for the repair of the body of the church.

Aisle.—In the aisle of the church an exclusive property may belong to any private house in the parish, from its having been occupied *and repaired* by the owners of that house; and such owner may have his action on the case for an intrusion therein.

Pews.—Formerly there were no pews in churches; and now, by

common law, pews are the common property of all the inhabitants of the parish, at whose expense in general they are erected and repaired. The distribution of them rests in the churchwardens, subject to the supervision of the ordinary. And though the higher classes are accommodated before the lower, yet they are not to be unnecessarily accommodated beyond their real wants, to the exclusion of others. Parishioners, however, have a right to rent pews, and to the exclusive use of them, as long as they continue parishioners; but not after, although a pew was in one case¹ adjudged to belong to a house out of the parish, from the presumption that it was formerly within the ecclesiastical limits of the church. It has recently been held, that a party not using a pew for a considerable time has no right to lock it up, and thus prevent the use of it by others.

If more pews are requisite, the ordinary may adjudge *galleries* to be built; or where the incumbent, churchwardens, and parishioners agree upon the necessity, they may be erected without the authority of the ordinary. As pews are part of the church, a person having an exclusive right thereto cannot maintain trespass for any intrusion, but must bring an action on the case.²

Of the Goods and Ornaments of the Church.—It is the duty of the churchwardens to see to the due ornament and cleanliness of the church. They are, at the expence of the parish, to provide and keep in order the communion table, the pulpit, reading desk, font, chest for alms, chalice, wine &c. for the sacrament, book of prayers, the homilies, tables of degrees of marriages prohibited, the ten commandments, bells and ropes, bier for the dead, &c. With regard to the erection of monuments and the exclusive use of vaults, that permission is obtained by a faculty from the ordinary; and when once obtained, an action is maintainable for the destruction or other damage done to either. The property of the church is unalienable, except for some special uses by the civil law, and with the general consent of the parish and churchwardens.

The expence of *repairs* of the church is now generally cast upon the parish, by a rate to be raised by the churchwardens, with the consent previously obtained of the parishioners. Though repairing the chancel exempts from a rate for repairs of the church, yet the repairs of a chapel will not in general do so.

Profanation of Churches.—This is visited with various common law and ecclesiastical punishments; and hereunder is prohibited the arrest upon *civil* process of persons in holy orders while going to, performing, or returning from divine service. So also are prohibited plays, banquets, musters, or other profane usages in the church, chapel, or churchyard; but the performance of oratorios of sacred music is allowed, and is of common occurrence in country churches and in cathedrals. So is brawling prohibited, which consists of quarrelling or chiding by words only. So is striking, or the offer or assumption of the attitude to strike, in the church or churchyard; but this does not extend to such coercion as is necessary for enforcing decent behaviour in church. So is drawing any weapon of offence. And it has been held that a person struck down cannot justify returning blows in his own defence; but this seems very questionable, if it be necessary for his protection

¹ Lonsley v. Hayward, 1 Younge and J. 583.

² Steer's P. L. 15—20.

against injury to life or limb. As to the more serious offences of setting fire to or otherwise destroying churches, breaking into and stealing therefrom, &c., these will be noticed when we come to treat of the **CRIMINAL LAW**.

It may here be observed, that a recent statute, the 7 Wm. IV. & 1 Vict. c. 45, has put an end to the practice of publishing in church during the time of divine service a variety of matters of a temporal nature, which had been previously required by statute or custom; such as notices of vestry meetings, of proceedings relating to the assessing and collecting of the highway and poor rates and land-tax, and of the holding of court-leets, courts baron, and customary courts; and also to the proclamation of outlawries at the doors of the church immediately after divine service. And it is enacted, that after the 1st January, 1838, all proclamations or notices, which under or by virtue of any law or statute, or by custom or otherwise, have been heretofore made or given in churches or chapels during or after divine service, shall be reduced into writing, and copies thereof, either in writing or in print, or partly in writing and partly in print, shall, previously to the commencement of divine service on the several days on which such proclamations or notices have heretofore been made or given in the church or chapel of any parish or place, or at the door of any church or chapel, be affixed on or near to the doors of all the churches or chapels within such parish or place; and such notices when so affixed shall be in lieu of and as a substitution for the several proclamations and notices so heretofore given as aforesaid. And after the said 1st of January, 1838, no decree relating to a faculty, nor any other decree, citation, or proceeding whatsoever, in any ecclesiastical court, shall be read or published in any church or chapel during or immediately after divine service.

Churchyards.—The care and repair of the churchyard, as well as of the church, are in the churchwardens, or, by custom, in particular individuals; and an indictment will lie in case of neglect. The trees and herbage therein are the property of the rector or vicar, by whom they may be appropriated for the repairs of the chancel. No one can erect a tomb, tombstone, or vault in the churchyard, without a faculty from the ordinary; and unless such is obtained, no exclusive property can exist in the person building it; and a prescriptive right may exist in the incumbent to demand a fee for such erection.

With respect to burying, permission to bury in the church itself is only to be obtained from the incumbent; but, by custom, the lord of the manor may have a right to bury there without such permission. In the churchyard every parishioner has a right of burial; and so has a stranger, if he die too far distant from his own parish. In the reign of Charles II. an act was passed to oblige all persons to bury their dead in woollen; and though this was repealed by 54 Geo. III. c. 108, it is left to be still done as a matter of custom. The Court of King's Bench refused to grant a *mandamus* to bury in an *iron coffin*; and the chief objection was, that it would be so long in decaying, that if it became general the future burying in the churchyard would become impossible for want of room. By the 48 Geo. III. c. 75, bodies cast on shore, and not claimed by the relatives of the deceased, are to be buried in the

parish where they are found, by the churchwardens and overseers, at the expence of the county. If the place is extra-parochial, notice must be given to the constable or headborough; and, by sect. 8, the person giving such notice within six hours is entitled to 5s. reward, and neglecting to give such notice subjects to a penalty of 5l.

If the clergyman refuses to bury a corpse in a convenient time, he is liable to suspension from office for three months, except where the deceased was denounced or excommunicated, and cannot be proved to have died repentant. Unbaptized persons are not entitled to christian burial; but baptism performed by a dissenting minister is sufficient. Neither are persons found *felo de se*; but persons found to be insane at the time of committing suicide are not deemed capable of having done the act voluntarily, and are therefore not excluded from the privilege of this rite; which gives rise to the usual merciful finding by juries, on inquests, of a verdict of insanity.

Where persons are found *felo de se*, the 4 Geo. IV. c. 52, after repealing the old law, which directed the burying of self-murderers in a cross road with a stake driven through the body, provides that the coroner shall issue his directions for privately burying the corpse in the parish churchyard, without the performance of any service over it, within twenty-four hours, between nine and twelve o'clock at night.

Though, in general cases, the clergyman is entitled to certain fees on burial, yet he cannot refuse to bury until they are paid: they are recoverable by action. Once buried, bodies cannot be legally taken up, except by permission from the ordinary, or warrant from the coroner; and removing such bodies by stealth for the purpose of sale is an indictable offence. So the stealing grave clothes is felony, as the property of them is in the executors, or in the relatives who paid the expences of burial.¹

CHURCHWARDENS.

Churchwardens are the guardians of the parish church, and the representatives of the body of the parish; and in a certain degree they are the guardians of the moral character and public decency of the parish. Not less than *two* are usually appointed for every parish; and when appointed and sworn in, they are so far incorporated in law, that they have power to sue and bring actions as to the church property, whether the cause of suit arose before or after their appointment, for the predecessor cannot sue. They are the persons to purchase goods for the parish use, or to take legacies or gifts for the parish, but they cannot purchase lands. One churchwarden cannot singly dispose of parish property, neither can all of them, without the consent of the parish obtained at a vestry meeting.

Who are to be Churchwardens.—The persons who are *exempt* are peers; clergymen; members of parliament; barristers and attorneys; apothecaries of seven years standing; surgeons of the corporation of surgeons in London; dissenting teachers and preachers duly qualified; Roman Catholic ministers; serjeants, corporals, drummers, or privates of militia; persons who have prosecuted felons to conviction; and non-residents of the parish.

¹ Steer's P. L. 42—57.

Those *disqualified* are Jews, aliens, infants, and felons. Dissenters (other than those above mentioned) may serve by deputy; and a person not residing in the parish, but being a partner in a house of trade within the parish, is liable to serve. Neither is poverty any disqualification.¹

Election.—If there is any particular custom as to the mode of their appointment and election, such custom is, of course, to be followed. Where not, the minister and parishioners are to agree on the persons; or else the minister is to choose one, and the parishioners one. Under the 58 Geo. III. c. 45 (the act providing for the building of additional churches), one churchwarden is to be chosen by the incumbent, and the other by the parishioners.

They are to be chosen yearly, in Easter week, by the majority of votes at a vestry meeting duly convened for that purpose. When appointed, they must take the oath of office, to be administered by the archdeacon or ordinary of the diocese, without fee; and they continue in office till a successor is sworn in.

Their Interest and Power over the Things of the Church is general; and they are, in their corporate character, the owners thereof, and may exercise all the rights necessary for its protection, but without any power of disposing thereof, except by general consent. They may also enter into contracts binding on the parish, if for the parish benefit; but they have no interest in the freehold of the church. They cannot interfere as to burials, though by custom they may be entitled to some fee in respect thereof. Neither can they remove or set up armorial bearings or monuments in the church, that being the right of the incumbent. Generally, they have no power to purchase lands for the parish; but in some instances this is given them for the benefit of the poor.²

Their *duties* in general consist in the due repair of the church, collecting church rates, the disposition of pews, and collecting the rents thereof, &c. Under the 58 Geo. III. c. 45, § 73, relating to the building of additional churches, they are to see to the payment of the stipends and salaries of the minister and clerk, and do all acts requisite for the repairs, management, good order, and decency of behaviour in church or chapel.

They are to give notice to the bishop on the death of the incumbent, and collect the profits of the benefice in the mean time. They are to do, or see done, all things necessary for the due observance of the sabbath; they are to see provided and well preserved all parish registers, to provide bread and wine for the sacrament, to collect money on charity briefs; with many other such like duties.³

Within a month after the end of the year they are to render their accounts, and hand over to the parish or their successors, or to a select vestry (by custom), all moneys in hand. If their disbursements exceed their receipts, the successors in office shall reimburse them. To compel them to account, the spiritual or common law courts may be resorted to.

Under the head of *OVERSEERS*, we have seen their conjoint duties relative to the poor.

¹ Chit. Burn. J. 638; Steer's Parish Law, 83.

² 59 Geo. III. c. 12, § 9—17.

³ 1 Chit. Burn. J. 641—5.

PARISH CLERKS.

The qualification to this office is, that the candidate be at least twenty years of age, known to the minister to be of honest conversation, and sufficient for his reading, writing, and also for his competent skill in singing (if it may be). The right of appointing him is generally dependent on custom, either in the minister or the parishioners. In new churches and chapels built under the 58 Geo. III. c. 45, and 59 Geo. III. c. 134, &c. the appointment is annual, and in the minister. When duly appointed, he is licensed by the ordinary, and sworn in by the arch-deacon. His remuneration depends also on custom; it is sometimes by contributions in goods, such as bread &c., and sometimes in money; sometimes it is by a clerk's rate on the parish; which latter is recoverable by action on the case against the churchwardens.

The parish clerk, as well as the sexton, has a freehold in his office; and though he may be punished by the ecclesiastical courts, he cannot be removed by them, being a temporal, and not an ecclesiastical officer. But in one case, where he was removed, and there was sufficient cause shown for his suspension, the Court of King's Bench would not grant a mandamus to re-admit him.¹ A parish clerk who deceives the clergyman, and obtains or makes a false entry as to publication of banns &c. is liable to transportation for life. Serving the office of parish clerk for a year was held to gain a settlement, before the passing of the 4 & 5 Wm. IV. c. 76, which put an end to this mode of acquiring a settlement.

SEXTONS.

The sexton's salary depends on custom, and is paid by the churchwardens. His fees are settled by order of vestry; and a table of them is generally hung up in the vestry room. His business is to keep the church clean, to open pew doors, to make and fill up graves, to provide candles and other necessities for the church, under the direction of the churchwardens; to get the church linen washed, &c.; to keep the church keys, under the authority of the minister; to attend during divine service, and keep out excommunicated persons; and to prevent disturbances in the church. His interest in his office is similar to that of the parish clerk, as before mentioned. A female may be sexton. Females may also vote in the election of sexton, where he is chosen by the parish.

OF PARISH VESTRIES.

A vestry is the council of a parish in all matters relating to the general interest of the parishioners; and in every parish there is either an *open* or a *select* vestry. Vestries are usually held in a room contiguous to the church; but it is not essential to its validity, that it should be held there, as it may be held in the church itself (in which case the ecclesiastical courts have jurisdiction over any misconduct or disorder committed thereat), or at any other place within the parish.

The powers and rights of vestries extend to the investigation and restraint of the parish expenditure, to determining on the expediency of enlarging or altering their churches or chapels, and other such like matters, and also to the election of parochial officers. The acts of a vestry duly convened bind the rest of the parishioners who do not attend; but the act of one vestry may be rescinded by a future one. The mode of voting ought not to be by ballot, but by show of hands; and an action will lie for excluding any person entitled to vote. A vestry cannot be adjourned but by consent of the whole persons present.

By the 58 Geo. III. c. 69, § 1, *for the regulation of parish vestries*, it is enacted, that no vestry, or meeting of the inhabitants in vestry, shall be holden, until public notice has been given of the place and hour of holding the same, and the special purpose thereof, three days before the day appointed, by affixing the same on the principal door of the church or chapel.

And for the more orderly conduct of vestries, in case the rector or vicar or perpetual curate be not present, the persons so assembled shall forthwith appoint, by plurality of votes (to be ascertained as hereinafter directed), one of the inhabitants to be chairman; and in all cases of equality of votes the chairman shall (in addition to such votes as he may be entitled to give in right of his assessment) have the casting vote. Minutes of the proceedings and resolutions of every vestry are to be fairly entered in a book (to be provided for that purpose by the churchwardens and overseers), and signed by the chairman and such other of the inhabitants present as may think proper.

Every inhabitant present at such vestry, who, by the last rate made for the relief of the poor, was assessed in respect of any annual rent, profit, or value not amounting to 50*l.*, is entitled to give one vote, and no more; amounting to 50*l.* or upwards (whether in one or more than one charge), is entitled to one vote for every 25*l.*; but no inhabitant is to have more than six votes. When two or more of the inhabitants present are jointly rated, each is entitled to vote according to the proportion borne by him of the joint charge; and where only one of the persons jointly rated attends, he is entitled to vote according to the whole of the joint charge.

Any person having become an inhabitant since the making of the last rate is entitled to vote in respect of the property for which he shall have become liable and shall consent to be rated, in like manner as if he had been actually rated for the same. And by the 59 Geo. III. c. 75, persons rated to the poor, though not parishioners, are entitled to vote according to the value of their premises; and also any clerk or agent of a corporation. But no person is entitled to vote who has refused or neglected, on demand, to pay his poor-rate.

The regulations of the 58 Geo. III. c. 69, for parish vestries extend throughout England and Wales, except the city of London and borough of Southwark. But by § 8 it is declared that nothing therein is to alter the time of holding any vestry, parish, or town meeting, which is by any act required to be holden on any certain day or within any certain time; nor to affect the powers of any vestry or meeting holden

¹ The 1 Vict. c. 56 repealed so much of the act as required notices of vestries to be published in church during or immediately after divine service.

by virtue of any special act, or any ancient or special usage or custom, or to change the manner of voting in any vestry or meeting so holden. It has therefore been held, that a right to a plurality of votes does not exist where the poor rates, according to an ancient custom, had been always assessed without regard to the annual value of property, but according to the supposed ability of the party assessed.

SELECT VESTRIES.—Hitherto we have been speaking of *open* or *general* vestries, where all the rate-payers have a right to attend. But a custom has prevailed in large and populous cities and towns (especially in and about the metropolis) of choosing yearly a *select* vestry, that is a certain number of the most respectable inhabitants, to represent and manage all the concerns of the parish for that year; and this, though it has been sometimes productive of injury to a parish, is held to be a good custom, and is countenanced by the courts.

It has also been held to be a good custom, where parishes have chosen a certain number of parishioners as a select vestry, that, as any of them drop off, the survivors shall fill up the vacancy; but the validity of such a custom must be founded on prescription and immemorial usage, for a modern agreement of this kind would not be binding. This mode of constituting select vestries was adopted by the directions of the legislature in 10 Ann. c. 11, for erecting fifty new churches in or near London and Westminster; and, in several private acts for building particular churches, a certain mode has been pointed out for the constitution of these assemblies.

NEW VESTRY ACT.—These *close* or self-elected vestries, however, having of late years fallen considerably into disrepute, many struggles had been made to set them aside. At length the 1 & 2 Wm. IV. c. 60 was passed, which enables the rate-payers, where they are so desirous, to abolish them, and appoint a *representative* vestry freely chosen by the parish at large in their stead, and also to appoint auditors of accounts. This act may be adopted by any parish in England and Wales in the following manner.

One-fifth of the rate-payers, or any proportion amounting to *fifty* in number, may, between the 1st December and 1st March, present a requisition, with their names and abodes, to the churchwardens, requiring them to call a meeting, to ascertain whether a majority of the rate-payers are favourable to the adoption of the act. On the first Sunday in the month of March, after receipt of the requisition, public notice is to be given on the door of every church and chapel of the establishment, specifying a place and day (not earlier than ten, nor later than twenty-one days) for the rate-payers to declare, by their votes, for or against the adoption of the act. The votes to be taken on three successive days, between the hours of eight in the morning and four in the afternoon. A *majority* of the rate-payers must vote; and if two-thirds of such majority vote in favour of the act, it is to be declared adopted, and notice thereof is to be given in the London Gazette and one or more public newspapers. Rate-payers (not being more than five together) may inspect the votes at any time within one month after notice of the rejection or adoption of the act. No person is to vote unless he has been *rated* for one year, and has paid all parochial rates, taxes, and assessments made six months preceding the day of voting. If the act is rejected, no

subsequent requisition can be presented within three years after. Parish officers refusing to call a meeting, or suppressing or falsifying votes, or doing any other thing contrary to the act, are guilty of a misdemeanor.

Election of Vestrymen.—Public notice of the election of vestrymen is to be given, on some Sunday, at least twenty-one days previous to the day of election. Rate collectors may be summoned to attend the election, to identify the voters and testify to their qualification. Inspectors of votes are to be chosen, four by the churchwardens and four by the parishioners. Five rate-payers may demand a poll, to be taken by ballot, at which no rate-payer is to have more than one vote. Inspectors are to examine the votes, and declare the result of the election within four days; in case of an equality of votes, the inspectors may decide by lot upon the person chosen. Falsifying voting lists, or in any way obstructing the election, subjects to a fine of not less than 10*l.* nor exceeding 50*l.* Wilfully making an incorrect return subjects an inspector to a penalty of not less than 25*l.* nor exceeding 50*l.* The election of vestrymen is to take place annually, in the month of May.

Number of Vestrymen.—The vestry is to consist of not less than twelve resident householders, where the rated householders do not exceed 1000; if they exceed 1000, twenty-four vestrymen; if they exceed 2000, thirty-six vestrymen; and so on, at the rate of twelve additional vestrymen for every 1000 rated householders; but the number is in no case to exceed 120, unless where a greater number is fixed by special act of parliament. The minister of the parish and churchwardens are to be vestrymen *ex officio*, and have votes. At the first election, one-third of the existing vestry is to retire by lot, and one third of the number of the new vestry to be chosen; at the second annual election, one half of the remaining part of the old vestry is to retire, and another third of the new vestry to be chosen; at the third annual election, the last remaining portion of the old vestry is to retire, and the remaining one-third of the new vestry to be chosen. Vestrymen are to quit office after three years, and one-third of the whole number is to be annually elected; vestrymen going out by rotation are eligible to be re-elected. No person is qualified to be elected a vestryman within the Metropolitan Police district and the city of London, where the resident householders exceed 3000, unless rated to the relief of the poor upon a rental of not less than 40*l.* per annum; elsewhere a rental of 10*l.* qualifies.

The new vestry are to exercise all the powers of former vestries, but not to invalidate any local act relative to vestries, or the management of the poor by directors or guardians, or any provision for religious worship. The powers of the vestry may be exercised by the majority of those present, there not being less than five present where the vestry consists of twelve to twenty-three, and not less than seven present where it consists of twenty-four to thirty-five, and not less than nine present where it consists of thirty-six and upwards. Vestry meetings are not to be held in the church or chapel. The vestry may choose a chairman when the person authorized by law or custom to take the chair is absent. All their proceedings are to be entered in books, and to be open to inspection. Books of accounts of all receipts and disbursements on account of the parish are to be kept, and to be open to inspection without charge, on penalty for refusing an inspection or extract, not exceeding 10*l.*

Auditors.—Five rate-payers, who shall have signified in writing their assent to serve, are to be chosen as auditors of accounts yearly, in the same manner and at the same time as the vestrymen; and the same qualifications are required of them. But if any person be chosen both vestryman and auditor, he shall be incapable of serving as vestryman; and no person shall be auditor who is interested in any contract, office, business, or employ, or in providing or supplying any article for the parish. The auditors are to meet at least twice a year, at the board-room of the vestry; and, a majority being present, are to examine and audit the accounts of the preceding half year, in presence of the vestry clerk, who is to lay before them a true account in writing accompanied with proper vouchers, of all sums which have come to the hands of the vestry or their treasurer, and also of all monies expended by them, or by the churchwardens, overseers, surveyors, or other persons employed by and responsible to the vestry; and in parishes where other boards have control over any part of the parochial expenditure, the auditors shall examine and audit their accounts in like manner. They may summon before them the parish officers or other persons interested in the accounts, and call for books and papers; and any parish officer or other person refusing to attend, or otherwise wilfully obstructing the purposes of such inquiry, is guilty of a misdemeanor.

The accounts, when audited and approved by the auditors, or the major part of them, shall be by them signed in the presence of the vestry clerk, who shall also affix his signature to the same; and they shall remain at the office of the said vestry clerk, and be open and accessible for examination, at all seasonable times, by any person rated to the relief of the poor, and by any creditor on the rates.

In any parish adopting this act, the vestry shall cause to be made out, once at least in every year, a list of the several freehold, copyhold, and leasehold estates, and of all charitable foundations and bequests, if any, belonging to the parish, and under the control of the vestry; such list to contain a true and detailed account of the place where the estate or charitable foundation may be situate, and in what mode or security such bequest may be invested, specifying also the yearly rental of each, and the particular appropriation thereof, together with the names of the persons partaking of their benefit (except where such benefit shall be allotted to the poor of the parish generally), and to what amount in each case, and also stating the name and description of the person in whom such estates are vested, and the names and description of the trustees of each charity; and the aforesaid list shall be open to the inspection of the rate-payers, at the office of the vestry clerk, at the same time with the accounts when audited according to the provisions of this act.

VESTRY CLERK.

It is usual for the vestry to appoint a clerk for the better management of the duty that devolves on the vestry itself. But this is an office of merely a private nature. It depends altogether on the will of the parishioners; and they may elect a different clerk at each vestry. Neither is any salary annexed to the situation. If the fees are paid out of the poor rates, there is an end to all prescriptive right to it. As to any sup-

posed agreement made by the parishioners, that such should be an annual office, it cannot be obligatory longer than the parties choose to fulfil it; for it may be revoked at the next vestry. It is not therefore a fixed permanent office, for which a *mandamus* will lie.¹ This officer acts as the registrar or secretary to the vestry, but has from thence no right to vote or take part in their consultations. His business is to attend the meetings, and draw up and copy all orders and other acts of the vestry, and to give out copies when necessary. He has the custody, therefore, of all books and papers relating thereto; and if they get into other persons' hands, he may have a *mandamus* for their restoration to him. But he cannot be compelled to produce documents for a mere personal object, as in support of an action of slander, &c.²

PARISH BEADLE.

The beadle is chosen by the vestry; and his duty is to attend vestries, to give notice to the parishioners when and where they are to meet; to execute its orders, as messenger; to assist constables in taking up beggars, in passing vagrants, &c. But unless he is also sworn in as constable, he is not generally entitled to act as such. His appointment is during pleasure; and he may, for misconduct, be dismissed at any time by the parishioners in vestry assembled.³

CHAPTER VIII.

Of Dissenters.

It seems advisable in this place to make a few remarks on that large body of subjects called *dissenters*. The annals of our country contain the record of times when they were regarded in a light far different from that in which they are at the present day. Roman Catholics, as well as Protestant Dissenters, now participate, in common with their fellow-subjects of the established church, in all the rights and duties, and are alike entitled to the protection and benefit, of the civil institutions of the empire. They are now admissible into either house of parliament, are capable of holding municipal and other offices, and generally of enjoying every other franchise and civil right; the tests imposed being no longer incompatible with the religious principles either of Catholics or other Dissenters from the established church. Bequests for the benefit of their communities are executed by courts of equity, provided they are not directly contrary to law. Like other subjects, they are exempted from payment of toll in proceeding on Sundays to their places of worship. They are, however, expressly declared liable to all tithes and other parochial and clerical dues.

As to Protestant Dissenters, the Toleration Act, 1 Wm. & Mary, sess. 1, c. 18, the 52 Geo. III. c. 155, and the 53 Geo. III. c. 160, made great concessions to them; but the 9 Geo. IV. c. 7, which repealed the sacramental test, destroyed the great barrier against their admis-

¹ *Rex. v. Churchwardens of Croydon*,
5 T. R. 714; 1 Chit. Burn. J. 647.

² Steer's P. L. 259.
³ Steer's P. L. 104.

sion to office and public employment. For, before that, persons upon entering into any public office or employment were obliged to take certain oaths, and receive the sacrament according to the rites of the established church, which the Dissenters in general felt to be incompatible with their peculiar religious tenets. But the 9 Geo. IV. c. 17, instead thereof, provides a declaration to be made and subscribed in the form following; viz.

"I, A.B., do solemnly and sincerely, in the presence of God, profess, testify, and declare, upon the true faith of a Christian, that I will never exercise any power, authority, or influence, which I may possess by virtue of the office of (*naming it*) to injure or weaken the Protestant church as it is by law established in England, or to disturb the said church, or the bishops or clergy of the said church, in the possession of any rights or privileges to which such church or the said bishops and clergy are or may be by law entitled."

Roman Catholics laboured under a variety of disabilities until the passing of the 10 Geo. IV. c. 7. By this act they are enabled to sit in either house of parliament, to vote at the election of members, and generally to hold all civil and military offices and places of profit and trust, upon taking and subscribing an oath provided by that act instead of the oaths of allegiance, supremacy, and abjuration.

The only offices they are now incapable of filling are those of regent of the United Kingdom, lord chancellor, lord keeper or commissioner of the great seal of England or Ireland, lord lieutenant or lord deputy or other chief governor of Ireland, and high commissioner in Scotland. Catholic members of lay corporations cannot vote in the election &c. of any clerical officer. Nor can they take any office in the established church, ecclesiastical courts, universities, or public schools; nor present to benefices; nor advise the crown, or governor of Ireland, touching the disposal of any clerical office.

By the 5 Geo. I. c. 4, and 10 Geo. IV. c. 7, all persons are prohibited from going to any public religious meeting other than the established church, clothed or attended with any insignia of the office which they may hold, under 100*l.* penalty.

The 3 & 4 Wm. IV. c. 49, allows Quakers and Moravians to make affirmation in all cases where an oath is required of other parties.

Quakers are expressly exempted from the operation of the marriage acts, and enjoy the liberty of solemnizing matrimony in their own conventicles, if both the contracting parties are of that denomination.

And now, by the 5 & 6 Wm. IV. c. 85, dissenters generally, who do not approve of the ceremony of marriage as laid down in the rubric of the church of England, are relieved from the necessity of being married according to that form, and may solemnize marriage in their own chapels, when registered for that purpose, in whatever form they may think proper. The only words which the act points out as necessary to form part of the ceremony are of the most simple nature, and in no way calculated to affect the scruples of any sect whatever.

Dissenting ministers who teach or preach in places duly certified according to law are now as fully exempted, without precedent qualification, from the penalty of any acts relating to religious worship, as those who take the oaths mentioned in the Toleration Act and the acts amending it, provided they subscribe the oaths to government when required by one justice. If they refuse, and continue so to teach or preach, they forfeit, at the discretion of the magistrate, from 10*s.* to 10*l.*

Preaching or officiating in any place of worship not duly certified, or in the fields, or any place in the open air, subjects the offender to the like penalties which, as we shall presently see, persons incur by being present at unlawful conventicles. And preaching in an assembly of more than the lawful number in any place without the consent of the occupier, or in any place with barred doors, subjects the party to not exceeding 30*l.* nor less than 40*s.* penalty.

Dissenting teachers carrying on any trade, except that of a school-master merely, must (in order to entitle themselves to the exemptions from serving as overseers or in other parochial offices, or on juries, or in the militia), besides the oaths to the government, subscribe the Thirty-nine Articles, except the 34th, 35th, 36th, and certain parts of the 20th and 27th.

A Dissenting Minister's Right to his Office.—There is nothing inimical to public policy in a court of equity taking cognizance of and protecting the appointment of dissenting ministers, pursuant to any trust to be administered in a suit before the court.¹ And where such minister is duly appointed, a *mandamus* will be granted by the Queen's Bench to compel parties to admit him to his rights consequent thereon.

We have seen, that all dissenting meeting-houses must be certified; and this must be to the bishop of the diocese, to the archdeacon, or to the justices at the general or quarter sessions in the part where the meeting is held; whereupon they are registered in the bishop's or archdeacon's court, and recorded at the quarter sessions, and a certificate is given, for which 2*s.* 6*d.* is paid. Any person disturbing a lawful assembly of Dissenters may be bound to answer the offence by two sureties of 50*l.* each, or in default be committed to prison, and the sessions, on conviction, may fine him 40*l.*, or commit him for three months; but such prosecution must be within six months after the offence committed. And the wilful destruction or deterioration of a dissenting meeting-house, is punished as other such felonies are; and the parties injured have the like remedies against the hundred.²

By the 3 & 4 Wm. IV. c. 30, dissenting meeting-houses are exempted under like circumstances, if certified, as those of the established church, from parish rates and the assessed taxes.

It is only needful to add, that Jesuits, and members of other religious orders of the church of Rome, bound by monastic or religious vows, in the kingdom at the time of the passing of 10 Geo. IV. c. 7, (18th April, 1829), and Jesuits being natural-born subjects returning to the kingdom, are to send the necessary particulars to the clerk of the peace where they reside, in order that they may be registered; and if any members come into the realm, they shall be banished, unless they have the licence of the secretary of state, who may grant it for six months, revocable at any time he may think fit. But this does not extend to females of such orders. Accounts of such licences are to be annually laid before parliament. The admitting persons to be members of such religious orders is a misdemeanor; and persons admitted may be banished for life; and not leaving the kingdom, they may be conveyed out of it to such place as her majesty may appoint; and if at large after three months, they may be transported.³

¹ See 7 & 8 Vict. c. 45, for the regulation of suits relating to meeting-houses &c. held by Dissenters. ² See 7 & 8 Geo. IV. c. 30, § 2; and c. 31, § 2. ³ 10 Geo. IV. c. 17

CHAPTER IX.

Of the Military State.

ALTHOUGH the laws and constitution of this kingdom acknowledge no such state as that of a perpetual standing army, and in olden times there was no regular army except in time of war; yet in this, as in other countries, it has long been judged necessary for the safety of the kingdom in general to maintain, even in time of peace, a standing body of troops under the command of the crown, which are continued from year to year by act of parliament.

A soldier is possessed of all the rights, and is bound to observe all the duties of other citizens; and he is as much required to prevent a breach of the peace in his individual capacity as any other person. If it be necessary for the purpose of preventing mischief, or for the execution of the law, it is not only the right of soldiers, but their bounden duty, to assist in the execution of legal process, or to prevent any crime or mischief being committed.¹

The military state consists of—1. *The Regular Army*; 2. *The Royal Marines*; 3. *The Militia*.

I. THE REGULAR ARMY.

By the Mutiny Act, which is continued from year to year, the crown may form Articles of War for the government of the forces, and constitute courts martial with power to try any crimes thereby. The articles of war are, it is presumed, within the knowledge of all members of the honourable profession of the army; and as they are not required to be known generally, little good would result from inserting them in the present work.²

By the Mutiny Act, any person who receives enlisting money from a commissioned recruiting officer is deemed thenceforth a soldier, and may be billeted; and if he enlist freely, certain forms are to be gone through before a justice of the peace. He is to take an oath of fidelity, which if he refuse to do, he may be detained by the officer enlisting till he comply. If he has hastily enlisted, he may, on application to a justice within twenty-four hours, obtain his discharge on repaying the enlisting money, with 20s. expences, and all beer money expended subsequent to his enlistment. If, after receiving the enlisting money, he abscond or refuse to go before a justice, he is deemed a soldier, and liable to the punishment for desertion, from which a subsequent enlistment will not save him.

Every regiment is to be mustered twice a year, when all belonging thereto must be present, unless certified to be employed on some other duty of the regiment, or to be sick, or in prison, or on furlough; and any person giving a false certificate, or making a false muster, is liable in the one instance to a penalty of 50*l.*, and in the other to be cashiered. Any person suffering himself to be mustered in lieu of another, or lend-

¹ 4 Taunt. 449.

² See 3 Chit. Burn. J. 768, 9.

ing a horse to attend muster, is liable to a penalty of 20*l*.; and the informer, if in the service, is entitled to be discharged therefrom.

Upon any part of the army marching through England or Ireland, certain officers are entitled to apply to a justice for a warrant to be directed to the constable of the place, requiring him to provide proper carriages &c. to go certain distances at stated sums, as mentioned in sects. 55, 56 of the above act. And if, in case of emergency, the constable is put to extraordinary expences, he is entitled to be reimbursed out of the county rate. The 80th section provides for the billeting soldiers on victualling houses, and the manner in which this is to be done, giving the party on whom they are billeted the right of redress by application to a justice of peace, who is not a military officer.

The rates of allowance to persons receiving soldiers so billeted are provided by § 53. The 54th section exempts private persons; canteens held under authority of the ordnance department; persons keeping taverns only, being vintners of the city of London and freemen of the company; distillers merely of brandy and strong waters; dealers whose principal dealing is more in other goods than in brandy &c., and in whose houses there is no tippling; and the houses of foreign consuls.

Sections 62, 63 impose penalties on constables and military officers offending against the act.¹

We have already seen that, during the election of members of parliament, all soldiers must be removed to a distance of two miles at least one day before, and must not return within one day after the poll is taken; but this does not extend to Westminster or places of royal residence, or fortified places, or to any soldier &c. having a right to vote at the election.² And by the 11 Geo. IV. c. 7, § 51, the *foot guards* are privileged to be billeted in Westminster or the places adjacent.

Persons purchasing the arms &c. of soldiers are liable to 10*l*. penalty and treble value of the articles. So trafficking in commissions in the army is punishable by 100*l*. penalty, and treble value of the consideration in cases in which they are *not* allowed to be sold, and treble the excess of the consideration beyond the regular price for which they are sold where the sale is allowable.

The Mutiny act does not generally interfere with the ordinary course of law with respect to soldiers, in cases either civil or criminal; but, by sect. 3, a soldier is not liable to be detained from his duty on account of any debt under 30*l*. A soldier in actual service may, however, be committed for disobeying an order of justices in a case of bastardy.³

The 60th section exempts all officers in undress or dress uniform, and all baggage waggons &c., from turnpike and other tolls and duties by land, but not from those on canals; and § 61 enables them to pass ferries in Scotland on paying half the regular fares. A further privilege is that of exemption from taking parish apprentices, by § 68.⁴

Soldiers, after their discharge, and their wives and children, may set up in any trade in any place except Oxford and Cambridge.⁵ And when sick &c., they are usually supported by the particular parish to which they belong, or else by the royal hospitals.

¹ See more particularly 3 Chit. Burn. J. 768—762.

² See 8 Geo. II. c. 30.

³ 3 Chit. Burn. J. 784.

⁴ As to the pay of soldiers and its forfeiture, see 3 Chit. Burn. J. 785; and as to deserters, see *Id.* 786.

⁵ 3 Geo. III. c. 8.

Personating a pensioner, or forging any document relating thereto, or knowingly uttering such, is punishable by transportation for life.¹

It is now fully established, that neither the full pay nor half pay of an officer, or of any person in a military or naval capacity, can in any instance be assigned before it is due; as the object of such pay is to enable those who receive it to be always ready to serve their country with that decency and dignity which their respective stations and characters require.² This is a law founded upon sound policy and general convenience. It may be a hardship upon a poor officer, that he cannot borrow money for himself and family by giving a security upon his future pay; yet it would be a much greater evil to the public service if officers, when called out, were destitute of the means of serving their country from the want of proper habiliments or accoutrements. By the 46 Geo. III. c. 69, § 7, all assignments of retired soldiers' pensions are void.

The probates of wills, letters of administration, and inventories of effects of any common soldier or sailor, dying in service, are exempted from stamp duties; and the 58 Geo. III. c. 73 provides how, in such cases, regimental debts are to be paid. Soldiers and their wives are, amongst other privileges, exempted from the penalties of the Vagrant acts upon pursuing certain forms, which are so far generally known to that profession that they need not be here recited.³

II. MARINES.

The regulations of the marines are in most respects the same with those of the regular army, except that some variation is necessary as they are under the jurisdiction of the admiralty.⁴

III. MILITIA.

The order of militia is very ancient in this kingdom; but, as it now stands, it is principally modelled on statutes passed soon after the restoration of Charles II., at which time military tenures were abolished. The general scheme is to discipline a certain number of inhabitants of every county,⁵ chosen by lot for five years, and officered by the lord lieutenant, the deputy lieutenant, or other principal landholders, under a commission from the crown. They are not compellable to march out of their counties, unless in case of invasion or actual rebellion within the realm or any of its dominions or territories, nor in any case to be sent out of the kingdom. They are to be exercised at stated times, and their discipline is in general liberal and easy; but when drawn out into actual service, they are subject to all the rigours of martial law.⁶

Meetings of the lieutenancy are to be held once a year, in October, in order to issue precepts to the different head constables of the county, who are to serve notices on the housekeepers to return lists of all persons residing in their house liable to serve; and for not making a

¹ 7 Geo. IV. c. 16, § 38.

² 3 T. R. 258; H. Bl. 628; 1 Ball & B. 389; 2 Anst. 535.

³ See 3 Chit. Burn. J. 793, where the mode in which they are to be passed from

place to place is pointed out; and see further as to this subject, *Id.* 767—801.

⁴ See further 5 Chit. Burn. J. 801.

⁵ As to this, see 3 Chit. Burn. J. 801.

⁶ 1 Bl. Com. 412.

return, or making a false return, a penalty of 5*l* is inflicted. Quakers are exempt from making this list, on obeying the directions of § 27. In the blank forms for these lists, which are left with every house-keeper once a year, is contained most of the information relating to exemptions from serving;¹ it is therefore hardly necessary to call the attention of the reader further to this branch of the subject.

If any party is aggrieved, a power of appeal is given to a subdivision meeting appointed for hearing such appeals, composed of lieutenants and others, whose decision is final.

Although a person chosen by ballot afterwards remove from the district for which he is appointed, he is still liable to serve.

The term of service is five years, either in person or by substitute.² When a person is balloted, he must take an oath for due service, and must also, before enrolment, be examined by a surgeon of the militia, or on refusal is liable in the first case to 10*l*. penalty, and in the other to imprisonment. A substitute undergoes the same ceremonies, and during his service the principal is exempt from further serving, as though he had actually served; but the substitute may, at the end of the time, be liable to serve again on his own account. The substitute must be a man of the same district for which the principal was chosen, and must be competent to serve;³ and by 43 Geo. III. c. 50, § 7, a seaman cannot be such substitute.

If servants hired by the year are balloted and enrolled, it does not vacate their contract with their master, who is still liable for their wages, unless they are actually embodied or called out, or leave the master for twenty-one days without returning; but an abatement of wages is allowed in case of absence, to be settled by the justices of the peace. If a man so enrolled volunteer into any other service, denying himself to be a militia man; or if a regular soldier offer himself for the militia, either as a principal or substitute, he is liable to pecuniary penalties and to imprisonment in the house of correction. They are liable at certain periods to be called upon for the purpose of training, when most of the foregoing observations on the regular soldiery, as to the application of martial law, providing carriages, &c., apply in like manner to the militia. The absenting himself from such training subjects the party to 20*l*. penalty, or to imprisonment and hard labour, or to be treated as a deserter. So the attempt to sell their arms subjects them to 3*l*. penalty; and the attempt to buy them is 10*l*. penalty.

The privileges and exemptions of persons serving in the militia are as follows. The acceptance of a commission therein does not vacate a seat in parliament. A militia-man is not liable to serve the office of sheriff, nor any parish office, nor to perform any highway duty; nor is he liable to any punishment for absence occasioned by his going to vote at any election. Like a regular soldier, under the 24 Geo. III. c. 44, he may set up in trade (being a married man) in any city or town, &c.; neither can he be removed from any parish on the fear of his becoming a charge thereon until he become actually chargeable. The post office privileges allowed to regular soldiers are extended to the militia when in regular service.

In cases of invasion or a rebellion, the militia is called into actual

¹ 3 Chit. Burn. J. 816. ² 42 Geo. III. c. 90, § 41. ³ R. v. Willis, 6 T. R. 179.

service by order in council. In case of non-appearance, a party is liable as a deserter; and any person wilfully concealing him forfeits 100*l*. From the date of the warrant for the embodying of the militia, they receive the same pay as the regular infantry, which commences from the day of their joining their corps, and one guinea is to be paid to the captain for the use of every private or recruit, to be disposed of for his advantage, and to be accounted for to him by the captain; and if such captain is not worth 500*l*., then he is to receive one half the current price paid for volunteers or substitutes, unless he is discharged within one month. So, at the expiration of the term of five years, if a balloted man, or a substitute or volunteer, is willing to continue serving three years longer, he shall have the like bounty.

Where part only of the militia is embodied, and vacancies occur, they are to be filled up by ballot of those enrolled, and in that case those who appear and attend at the ballot and are not chosen are entitled to 1*s*. per day for such attendance while from home.

However, for the present, the balloting and enrolling for the militia is altogether suspended, subject to be again enforced by an order in council.

CHAPTER X.

Of the Maritime State.

THIS is in many points nearly related to the military state, though much more agreeable, says Blackstone, to the principles of our free constitution. The present flourishing condition of our navy is in a great measure owing to the salutary provisions of the Navigation acts, whereby the constant increase of British shipping and seamen is not only encouraged, but rendered unavoidably necessary. This subject, however, will be more particularly adverted to when we come to treat of the mercantile part of our marine. We shall in the first place direct our attention to the royal navy.

I. THE ROYAL NAVY.

There are many laws for the supply of the royal navy with seamen, for their regulation when on board, and for conferring privileges and rewards on them during and after their service.

Of Impressing Seamen.—The right of impressing seafaring men for the sea service by a royal commission has been a matter of some dispute; but, though with reluctance, it is now so fully established that it will not admit of a doubt in any court of justice, and is said to be founded on immemorial usage; and therefore all that the courts now do is to see that the power is not abused.

This right in the crown, however, only exists in regard to seafaring men, and not to landsmen. Neither a freeholder, nor a headborough, nor a freeman and liveryman of London as such merely, nor a seaman or master in the coal trade, nor an apprentice in the Greenland fisheries after three years service, nor a carpenter on board a coal or coasting

trader, are privileged from impressment. But a bargeman employed by the Navy board, and a waterman retained by a fire-insurance company, are exempt. So ferrymen are said to be exempt. So a protection therefrom may be given by the admiralty.

In case of wrongful impressment, the remedy is by the writ of *habeas corpus* before any judge for his discharge; which must be obtained within the time mentioned in 13 Geo. II. c. 27. An unlawful impressment, or an excess of duty in a lawful impressment, subjects the party guilty of it to an action at common law; and the officer would not be protected if death or other accident happened while in the act of or by reason of such excess.

If a sailor on board a merchantman be pressed into the queen's service, he is not entitled to any portion of his wages from the former, unless the voyage is completed.

The 5 & 6 Wm. IV. c. 24, in order to increase the inducements to seafaring men to enter into the royal navy, limits the period of their service to five years, unless they voluntarily enter for a longer term. The commanding officer of the fleet is empowered, in consequence of special emergency, to detain them for six months longer; in which case they are entitled, for such extra service, to an addition of one-fourth in their rate of pay.

Privileges of Seamen.—Sailors are entitled to the same advantages in respect to the setting up in any trade in any place as soldiers are.

By the 31 Geo. II. c. 10, § 28, no listed seaman can be arrested for a debt or damage not exceeding 30*l*. And the 44 Geo. III. c. 13, § 1, in order to prevent the practice of liberating seamen from service by means of improperly suing out process, provides, that, having been arrested, the sheriff shall keep the party in custody, when he is otherwise entitled to his discharge from the process, and convey him to the commander in chief or other commissioned officer for raising seamen, in order that he may serve on board the fleet; and the sheriff is allowed 2*s*. per mile for conveying him. If the sheriff suffer him to escape, he is liable to 100*l*. penalty. The privilege from arrest is confined to civil causes of suit, and does not extend to criminal cases.

Regulation of the Navy.—The method of ordering seamen in the royal navy is directed by certain express rules, articles, and orders, in which almost every possible offence is set down, and its punishment annexed. And by the 31 Geo. II. c. 10, § 33, printed copies of the articles of war are to be hung up in the most public places in the ship, so as to be accessible to the crew, and are to be read over to them once a month; and, by the 32 Geo. III. c. 67, the same rules hold as to abstracts of statutes relating to their pay.

Offences are to be tried and punished by courts martial, whose jurisdiction extends to all offences against the articles of war committed on the high seas, or below the bridges of navigable rivers, or in havens and creeks within the admiralty jurisdiction, and by persons in actual service and on full pay. But murders are only triable by the admiralty when both the death and its cause happened in such situations.

Seamen assaulting their commander in order to prevent their fighting with an enemy are liable to all the penalties that attach to piracy.

¹ 22 Geo. II. c. 44; 3 Geo. III. c. 8.

Assaulting seamen and others to prevent them working is, by the 9 Geo. IV. c. 31, § 26, punishable by imprisonment for three months and hard labour.

Swearing, among them, is punished by one hour's imprisonment in the stocks for every single offence, or two hours for a number of offences of which they are convicted at the same time;¹ and for making disturbances in dock yards &c., they may be prosecuted at the quarter sessions or assizes, and in the mean time may be bound in bail to good behaviour.²

Their Pay, &c.—By the 37 Geo. III. c. 56, § 2, if a seaman &c. is wounded in action, he shall receive his full wages till he is cured, or until, being declared incurable, he shall receive a pension from the chest at Chatham, or be admitted into Greenwich hospital; and by the 34 Geo. III. c. 28, 37 Geo. III. c. 53, and 46 Geo. III. c. 127, seamen &c. may, under certain forms, allot certain parts of their pay to be paid to their wives, children, or mothers. This allotment once made can only be revoked under certain circumstances. Forging orders under these enactments is felony, punishable as before mentioned.

Great advantages in point of wages are given to seamen volunteering into her majesty's service; and foreign seamen who during war serve two years on board a man of war, merchantman, or privateer, are *ipso facto* naturalized, and after serving three years are registered as British mariners.

Letters of Attorney and Wills of Seamen.—Parliament has provided against the frauds and impositions which were too often practised in regard to these documents, by the statutes 55 Geo. III. c. 60, 59 Geo. III. c. 59, 1 & 2 Geo. IV. c. 49, pointing out the mode in which each is to be executed, and providing that a will and power of attorney to receive pay &c. shall not be contained in the same instrument; that, if attested in a certain manner, such documents shall be valid though executed in a foreign prison; that wills &c. are to be entered on the ship's muster book; and, amongst other enactments, pointing out the manner in which the executors of seamen shall obtain probate of such wills, and the duty of the minister and officers of the parish &c. where the executor dwells as to authenticating the character of the executor.

Persons illegally obtaining Seamen's Pay or Prize Money.—By 59 Geo. III. c. 56, any person falsely representing himself to be a relation of a seaman in order to obtain his wages, prize-money, &c.; or receiving it, not being duly authorized so to do; or falsifying dates of orders for the payment thereof; or being really entitled thereto, and endeavouring to obtain payment by false certificates, are deemed guilty of and liable to be punished as for a misdemeanor.

And persons falsely assuming the name and character of others entitled to prize money &c., or forging &c. any letter of attorney or other document to receive it, or taking a false oath to obtain probate of any will or letters of administration, are guilty of felony and punishable by transportation or imprisonment.

And by 1 & 2 Wm. IV. c. 49, similar offences relative to remittance bills are punishable in like manner.

Widows' Pensions.—The 10 Geo. IV. c. 14 regulates the mode of

¹ 19 Geo. II. c. 21, s. 5.

² 1 Geo. I. st. 2, c. 25, ss. 1, 2.

payment of pensions to widows of seamen, and declares that all assignments and sales of such pensions are null and void to all intents and purposes whatever.

All orders, certificates, vouchers, bills, and receipts relating to pensions are free from stamp duties. Personating a widow entitled to pension with a view fraudulently to obtain such pension is punishable by fourteen years transportation; and producing false certificates or false affidavits is liable to fine and imprisonment and hard labour at the discretion of the court.

II. OF MERCHANT SHIPS AND SEAMEN.

Before entering upon the consideration of the rights and duties of the mercantile part of the maritime order, we shall first notice those laws which have been passed for their more especial increase and encouragement—we mean the Navigation act, and the act for the registration of the ships.

Law of Navigation.

It has ever been the policy of our legislature to confine the maritime trade of the country as much as possible to British shipping and seamen. So far back as the reign of Henry VII. the leading principle of the Navigation law is distinctly recognized in the prohibition of certain commodities unless imported in ships belonging to English owners and manned by English seamen; and in the early part of the reign of Elizabeth (5 Eliz. c. 5) foreign ships were excluded from our fisheries and coasting trade. To the republican parliament, however, in the year 1651, must be attributed the full developement of those principles, which, being adopted in the succeeding reign of Charles II. as the groundwork of the famous Navigation act (12 Car. II. c. 18) have almost ever since constituted the basis of our intercourse with foreign nations, though it has been found necessary of late years to make some relaxation in these restrictive principles. The law of navigation at present in force is the 8 & 9 Vic. c. 88.

By this act it is enacted, that the following goods, *being the produce of Europe*, namely, masts, timber, boards, tar, tallow, hemp, flax, currants, raisins, figs, prunes, olive oil, corn or grain, wine, brandy, tobacco, wool, shumac, madders, madder roots, barilla, brimstone, bark of oak, cork, oranges, lemons, linseed, rape seed, and clover seed, shall not be imported into the United Kingdom to be used therein, except in British ships, or in ships of the country of which the goods are the produce, or of the country from which the goods are imported.¹

¹ The 3 & 4 Vict. c. 95 (reciting that the Danube is the principal outlet for the produce of a great part of the Austrian dominions, and the ports of the Danube, which belong to the Turkish dominions, are the natural shipping ports for such produce) empowers her majesty by order in council to declare, that Austrian vessels from any of the ports of the Danube, as far as Galatz inclusively, shall, together with their cargoes, be admitted into the ports of the United Kingdom and of all the possessions of her

majesty, exactly in the same manner as if they came direct from Austrian ports.

And whereas, by the application of steam power to inland navigation, and the facilities thereby afforded of ascending rivers, new prospects of commercial adventure are opened to many states situate wholly or chiefly in the interior of Europe, and whose most convenient shipping ports are not within their own dominions, her majesty is enabled to exercise similar powers with regard to such states.

And no goods *the produce of Asia, Africa, or America*, shall be imported from *Europe* into the United Kingdom, to be used therein, except the following:

Goods the produce of the dominions of the Emperor of Morocco, which had been imported from places in Europe within the Straits of Gibraltar:

Goods the produce of Asia or Africa, which having been brought into places in Europe within the Straits of Gibraltar from or through places in Asia or Africa within those Straits, and not by way of the Atlantic Ocean) may be imported from places in Europe within the Straits of Gibraltar:

Goods the produce of places within the limits of the East India Company's charter which (having been imported from those places into Gibraltar or Malta in British ships) may be imported from Gibraltar or Malta:

Goods taken by way of reprisal by British ships:

Bullion, Diamonds, Pearls, Rubies, Emeralds, and other jewels or precious stones.

And no goods *the produce of Asia, Africa, or America* shall be imported into the United Kingdom, to be used therein, *in foreign ships*, unless they be the ships of the country in Asia, Africa, or America, of which the goods are the produce, and from which they are imported; except the following:—

Goods the produce of the dominions of the Grand Seigneur in Asia or Africa, which may be imported from his dominions in Europe in ships of his dominions:

Raw Silk and Mohair Yarn, the produce of Asia, which may be imported from the dominions of the Grand Seigneur in the Levant Seas, in ships of his dominions:

Bullion.

Provided always, that in case any treaty shall be made with any country having a port or ports within the Straits of Gibraltar, stipulating that such productions of Asia or Africa as may by law be imported into the United Kingdom from places in Europe within the Straits of Gibraltar in British ships shall also be imported from the ports of such country in the ships of such country, then it shall be lawful to import such goods from the ports of such country in the ships of such country.

All manufactured goods are to be deemed the produce of the country of which they are the manufacture.

And no goods shall be imported into the United Kingdom from the islands of Guernsey, Jersey, Alderney, or Sark, nor exported to any of such islands, or to any British possession in Asia, Africa, or America, except in British ships; nor be carried coastwise from one part of the United Kingdom to another, nor from any one to any other of such islands, nor from one part to another part of the same island, except in British ships; nor from any British possession in Asia, Africa, or America, to any other of such possessions, nor from one part to another part of the same, except in British ships; nor be imported into any British possession in Asia, Africa, or America in any *foreign ships*, unless they be ships of the country of which the goods are the produce, and from which the goods are imported.

What are British Ships.—No ship is to be admitted a British ship unless duly *registered and navigated*. Every British registered ship (so long as the registry shall be in force, or the certificate of registry be retained for the use of such ship) shall be navigated during the whole of every voyage (whether with a cargo or in ballast), in every part of the world, by a master who is a British subject, and by a crew whereof *three fourths* at least are British seamen; and if such ship be employed in a coasting voyage from one part of the United Kingdom to another, or in a voyage between the United Kingdom and the islands of Guernsey, Jersey, Alderney, Sark, or Man, or from one of the said islands to another of them, or from one part of either of

them to another of the same, or in fishing on the coasts of the United Kingdom or of any of the said islands, then the *whole* of the crew shall be British seamen. But vessels under fifteen tons burthen are admitted in navigation upon rivers &c. although not registered; and vessels under thirty tons employed in the Newfoundland fishery &c. need not be registered. Honduras ships are to be taken as British in the trade with the United Kingdom or the British colonies in America.

In order to be deemed the ships of any particular foreign country, vessels must be of the built of, or prize to such country; or British-built, and owned and navigated by subjects of such country.

Master and Seamen.—No person is qualified to be master of a British ship, or to be a British seaman within the meaning of this act, except natural-born subjects of her majesty, or persons naturalized by act of parliament, or made denizens by letters of denization; or except persons who have become British subjects by virtue of conquest or cession of some newly acquired country, and who shall have taken the oath of allegiance to her majesty, or the oath of fidelity required by the treaty of capitulation by which such newly acquired country came into her majesty's possession; or persons who shall have served on board any of her majesty's ships of war in time of war for the space of three years. The natives of places within the limits of the East India Company's charter, although under British dominion, shall not, upon the ground of being such natives, be deemed to be British seamen. Every ship (except ships required to be wholly navigated by British seamen) which shall be navigated by one British seaman if a British ship, or one seaman of the country of such ship if a foreign ship, for every twenty tons of the burthen of such ship, shall be deemed to be duly navigated, although the number of other seamen exceed one fourth of the crew. Her majesty may, by proclamation during war, declare that foreigners having served two years on board any of her majesty's ships of war in time of such war, shall be British seamen within the meaning of this act.

No British registered ship shall be suffered to depart any port in the United Kingdom, or any British possession in any part of the world, whether with a cargo or in ballast, unless *duly navigated*. But British ships trading between places in America may be navigated by British negroes; and ships trading eastward of the Cape of Good Hope within the limits of the East India Company's charter may be navigated by Lascars or other natives of countries within those limits.

If any British registered ship shall at any time have, as part of the crew, in any part of the world, any foreign seamen not allowed by law, the master or owners of such ship for every such foreign seaman forfeit 10*l*. Provided, that if a due proportion of British seamen cannot be procured in any foreign port, or in any place within the limits of the East India Company's charter, for the navigation of any British ship; or if such proportion be destroyed during the voyage by any unavoidable circumstances, and the master of such ship shall produce a certificate of such facts under the hand of any British consul, or of two known British merchants, if there be no consul at the place where such facts can be ascertained, or from the British governor of any place within the limits of the East India Company's charter; or, in the want

of such certificate, shall make proof of the truth of such facts to the satisfaction of the collector and controller of the customs of any British port, or of any person authorized in any other part of the world to inquire into the navigation of such ship, the same shall be deemed to be duly navigated. The proportion of seamen may be altered by proclamation.

But goods of any sort or the produce of any place, not otherwise prohibited than by the law of navigation hereinbefore contained, may be imported from any place in a British ship, and from any place not being a British possession in a foreign ship of any country, and however navigated, to be *warehoused for exportation only*, without payment of duty upon the first entry thereof.

If any goods be imported, exported, or carried coastwise, contrary to the law of navigation, they are forfeited, and the master of the ship forfeits 100*l*.

With regard to *passage vessels* between Great Britain and Ireland, by 4 Geo. IV. c. 88, no captain of any vessel under 200 tons shall take more than twenty passengers, unless licensed by the collector of the customs at the port of sailing, under 50*l*. penalty.

Nor shall any master or other person having the charge or command of any ship so licensed which shall clear out from any port or place in the United Kingdom, have on board, at or after being cleared out, at any one time, or convey or transport from any place in Great Britain or Ireland respectively, in any such ship or vessel, a greater number of persons (exclusive of the ordinary crew) than in the proportion of five adult persons, or of ten children under fourteen years of age, or of fifteen children under seven years of age, for every four tons burthen of such ship; and if any such vessel be partly laden with goods, wares, or merchandize, or horses or carriages, then the person having the command of such ship shall not take on board a greater number of persons (exclusive of the ordinary crew) than in the proportion of five adult persons, or of ten children under fourteen years of age, or of fifteen children under seven years of age, for every four tons of that part of such ship which shall remain unladen; and such goods, with which such ship or vessel may be partly laden, shall, at the sight and under the direction of the officer of the customs at the place where such goods are taken on board, be stowed in such a manner as to leave sufficient accommodation for the proportion of persons allowed to be received on board, under penalty of 5*l*. for every additional person.

Merchant vessels &c. are not to carry more than ten persons if of or under 100 tons, or twenty if not exceeding 200 tons, under the penalty of 5*l*. for every person beyond the proportion.

But this act does not extend to vessels in the service of government or of the East-India Company, nor to any vessel of 200 tons burthen or upwards, nor to any vessel employed in carrying troops.

Penalties are recoverable in three calendar months, before a justice of peace of the place from which the ship departs. A power of appeal is given to the quarter sessions.

For the regulations as to vessels carrying passengers from the United Kingdom to any place out of Europe, not being within the Mediterranean Sea, see 5 & 6 Wm. IV. c. 53.

Of the Registration of Ships.

The principal object of the registration of ships is to facilitate the exclusion of foreign ships from those departments of trade in which they are prohibited from engaging by the Navigation law, by affording a ready means of distinguishing such as are really British. It has also been considered advantageous to individuals, by preventing the fraudulent assignment of property in ships.

The provisions relating to the registry of British ships were consolidated by the 8 & 9 Vic. c. 89. This act provides, that no vessel shall claim or enjoy the privileges of a British vessel, unless it shall have been duly registered according to the provisions of that act, or under the 6 Geo. IV. c. 118, or 4 Geo. IV. c. 41; and certain persons are authorized to make such registry, and grant certificates thereof, being in the United Kingdom the collector and comptroller of the customs at the port of registry. Ships exercising the privileges of British ships before registry become forfeited.

No ship shall be deemed duly registered, except such as are wholly of the built of the United Kingdom, or of the isle of Man, or of the islands of Guernsey or Jersey, or of some of the colonies, plantations, islands, or territories in Asia, Africa, or America, or of Malta, Gibraltar, or Heligoland, which belonged to her majesty at the time of building, or such ships as shall have been condemned as prize of war, or forfeited for breach of the laws for the prevention of the slave trade and which shall continue wholly to belong to her majesty's subjects duly entitled to be owners of ships registered.

No Mediterranean pass shall be issued for any ship as belonging to Malta or Gibraltar, except such as shall have been duly registered at those places respectively, or such as, not being entitled to be so registered, shall have wholly belonged before the 10th October, 1827, and shall have continued wholly to belong, to persons actually residing at those places respectively as inhabitants thereof, and entitled to be owners of British ships there registered, or who, not being so entitled, shall have so resided upwards of fifteen years prior to the said 10th October, 1827.

If the foreign repairs of a vessel exceed 20s. per ton, except they are absolutely necessary to enable her to perform the voyage in which she is engaged, she loses the privilege of her registry; and the master, on arrival at a British port, is to report such repairs, and the necessity thereof must be proved to the commissioners of customs. If a ship is declared unseaworthy, it is to be deemed lost or broken up, and never can regain the privilege; nor can British ships captured by enemies be again entitled to registry; but ships condemned in courts of admiralty may be registered.

All ships are to be registered at the port to which they belong, unless the commissioners of customs permit registry at other ports.

A vessel is deemed to belong to the port at or near to which some or one of the owners who shall subscribe the declaration required by the act resides; and whenever the owners transfer shares in such ship or vessel, the same shall be registered *de novo* before the ship sail from the port she is in. But if there is not time to comply with the requisites of the act before it sails upon another voyage, the collector and controller of the port where it then is may certify upon the back of the existing certificate of registry, that the same is to remain in force for that voy-

of such certificate, shall make proof of the truth of such facts to the satisfaction of the collector and controller of the customs of any British port, or of any person authorized in any other part of the world to inquire into the navigation of such ship, the same shall be deemed to be duly navigated. The proportion of seamen may be altered by proclamation.

But goods of any sort or the produce of any place, not otherwise prohibited than by the law of navigation hereinbefore contained, may be imported from any place in a British ship, and from any place not being a British possession in a foreign ship of any country, and however navigated, to be *warehoused for exportation only*, without payment of duty upon the first entry thereof.

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No ship shall be deemed duly registered, except such as are wholly of the built of the United Kingdom, or of the isle of Man, or of the islands of Guernsey or Jersey, or of some of the colonies, plantations, islands, or territories in Asia, Africa, or America, or of Malta, Gibraltar, or Heligoland, which belonged to her majesty at the time of building, or such ships as shall have been condemned as prize of war, or forfeited for breach of the laws for the prevention of the slave trade and which shall continue wholly to belong to her majesty's subjects duly entitled to be owners of ships registered.

No Mediterranean pass shall be issued for any ship as belonging to Malta or Gibraltar, except such as shall have been duly registered at those places respectively, or such as, not being entitled to be so registered, shall have wholly belonged before the 10th October, 1827, and shall have continued wholly to belong, to persons actually residing at those places respectively as inhabitants thereof, and entitled to be owners of British ships there registered, or who, not being so entitled, shall have so resided upwards of fifteen years prior to the said 10th October, 1827.

If the foreign repairs of a vessel exceed 20s. per ton, except they are absolutely necessary to enable her to perform the voyage in which she is engaged, she loses the privilege of her registry; and the master, on arrival at a British port, is to report such repairs, and the necessity thereof must be proved to the commissioners of customs. If a ship is declared unseaworthy, it is to be deemed lost or broken up, and never can regain the privilege; nor can British ships captured by enemies be again entitled to registry; but ships condemned in courts of admiralty may be registered.

All ships are to be registered at the port to which they belong, unless the commissioners of customs permit registry at other ports.

A vessel is deemed to belong to the port at or near to which some or one of the owners who shall subscribe the declaration required by the act resides; and whenever the owners transfer shares in such ship or vessel, the same shall be registered *de novo* before the ship sail from the port she is in. But if there is not time to comply with the requisites of the act before it sails upon another voyage, the collector and controller of the port where it then is may certify upon the back of the existing certificate of registry, that the same is to remain in force for that voy-

age. And if any ship be built in any of the colonies, plantations, islands, or territories belonging to her majesty in Asia, Africa, or America, for owners residing in the United Kingdom, and the master, or the agent for the owner, produces to the collector &c. of the port where such ship was built the certificate of the builder, and subscribes a declaration before such collector of the names and descriptions of the principal owners of such ship or vessel, and that she is the identical ship or vessel mentioned in such certificate of the builder, and that no foreigner, to the best of his knowledge and belief, has any interest therein; the collector of such port may cause such ship to be surveyed and measured, and shall give the master a certificate, stating when and where and by whom such ship or vessel was built, the description, tonnage, and other particulars required on registry of a ship or vessel, and such certificate shall have all the force and virtue of a certificate of registry under the act during the term of two years, unless such ship shall sooner arrive at some place in the United Kingdom.

Persons residing in foreign countries may not be owners, unless members of British factories, or agents for or partners in British houses.

A declaration being made by the subscribing owners, according to the form prescribed by sec. 13, to the effect that no foreigner hath any share or interest in the vessel, it is to be surveyed previous to registry, and a certificate of the survey given, the owner or master concurring therein. Sections 16 to 19 prescribe the modes of ascertaining the tonnage, which when ascertained is to be carved in figures three inches long on the main beam, and ever after deemed the tonnage, unless any alteration be made in the burthen of the vessel.

A bond is given by the master and owners at the time of registry, in a penalty according to the tonnage, conditioned that the certificate of registry shall be solely made use of for the service of such vessel, and given up to be cancelled in case of its becoming no longer entitled thereto. When the master is changed, the new master gives a similar bond, and his name is indorsed on the certificate of registry. These bonds are liable to the same stamp duties as customs bonds.

The name of a vessel when registered is not afterwards to be changed; and must be painted on the stern, under 100*l.* penalty.

Upon application for registry, the builder's certificate of the particulars of the ship must be given, with the name of the first purchaser, and a declaration made to the truth thereof.

If the certificate of registry be lost or mislaid, the commissioners may permit registry *de novo*, upon a bond being given by the owners and master, that if the certificate at any time afterwards be found, it shall be forthwith delivered to the proper officers of customs to be cancelled, and that no illegal use has been or shall be made thereof with their privity or knowledge; or if, by reason of the absence of the ship or owners, or any other impediment, registry cannot be made, the commissioners may grant a licence for present use, which for the time limited therein is as effectual as a certificate of registry.

Persons detaining a certificate of registry forfeit 100*l.*; and if a justice certify such detainer, the ship is to be registered *de novo*. If the person detaining the certificate have absconded, the ship may be registered *de novo*, as in the case of a lost certificate.

If a ship be altered so as not to correspond with the old registry, it is to be registered *de novo*.

Where a vessel is condemned as a prize, or for breach of the laws against the slave trade, the certificate of condemnation is to be produced for the purpose of registration. Prize vessels are not to be registered at Guernsey, Jersey, or Man, but at the ports of Southampton, Weymouth, Exeter, Plymouth, Falmouth, Liverpool, or Whitehaven.

All transfers of interest are to be made by bill of sale, reciting the substance merely of the certificate of registry.

The property in every ship is divided into sixty-four parts or shares, and a shareholder of less than a sixty-fourth part is not entitled to be registered as a part owner. The declaration upon the first registry states the number of such shares held by each owner. Smaller portions may be conveyed or transferred without a stamp; and partners may hold ships or shares without distinguishing the proportionate interest of each owner. Only thirty-two persons are to be owners of a ship at one time; but this is not to affect the equitable title of heirs &c., nor joint stock companies, whose trustees may apply to have registry made.

Bills of sale are not effectual until produced to officers of customs, and entered in the book of registry or intended registry.

The entry of bill of sale is valid to pass the property, except as against such subsequent purchasers and mortgagees who shall first procure the indorsement to be made upon the certificate of registry of such ship or vessel in manner hereinafter mentioned.

When a bill of sale has been entered for any shares, thirty days are allowed for indorsing the certificate of registry, before any other bill of sale for the same can be entered; it being the true intent and meaning of this act that the several purchasers and mortgagees (when more than one appear to claim the same property, or to claim security on the same property) in the same rank and degree shall have priority one over the other, not according to the respective times when the particulars of the bill of sale or other instrument by which such property was transferred to them were entered in the book of registry as aforesaid, but according to the time when the indorsement is made upon the certificate of registry as aforesaid: provided, that if the certificate of registry shall be lost or mislaid, or shall be detained by any person whatever, so that the indorsement cannot in due time be made thereon, and proof thereof shall be made by the purchaser or mortgagee, or his known agent, to the satisfaction of the commissioners of her majesty's customs, it shall be lawful for the said commissioners to grant such further time as to them shall appear necessary for the recovery of the certificate of registry, or for the registry *de novo* of the said ship or vessel under the provisions of this act, and thereupon the collector and controller shall make a memorandum in the book of registry of the further time so granted, and during such time no other bill of sale shall be entered for the transfer of the same ship or vessel, or the same shares thereof, or for giving the same security thereon.

Bills of sale may be produced after entry at other ports than those to which vessels belong, and transfers be indorsed on the certificate of registry, on previous notice to the officers at the port of registry.

If upon registry *de novo* any bill of sale shall not have been recorded, the same shall then be produced. A bill of sale previous to registry may be recorded after registry; upon change of property, a registry *de novo* may be granted if desired, although not required by law.

Copies of declarations &c. and of extracts from books of registry are to be admitted in evidence, without the production of the original or originals, and without the testimony or attendance of any collector or controller, or other person or persons acting for them respectively, in all cases, as fully and to all intents and purposes as such original or originals, if produced by any collector or collectors, controller or controllers, or other person or persons acting for them, could or might legally be admitted or received in evidence.

Where vessels or shares are sold in the absence of the owners by their known agents without formal powers, the commissioners may permit a record of such sales, or registry *de novo*, as the case may require, and in other cases where the bills of sale cannot be produced, security being given to produce legal powers or abide future claims.

When the transfer of any ship, or of any shares thereof, shall be made only as a security for the payment of debts, either by way of mortgage, or of assignment to trustees for the purpose of selling the same for the payment of debts, then the collector and controller of the port where the ship or vessel is registered shall, in the entry in the book of registry, and also in the indorsement on the certificate of registry, in manner hereinbefore directed, state and express that such transfer was made only as a security for the payment of debts, or by way of mortgage, or to that effect; and the person to whom such transfer shall be made, or any other person claiming under him as a mortgagee or trustee only, shall not by reason thereof be deemed to be the owner of such ship, or share thereof, nor shall the persons making such transfer be deemed by reason thereof to have ceased to be owners of such ship, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or shares so transferred available by sale or otherwise for the payment of the debts for securing the payment of which such transfer shall have been made.

Transfers of ships for security of debts being registered, the rights of a mortgagee are not affected by any act of bankruptcy of the mortgagor, &c.

Of the Owners of Ships.

The ownership in ships is acquired either by building at a man's own expence, or by purchase. But in the latter mode great attention is required to see that the seller has the legal title; for otherwise the purchase will not, as in many other cases of personal property, give any title.

The master or captain has every power necessary for the employment and navigation of the vessel; but he has not, except in case of extreme necessity, authority to sell it, and is bound seriously and deliberately to try every other expedient to raise money before disposing of the ship or any part of the cargo. Therefore no person can safely purchase a ship of the master, not even though the master be

part owner; for the sale will only be good as to his own share, which differs from the case of ordinary partnerships, as we shall see hereafter. In foreign countries attempts have been made to evade the effect of these restrictions, by procuring a sentence of condemnation and sale of a ship as unfit for service, from some court or judge having jurisdiction in maritime affairs. But this jurisdiction is unknown in England, and does not bind the real owner, who may litigate the right of such sale in England.

If a ship, "with its tackle, apparel, furniture, and other instruments thereunto belonging," be assigned, the ship's *boat* does not pass. The title in the ship only passes by written documents. When the ship is in a British port, and on sale of the whole interest therein actual possession can be given by the seller, that ought to be done; for if the seller is allowed to retain possession, and during that time become bankrupt, the property passes to his assignees, as being in his order and disposition. But if the purchaser obtain possession any time before the bankruptcy, it will be sufficient. But in case of a sale of part only, the mere title deeds pass the property, unless the part owner is in actual possession. When the ship is at sea, then the property also passes, even though the whole be sold, by mere delivery of the requisite title deeds.

Another mode of acquiring property in a ship is by capture from an enemy, legalized and sanctioned by sentence of condemnation in a court of the capturing state. But a capture by a neutral state, or by pirates, does not alter the property.

The mortgage of a ship merely as a security does not pass the property of it, so as to constitute the mortgagee an owner.

Of Part Owners.—The property in a ship is usually divided into shares, possessed by several persons, who are part owners, and, as such, tenants in common, and not joint tenants; as to the difference of which we shall see more hereafter; suffice it here to observe, that such part owner has a distinct, though undivided, interest in the whole; and that a share of such owner on his death passes to his representative, and does not go to the other part owners by survivorship, as it would were it a joint tenancy.

Generally, where there are several owners, one of them is appointed the *ship's husband*, who has all the authority of a sole owner, provided he act with due discretion. When this is not the case, and the owners differ among themselves as to the employment of the ship on a voyage, those willing must give bond to the court of admiralty to return the ship or pay for the fares of those dissenting, and are liable to all loss and damage and entitled to the profit. One part owner may render the others liable to expences of repairs, though, if the creditor knew not that there were several owners, he may sue the party ordering such repairs alone.

So, where a voyage is commenced after the bankruptcy of a part owner who has not paid his quota of outfit, the others are entitled to deduct such quota from the ultimate profits, and are not to pay his full share of them to the assignees and rest satisfied by proving the debt and taking a dividend with the other creditors under the commission. But where one is appointed ship's husband, and the accounts are ascertained between him and the other owners, and one of them afterwards

settles his quota by giving a bill of exchange, the only remedy is proof under the commission.

The ordinary remedy for the adjustment of a ship's accounts between ship owners is by bill in equity. But an action at law may in some cases be resorted to, in case of joint and several agreements appointing a ship's husband.

As respects strangers, all the part owners form one owner, and actions concerning the ship must be by or against them all.

Of the Master and Mariners.

The *master* is the person entrusted with the care and management of the ship or vessel; and his powers and authority for this purpose are very great. The situation of a master is so important, that in some countries no one can be appointed to it who has not submitted to an examination by competent persons to ascertain his fitness for properly discharging its duties; but in this country the owners are left to their own discretion as to the skill and honesty of the master. Although he is bound to make good any damage that may happen to the ship by his negligence or unskilfulness, yet he cannot be punished criminally for mere incompetence.

The Authority of the Master in relation to the employment of the Ship.—A trading ship is let either by an entire contract called *charter-party*; or, by several contracts, the goods of distinct persons are carried to their destination. This is called a *general* ship. Whether the master is part owner, or is a mere agent of the owners, the owners are bound to the performance of every lawful contract made by him relative to the usual employment of the ship, in the same manner as every agent is enabled to bind his principal. But the master is at the same time liable on his contract, the law giving the merchant the double remedy. A charterparty made by the master in his own name does not render the owners *directly* liable to an action; but if it be made in a foreign port, and in the usual course of a ship's employment, and without circumstances affording evidence of fraud, or where made at home under circumstances implying the owners' assent, they are, to the extent of the value of the ship and freight, liable thereto.

As owners are bound to perform these contracts, so they are liable for breaches committed by the master or seamen.

But if the owners themselves have made a special contract for the employment of the ship, the master cannot annul it and substitute another. Neither are owners bound by the master's contract to carry goods freight free.

The master has power to subject the owners to pay charges for needful repairs and necessities for the ship, such as stores, pilots, mariners, &c., or money borrowed for these purposes; and they may be either directly liable and made *personally* to pay them, or *indirectly* by a suit against the ship. The master is himself also liable for these, unless he takes care by express terms to exonerate himself. By owners here is to be understood not those who have the legal title merely to the ship, but those from whom the master derives his appointment, and for whom he acts as agent. But the owners of a mail packet are liable, though the master be appointed by the postmaster-general.

In an action by a creditor, he must always show the *necessity* of the expenditure; for the master's power to charge the owners does not extend beyond necessities. The ship itself is not, however, liable where the repairs &c. are provided in the ship's own port. The pledging the ship for these purposes is called *hypothecation*, the contracts of which are bottomry and respondentia bonds. *Bottomry* is a word derived from the bottom or keel of the ship, and is a figurative expression signifying the entirety of the ship. *Respondentia* applies to a loan upon the merchandise on board the ship. On bottomry more than five per cent interest may by the contract of the parties be chargeable, dependent on the risks of the voyage. Hypothecation does not vest the property of the ship absolutely in the creditor, but only gives him a privilege or claim upon it, to be carried into effect by legal process, just in the same manner as in the case of mortgages. Upon the arrival of the ship, if the loan is not repaid at the time prescribed, the creditor must apply to the admiralty court, with the instrument of hypothecation and proper affidavits of the facts, and he thereupon obtains a warrant to arrest the ship, and must cite all the parties to appear, when the ship will be dealt with, either by sale or otherwise, as circumstances demand. Hypothecation must be by some deed or contract in writing, as it cannot be constituted by a mere verbal pledge; and it is necessary to its validity that the money be advanced on the credit of the ship originally; for if in the first instance the owner's personal credit was relied on, the bond taken subsequently will be void. The master cannot pledge the ship for any debt of his own; and there is this peculiarity attending hypothecation, that, generally speaking, the last creditor has a priority of lien, since it may be presumed that the last loan was the means of saving the ship, so as to complete her voyage.

The master is bound to bestow the utmost fidelity and attention upon his trust; and in case of negligence or misconduct, whereby the owners suffer any damage, he may be made responsible. He is bound to bestow his whole time and attention in the service of his employers; and if he enters into any engagement that may distract him from their interests, and the profits of that engagement get into the hands of the owners, he cannot recover them back from them.

Of the Seamen.

Many regulations have been made from time to time by different statutes for the regulation and government of seamen, the chief of which are now consolidated in the 7 & 8 Vict. c. 112.

Register Tickets.—An office for the registry of merchant seamen, first established under the 5 & 6 Wm. IV. c. 61, and continued by the present act under the title of "The General Register and Record Office of Seamen," is held at the Custom-house, London; from which office, or from the collector or comptroller of customs at an outpost, every person intending to serve on board any ship under the provisions of this act (except as master, physician, surgeon, or apothecary) must first provide himself with a register ticket. For this purpose he must apply personally, and answer all the questions set forth in the schedule to the act. Masters also must procure register tickets for their apprentices, by taking them, with their indentures, to the register office, or to a custom-house at the nearest outpost.

A seaman losing his register ticket may be furnished with another, upon giving a satisfactory account of the loss ; but otherwise he is liable to a penalty of from 2s. to 10s. Giving false answers to questions with reference to the granting of tickets is a misdemeanour ; as it is to alter or destroy any register ticket, or to counterfeit, transfer, or traffic in such for gain or otherwise.

Agreements.—No master of a ship, of whatever tonnage or description, belonging to a subject of her majesty, proceeding to parts beyond the seas, or of a British registered ship of 80 tons burden or upwards employed in the fisheries or coasting trade, shall carry to sea any seaman as one of his crew (apprentices excepted), unless he shall have first made and entered into a written agreement with him, specifying what wages he is to be paid, the quantity of provisions he is to receive, and the nature of the voyage in which the ship is to be employed, so that he may have some means of judging of the period for which he is to be engaged. The agreement is to be properly dated, and signed by the master in the first instance, and by each of the seamen at the port where they are respectively taken on board, the signature of each party being duly attested by one witness at least, and the agreement having been first read over and explained to the seaman in the presence of such witness before executing it. And no master of a ship shall carry to sea any seaman, being a subject of her majesty, until he shall have first obtained from him his register ticket, which he is to retain until the termination of his service, and then restore it to him. A penalty of 10*l.* attaches to a breach of any of these regulations, except for not reading over and explaining the agreement to a seaman before his signing it, for which the penalty is 5*l.*

The owner or master of a ship under the burden of 80 tons, though not required to enter into a written agreement, must, before employing a seaman receive his register ticket, and retain it until the expiration of his service, and then return it to him.

The agreement, or a copy of it properly certified, is to be deposited by the master with the collector or comptroller of customs, within twenty-four hours after the ship's arrival at her final port of destination in the United Kingdom ; or, in the case of ships engaged in the fisheries or in the coasting trade, within ten days after every 30th June and 31st December, under a penalty of 10*l.* Such copy may be received as evidence on behalf of the seaman ; though he is not required to produce the agreement or a copy, or give notice for the production thereof. If not produced, he may prove the contents, or establish his claim by other evidence, according to the nature of the case.

No seaman, by reason of any agreement, shall forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise be entitled. And no agreement contrary to or inconsistent with this act, nor any contract or engagement whereby he shall consent to forego any claim to wages in the case of freight earned by a ship subsequently lost, or to salvage or reward for salvage services, shall be valid or binding on him.

Wages.—The wages of a seaman are to be paid within two days after the cargo has been delivered, or within seven days after the seaman's discharge, whichever may first happen ; and in the coast-

ing trade, within two days after the termination of the agreement, or at the time when he is discharged, whichever may first happen. In all cases the seaman, at the time of his discharge, is entitled to be paid on account a sum equal to one-fourth of the balance due to him. In case of neglect or refusal to make such payment, the master or owner shall forfeit to the seaman (to be recovered as wages) the amount of two days pay for every day (not exceeding ten) during which payment shall, without sufficient cause, be delayed beyond such periods. But nothing in this clause as to wages extends to ships employed in the Southern Whale Fishery, or on voyages for which seamen are wholly compensated by shares in the profits of the adventure.

Payment of wages to a seaman is valid notwithstanding any bill of sale or assignment thereof, or attachment or incumbrance thereon. No assignment or sale of wages or salvage made prior to the accruing thereof, nor power of attorney expressed to be irrevocable for the receipt of wages or salvage, is valid or binding; and no attachment from any court shall prevent the payment of wages to a seaman.

If on the voyage the allowance of provisions which he agreed to receive were reduced one-third, or less, he shall receive fourpence a day, or if reduced more than one-third, eight-pence a day in addition to his wages for the period such reduction continued.

Upon the discharge of a seaman, or on payment of his wages, the master shall give him, not only his register ticket, but a certificate specifying the period of his service and the time and place of his discharge, or in default shall forfeit and pay to him the sum of 10*l*.

If, three days after the termination of the stipulated service, or three days after a seaman has been discharged, he be desirous of proceeding on another voyage, and in order thereto, or for any other sufficient reason, he require immediate payment of any amount of wages, not exceeding 20*l*., a justice of peace, on satisfactory proof that he would be prevented from employment or incur serious loss or inconvenience by delay, may summon the parties before him, and, if no reasonable cause for delay appear, may order payment to be made forthwith; and, in default of immediate compliance, the party liable shall forfeit and pay the sum of 5*l*. in addition to the wages.

Wages not exceeding 20*l*. may be recovered before a justice of peace in and for any part of her majesty's dominions, or of the territories under the government of the East India Company, where or near to the place where the ship ended her voyage, cleared at the custom-house, or discharged her cargo, or the party liable resides. If the order for payment be not obeyed within two days, the justice may issue his warrant to levy the amount by distress and sale of the party's goods, or may cause the amount to be levied on the ship; and if such levy cannot be made, may cause the party to be committed to the common gaol until the amount with all costs be paid. The decision of such justice is final and conclusive.

All the rights, liens, privileges, and remedies given by this act or by any law or usage to seamen for the recovery of wages extend, in the case of the insolvency or bankruptcy of the owner, to the masters of ships for the recovery of wages due to them.

No suit or proceeding for the recovery of wages, unless they exceed 20*l.*, can be instituted against the ship, or the master or owner, in any court of admiralty or of record, unless the owner be bankrupt or insolvent, or the ship be under arrest or sold by authority of an admiralty court, or unless a magistrate under this act refer the case to such court, or unless neither the master or owner reside near the place where the service terminated or the seaman was discharged.

Whenever a ship is sold or transferred at a foreign port (unless the crew consent in writing to complete the voyage if continued), or whenever the service of a seaman terminates at any place out of her majesty's dominions, the master shall give to each of the crew, or to each of the seamen whose service so terminates, a certificate of discharge and also his register ticket, and, besides paying their wages, either provide them with adequate employment on board some other British vessel homeward-bound, or furnish the means of sending them back to the port at which they were originally shipped, or to such other port in the United Kingdom as shall be agreed upon, or provide them with a passage home, or deposit with the consul &c. of the place a sum sufficient to defray the expences of their subsistence and passage home. If the master refuse or neglect so to do, such expences, if defrayed by the consul or any other person on behalf of the seaman, shall be a charge upon the owner, except in cases of barratry, and may be recovered with full costs of suit, or if defrayed by the seaman, may be recovered as wages.

In case of wreck or loss of the ship, every surviving seaman shall be entitled to his wages up to the period of the wreck or loss, whether the ship shall or shall not have previously earned freight, provided he produce a certificate from the master or chief surviving officer of his having exerted himself to the utmost to save the ship, cargo, and stores.

Medicines.—Every ship navigating between the United Kingdom and any place out of the same shall have constantly on board a sufficient supply of medicines and medicaments suitable to diseases arising on sea voyages, according to the scale issued by the Admiralty; and (excepting ships bound to European ports, or to ports in the Mediterranean Sea) shall also have on board a sufficient quantity of lime or lemon juice, sugar, and vinegar, to be served out whenever the crew shall have been consuming salt provisions for ten days,—the lime or lemon juice and sugar at the rate of half an ounce each per day, and the vinegar at the rate of half a pint per week to each person, so long as the consumption of salt provisions is continued.

In case the master or any of the seamen receive any hurt or injury in the service of the ship, the expence of providing the necessary surgical and medical advice with attendance and medicines, and for his subsistence until he be cured, or brought back to some port of the United Kingdom, shall be defrayed by the owner, without any deduction from his wages.

Every ship having 100 persons or upwards on board, and every ship whose voyage is estimated to exceed twelve weeks having 50 persons on board, shall have, as one of her complement, a physician, surgeon, or apothecary; or, in default, the owner shall forfeit 100*l.*

Provisions, &c.—Upon complaint of three or more of the crew, it shall be lawful for any consul or vice-consul of her majesty, or any collector or comptroller of customs, to survey and examine, or cause to be surveyed and examined, the provisions, water, and medicines put on board any ship for the use of the crew; and if it be found that they are of bad quality, or unfit for use, or not appropriate, or not in sufficient quantity, the surveying officer shall signify the same in writing to the master; and if the master do not provide other fit and proper provisions, water, and medicine, or a sufficient quantity, or shall use any which have been signified to be of bad quality, he shall in each case be guilty of a misdemeanor.

Refusal to join Ship, Absence, Desertion, &c.—In case a seaman, whether before the commencement or during the progress of a voyage, shall neglect or refuse to join the ship on board of which he has engaged to serve, or shall refuse to proceed to sea, or shall absent himself without leave, or shall desert, a justice of peace, upon complaint thereof on oath by the master, mate, owner, or his agent, may issue his warrant, and cause him to be apprehended and brought before him, and, upon due proof of such neglect, refusal, absence, or desertion, commit him to prison or the house of correction for a period not exceeding thirty days; or, at the request of the master &c., instead of committing him, may cause him to be conveyed on board the ship, or deliver him to the master &c. for the purpose of being so conveyed and proceeding on the voyage, and may also award to the master or owner the costs incurred in his apprehension, not exceeding 40s., to be deducted from his wages.

If any seaman, during the period of his service, wilfully and without leave absent himself from the ship, or otherwise from his duty, he shall (in all cases not of desertion, or not treated as such by the master), forfeit out of his wages the amount of two days pay, and for every twenty-four hours of such absence the amount of six days pay, or, at the option of the master, the expences necessarily incurred in hiring a substitute; and if, while he belong to the ship, he shall without sufficient cause neglect or refuse to perform such his duty as shall be reasonably required of him by the master, he shall be subject to a like forfeiture in respect of every such offence, and for every 24 hours continuance thereof. And in case any seaman, after the ship's arrival at her port of delivery, and before her cargo shall be discharged, quit the ship without a previous discharge or leave from the master, he shall forfeit one month's pay. But no such forfeiture shall be incurred unless the fact of the seaman's absence, neglect, or refusal be duly entered in the ship's log-book, the truth of which entry it shall be incumbent on the owner or master, in case of dispute, to substantiate by the evidence of the mate or other credible witness.

Any seaman or other person deserting the ship shall forfeit to the owner all his clothes and effects which he may leave on board, and also all wages and emoluments to which he might otherwise be entitled; and in the case of a seaman deserting abroad, he shall likewise forfeit all wages and emoluments which shall become due or be agreed to be paid to him by the owner or master of any other ship in whose service he may engage for the voyage back to the

United Kingdom. The wages &c. thus forfeited for desertion are to be applied to the reimbursement of the expences occasioned by such desertion to the owners or master, and the remainder paid to the Seamen's Hospital Society; and the master shall, in case of desertion in the United Kingdom, deliver up the register ticket to the collector or comptroller of customs at the port. Every desertion must be entered in the log-book at the time, and certified by the signature of the master and mate, or of the master and one other credible witness.

The absence of a seaman from the ship for any time within twenty-four hours immediately preceding its sailing, whether before the commencement or during the progress of a voyage, wilfully and knowingly, without permission; or the wilful absence of a seaman from his ship at or for any time without permission, and under circumstances showing an intention to abandon the same and not return thereto, shall be deemed a desertion.

In case of a desertion in parts beyond seas, if the master engage a substitute at a higher rate of wages, he shall be entitled to recover from the deserter, by summary proceeding, such excess of wages. But the seaman is not to be imprisoned longer than three calendar months for nonpayment of such excess.

Persons wilfully harbouring and secreting any seaman or apprentice who has deserted, knowing or having reason to believe him to be a deserter, shall forfeit the sum of 10*l*.

No debt exceeding 5*l*. incurred by any seaman after he has engaged to serve, is recoverable until the service is concluded.

No keeper of a public-house, or of a lodging-house for seamen, shall detain any chest, tools, or other property of a seaman for debt; and in case of such detention, a justice of peace, upon complaint on oath, may inquire into the matter in a summary way; and if it appear that the alleged claim is fraudulent, or that the debt was not fairly incurred to the full amount, may by his warrant cause the effects to be delivered to such seaman, and the person detaining them shall forfeit a sum not exceeding 10*l*. at the discretion of the justice.

But nothing in this act, or in any agreement, shall prevent any seaman or person belonging to any ship or vessel from entering into the naval service of her majesty; nor shall such entry be deemed a desertion, nor shall such seaman or other person thereby incur any penalty or forfeiture, either of wages, clothes, or effects. And when a seaman shall quit any ship in order to enter her majesty's naval service, and shall thereupon be actually received into such service, not having previously committed any act amounting to and treated by the master as desertion, he shall be entitled immediately to have his register ticket and all his clothes and effects delivered to him, and to receive the proportionate amount of his wages up to the time of such entry, to be paid either in money or by a bill on the owner; and the master shall deliver and pay the same accordingly, under a penalty of 20*l*., recoverable by such seaman with full costs of suit. But in case the master have no means of ascertaining the balance, he shall deliver to him a certificate of the period of his service, and

the rate of his wages, producing at the same time the agreement to the commanding officer of her majesty's vessel; who, upon such delivery and the settlement of the wages, shall indorse thereon a certificate of such entry.

Any master *forcing on shore and leaving behind* any part of his crew in any place abroad, is guilty of a misdemeanor. And no part of the crew can be *discharged* in any place abroad, even with their consent, without the sanction of the governor &c. if at a British colony, or of the consul &c. if at a foreign port. And if any master *leave* any of his crew at any place abroad by reason of their not being in a condition to proceed on the voyage, he must obtain a certificate to that effect from such functionaries, and deliver a true account of the wages due to each, and pay the same either in money or by a bill drawn upon the owners of the ship.

For the *protection of seamen* against the arts and impositions of *crimps*, the 8 & 9 Vic. c. 116 empowers the Board of Trade to grant licences to fit and proper persons for providing seamen for merchant ships, and imposes a penalty of 20*l.* on any person (not being the owner, part owner, master, or person in charge of the ship, or the ship's husband) who shall hire, engage, supply, or provide a seaman to be entered on board a merchant ship without having such a licence; and on any person, whether licensed or not, who shall obtain the register ticket of a seaman on pretence of so engaging him; and on any owner, master, &c., who shall receive or accept to be entered any seaman so engaged contrary to the act.

And any person who shall receive or demand from a seaman, or from any person other than the owner, master, or ship's husband, any remuneration for or on account of the hiring or providing such seaman, is subject to a forfeiture of 5*l.*

No wages shall be advanced, nor any advance note for wages given, until six hours after the ship's articles have been signed on board the ship, and then only to the seaman himself, unless such wages are paid in money, in which case payment may be made to the seaman himself at any time after the signing. All payments contrary hereto are declared null and void, and the wages may be recovered by the seaman as if they had not been paid.

Any person, other than an officer or person in her majesty's service, going on board a merchant vessel before her arrival in dock or at her place of discharge, without the consent of the master, is liable to a penalty of 20*l.*, and may be delivered by him to a constable or peace officer to be taken before a magistrate.

If any person shall, on board a merchant ship, within twenty-four hours of her arrival, solicit a seaman to become a lodger at the house of a person not licensed as aforesaid, or shall take out of the ship any chest, bedding, or other effects of a seaman, except under his personal direction, and without the permission of the master, he is liable to forfeit 5*l.*

Any person, who shall demand from a seaman payment for his board or lodging for a longer time than such seaman actually resided and boarded with him, or who shall take any money, documents, or effects of a seaman, and not return the same when required, after

deducting what is justly due in respect of his board and lodging, shall forfeit 10*l.* over and above the amount thereof so unjustly detained.

Penalties under this act may be recovered before two justices; one half to be paid to the informer, and the other to the Seamen's Hospital Society. If not paid, the offender may be imprisoned and kept to hard labour for six months.

Apprentices.—Every vessel of 80 tons and under 200 is required to have on board one apprentice; of 200 and under 400, two apprentices; of 400 and under 500, three apprentices; of 500 and under 700, four apprentices; of 700 and upwards, five apprentices; or the master shall forfeit 10*l.* for every apprentice deficient.

Overseers of the poor may bind out healthy boys, with their consent, not under twelve years of age, who or whose parents are chargeable to the parish, as apprentices to the sea service for seven years, or until the age of twenty-one, and may pay to the master 5*l.* to be expended in providing such boy with necessary sea clothing and bedding. And any person to whom any poor parish apprentice has been bound to a service on shore, or his executors or widow, may, with the consent of such apprentice, assign or turn him over to any master or owner of a ship not having her complement of apprentices. All indentures and assignments are to be registered with the registrar at the custom-house, London, or elsewhere with the collector of the port.

Apprentices are not allowed to enter into her majesty's service without the consent of the master; and if they do, he is entitled to their wages.

Seamen's Hospital.—During the reign of George II., an establishment, attached to Greenwich Hospital, was erected, under the 20 Geo. II. c. 38, "for the relief of sick, maimed, and disabled seamen, and the widows and children of such as shall be killed, slain, or drowned in the merchant service." That act has been repealed, and the establishment is now regulated by the 4 & 5 Wm. IV. c. 52. Towards the fund for these purposes, every master of a British ship in the merchant service pays two shillings per month, and every seaman, pilot, or other person (except apprentices), one shilling per month, which sums are deducted from their wages, and must be paid over by the master to the person appointed under the authority of the act at the port to which the ship belongs before she can be cleared inwards. But it does not extend to persons employed in boats upon the coast in taking fish, or in boats or vessels trading from place to place within rivers.

Of Pilots.

As to pilots who have the care of the helm out at sea, there are no particular laws in this country affecting *them*; but it is otherwise as to pilots which ships are *obliged to take in* to navigate them in certain places, where the right is founded on ancient statutes of incorporation. All the provisions as to pilotage are consolidated in the 6 Geo. IV. c. 125. This statute, which imposes an obligation to take a pilot on board within the limits of certain ports and places, allows persons residing within the Cinque Ports to conduct their vessels up and down the Thames and Medway into or out of any port or place within the jurisdiction of the Cinque Ports. And where a ship has been brought into

port by a pilot, she may be removed by the master or mate or other person in command, or if in ballast by any other person, for the purpose of entering or going out of any dock, or for changing her moorings. In other cases any unlicensed person piloting a vessel subjects the master to a penalty of 5*l.* for every fifty tons burthen.

The charge of pilotage is regulated by usage or by statute, usually increasing according to the greater depth of water drawn by the vessel; and is to be recovered against the owner, master, or consignee, or their agents, in the same manner as are the penalties under the act, viz., either before justices if not above 20*l.*, or by action of debt in the courts at Westminster if above 20*l.*

By s. 59, however, certain vessels there mentioned are exempted, provided they are piloted by the master and crew, and not by an unlicensed person employed solely for that purpose. Neither do any penalties attach on persons assisting in case of distress.

By s. 53 the master is not liable for the loss or damage of the vessel arising by reason of his not having a pilot on board, unless the absence of that officer were caused by the master's wilful conduct in any way. And s. 55 provides that no owner or master is liable in such case where a pilot was on board; but the pilot is liable, though only to the extent of his bond. With respect to this, however, it is necessary to observe, that the release of the master from liability only occurs where he is bound to take such pilot on board, and not where it is in his election or discretion to do so or not; for in the one case the entire management is taken out of the master by the statute and given to the pilot, and in the other the pilot is only the agent or servant of the master.

Affreightment by Charterparty.

This is a contract where the whole or the principal part of a ship is let to a merchant for the conveyance of goods on a determinate voyage to one or more places; and if entered into by the owners themselves, they are liable for the negligence of the master &c. in the first instance, as they are also if entered into by the master avowedly on their behalf; otherwise the master is liable in the first instance. The *freight* is a sum of money paid by the merchant for the use of so much of the ship, or for so much tonnage. The charterparty usually mentions the burthen of the ship, and a mistake in this may be prejudicial to one party or the other. Where stated to be of 200 tons burthen or thereabouts, the "thereabouts" was construed to be to the extent of five tons more or less.

The usual contents of this contract are, to provide a tight and staunch ship, furnished with all necessaries, to be ready by a certain day to receive cargo; with provisions as to sailing, delivering of cargo, keeping vessel in repair, &c.

The merchant covenants to load and unload in a certain number of days, or further time, for which a further sum of money is to be paid in case of necessity. The delay and payment are called *demurrage*, which ceases as soon as the merchant has done all acts necessary on his part for dispatching the ship.

The construction of a charterparty is in general liberal, and not according to the strict letter. It being under seal, it cannot be released or varied by parol.

The other contract of affreightment is a *bill of lading*, which is a written document subscribed by masters of ships, acknowledging the receipt of goods on board, and promising to deliver them at a certain specified place, "in the like good order and condition (the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, save risk of boats, as far as ships are liable thereunto, excepted)." Bills of lading are made out in sets of three or four, three of them being on stamped paper: one of them should be remitted by the first post after signing to the person to whom the goods are consigned, a second being sent to him by the ship; a third is to be retained by the shipper of the goods; and a fourth, on unstamped paper, is to be given to the master for his government. When a bill of lading is given together with a charterparty, it is to be considered merely as evidence of the shipment of the goods. Bills of lading ought to be signed within twenty-four hours after delivery of the goods on board. But, upon delivery of the goods, the master, or person officiating for the master in his absence, is to give a common receipt for them, which is to be delivered up on the master signing the bill of lading.

Average.—If one party's goods are damaged or lost for the benefit of the others, the owners of the latter must contribute to make good the loss the first sustains. This is called *average*; and this applies in general not only to goods on board, but to the ship and its parts which are sacrificed for the general good.

Stoppage in transitu is that power which the consignor has of countermanding the delivery of goods sent off to the consignee. It is therefore an adverse act on the part of the former against the latter. Where the consignee becomes bankrupt, and before delivery the consignor gives this order to the master, it is his duty to obey the countermand. But the consignor's power of doing this may be restricted by various acts and circumstances. We shall see more of this subject when treating on CARRIERS and BAILEES in general.

Salvage is a compensation to be paid to those by whom the ship or cargo is saved from impending danger &c., or rescued from an enemy; and the party is entitled to hold possession of the thing saved till compensation be made. If its amount be not agreed upon, it is a question to be determined by a jury. Within the limits of high and low water mark, and at sea, the Admiralty has jurisdiction. No person on board the ship (as a passenger) can claim salvage, as it is the general interest and duty of all on board to do their best for the safety of the goods and vessel. But there are cases where it is allowed; as where a passenger remained on board for that purpose, when he had an opportunity of escaping from the vessel, and the vessel was deserted by the master. There are several enactments which enforce this right, and give encouragement to all persons to assist in cases of distress. So in the case of recapture, the amount of salvage, which varies according to different circumstances, is fixed by several statutes, on payment of which the ship &c. are restored to the original owners; but a privateer once taken by the enemy and recaptured becomes the prize of the recaptors. The land forces co-operating with the navy in saving vessels may also be entitled to salvage.

CHAPTER XI.

Of Master and Servant.

THIS relationship is created in a variety of ways, depending upon the nature of the service to be performed. Servants are generally the constituted agents of the master; and therefore most of the observations on the law of principal and agent will apply to this subject also. The law recognizes various sorts of servants; we shall therefore consider them separately.

I. APPRENTICES.

The term *apprentice* is derived from the French word *apprendre* to learn.

Prior to the 54 Geo. III. c. 96, no person could set up a trade without having been bound apprentice in his youth; but now that obligation is only in force where the bye laws or customs of a particular corporate town require it, or where a settlement under the poor laws is sought to be obtained. And now also, though formerly otherwise, any person may take an apprentice, even an infant, with the exception only of a *feme covert*. Yet even a *feme covert* sole trader in the city of London, who is regarded as distinct from her husband for the purposes of trade, and is liable to the bankrupt laws, may take an apprentice.

With respect to who may be compelled to be bound as an apprentice, we shall see hereafter how far a father has the right to bind his child,¹ and how far parishes have power to put out poor children;² and we have already shewn the law respecting sea apprentices.³

Any person may bind himself apprentice voluntarily, as an infant without his father's consent; but his contract cannot render him liable to an action thereon, except in the city of London, it only subjecting him to the jurisdiction of magistrates.

The number of apprentices that a man may take is in certain cases limited. Thus, a clothmaker, fuller, shearman, weaver, tailor, or shoemaker, can only have three apprentices to one journeyman. No hatmaker can have more than two, and those by indenture for seven years each; and weavers of stuffs in Norwich or Norfolk, shall have two apprentices only, and with these two journeymen also.

The contract of apprenticeship should always be in writing, though it is not always necessary that it should be by deed; for if it be for more than a year's binding or service, the Statute of Frauds requires it to be in writing, in order to ground an action thereon. But for the purposes of gaining a settlement it must be by deed, though it need not be indented; and the writing should state all the particulars of the contract, and should be properly executed by both parties; and if by deed, it should be duly stamped.⁴

¹ See *post*, tit. PARENT AND CHILD.

² See *post*, PARISH APPRENTICES.

³ See *ante*, tit. MARITIME STATE.

⁴ See *ante*, tit. STAMPS.

If an apprentice absent himself, or neglect his duty, or commit any other breach of the stipulations agreed to be performed by him, the master may support his action against the parties (other than the infant) who are bound by the contract. And covenant lies against those parties on the apprentice not duly accounting; and if the apprentice, being an infant at the time of his being bound, on his coming of age, refuses to abide by the indenture (which he may do by giving a proper notice to that effect), the other parties are bound. Neither is a breach of covenant by the master any answer to an action brought by him, as the other party has his cross remedy on the covenant.

If the master, however, put an end to the service by direct waiver or otherwise, then indeed no action can be maintained on the contract; but if the contract were by deed, such termination can only be made by deed. It is not every little occasional absence that constitutes a breach of the contract, as being an act of unlawful absents, but it must be a substantial absence; and therefore if it extend to merely half an hour beyond his time, that would be insufficient.

The master is in like manner liable to an action for any breach of duty on his part; and he cannot justify to such action by a plea that the apprentice ran away, unless sufficient appears on the pleadings to justify the master in terminating the contract from the apprentice's conduct.

If the apprentice is unwell, and there is a probability of his recovery, the master must provide for him; though it is otherwise if the apprentice become idiot, or otherwise incapable of learning. During the term of the apprenticeship the master is entitled to all the earnings and gains which an apprentice may acquire by his labour, either in the service of another or in any employment on his own account; and for this purpose it is sufficient if he be an apprentice *de facto*, though not legally so constituted. If the apprentice be enticed away or harboured by another person, after notice to the latter to deliver him up not complied with, an action may be sustained by the master against him, if any damage can be shown to have ensued by reason of the loss of his services.

If an apprentice be guilty of negligence or other misbehaviour, the master may exercise moderate correction, though he cannot delegate such authority to another person. But, in case of gross misconduct, it is better for the master to apply to a justice, or the sessions, to discharge or punish him. In like manner the master is justified in using all means *necessary* for the defence of his apprentice. If the master be guilty of misusing or ill-treating an apprentice, the justices may, on complaint, where not more than 25*l.* has been paid as the premium, discharge the apprentice from further serving him, and the master is liable to an action, and sometimes to an indictment for neglect or ill treatment. If the apprentice rob the master of property entrusted to him, it is, by the 7 & 8 Geo. IV. c. 29, declared to be felony.

Apprentices cannot *in general* be assigned from one master to another without all parties are consenting, except by the custom of London; though such assignment, if it take place, will not, as we have before seen, take away the apprentice's right to a settlement. But a dissolution of the apprenticeship may take place by other ways

¹ See *Penn v. Ward*, 2 Cr. M. & R. 338.

than those already pointed out: thus, it may be terminated by death, by bankruptcy, insolvency, &c.

In case of the death of the master, it is doubtful how far the contract is at an end. It seems that the executors are bound to continue the performance of it in the best manner they can; at least, they are liable to provide him with necessaries that are covenanted for by the contract. By the custom of London, they are bound to place him with another master; and courts of equity will also, in some cases, compel the executors to return part of the premium.

In case of bankruptcy, the 6 Geo. IV. c. 16, § 49, enacts, that where any person shall be an apprentice at the time of issuing the commission against the master, the bankruptcy shall be and enure as a complete discharge of the indentures; and if any sum shall have been really and *bonâ fide* paid by or on the behalf of such apprentice to the bankrupt as an apprentice fee, it shall be lawful for the commissioners to order any sum to be paid to or for the use of such apprentice which they shall think reasonable, regard being had to the amount of the sum so paid by or on behalf of such apprentice to the bankrupt, and to the time during which such apprentice shall have resided with the bankrupt previous to the issuing of the commission.

By the 20 Geo. II. c. 19, 33 Geo. III. c. 55, and 4 Geo. IV. c. 29, a summary jurisdiction is given to two justices of peace in the cases of complaints by and against apprentices upon whose binding not more than 25*l.* premium has been paid; and the 32 Geo. III. c. 57 contains certain enactments as to parish apprentices upon whose binding out not more than 5*l.* has been paid. But doubts having arisen whether these acts applied to cases where *no sum whatever* had been given as a premium, the act 5 & 6 Vic. c. 7 was passed, which declares that all the said acts shall be taken to extend to apprentices where no sum or premium of apprenticeship is paid.

Parish Apprentices.—Where the parents of children are not able to support them, the churchwardens and overseers, with the assent of two justices, may place out such children as apprentices, till twenty-one if a male, or till twenty-one or marriage if a female; but they must not be under nine years old at the time of binding.

Formerly they might be bound to any clergyman, gentleman, farmer, or trader of the parish, in turn; and 10*l.* penalty was attached to a refusal to take and provide for them. A power of appeal, however, was given, to the sessions. But now, by 7 & 8 Vic. c. 101, § 13, poor children can no longer be put out as apprentices, under the 43 Eliz. or 8 & 9 Wm. III. c. 30, to parishioners unwilling to receive them; all provisions in those and all other acts, general or local, for this purpose, being repealed.

The child is first to be carried before two justices of the peace, who are to inquire whether the intended master resides within a reasonable distance, and who may examine the parents thereon, and into the character and circumstances of the master. No child is to be bound where the master resides above forty miles from the parents, or out of the country, unless the child's parish be more than forty miles in extent, when under special circumstances, to be stated in the indenture, they may be so bound. The binding must always be by indenture.

II. SERVANTS IN GENERAL.

There are several observations which apply generally to all who come under the denomination of servants, *viz.* clerks, domestics, husbandry servants, manufacturers, journeymen, artificers, labourers, and the like. Thus, the contract need not, in general, be in writing; nor does the memorandum or agreement require a stamp, except where the service is under articles of clerkship, which seems to be more like an apprenticeship than that species of service of which we are now speaking. The term is (with the exception of domestic service) generally held to be for a year, unless the term of hiring, or the express contract, raise a different construction; and in such cases the service cannot be put an end to before the end of the year, unless on the ground of misconduct. If the contract be for wages at so much per week, then it seems not to be a yearly hiring; nor if at so much per month or half year. But if it is at so much per annum, to be paid half-yearly, quarterly, monthly, or by the week, it may be regarded as a yearly service. With domestic servants, however, the general understanding seems to be, that, in the absence of any contract to the contrary, the service is under any circumstances monthly, and may be determined by either party on a month's notice; and if the service be determined otherwise without sufficient grounds, a month's wages is forfeited by the party breaking the implied contract. If, in any case of service, the parties are either of them guilty of misconduct, the other is justified in putting an end to the service. Thus, if the servant disobey the master's orders, or absent himself from home at night, or assault another servant, or being a female become pregnant, or being a male get a female servant with child, though the latter may have left the service.¹

Whether a servant can be discharged on the ground of insanity is very doubtful. A servant's marrying is no cause for discharge; neither is sickness, though the master is not liable for the doctor's bill.

Any public crime, or even gross impertinence towards the master, will justify the determination of the service. And we may add generally, that where the contract ends, there ends also the right to demand wages.

If any servant through negligence cause a house to be set on fire, he shall forfeit 100*l.* to the churchwardens, to be distributed among the sufferers, &c.; and if he refuses to pay it, he shall be committed to prison for eighteen months. Stealing property entrusted to them is not a mere breach of trust, but is an indictable offence; as is also the inciting or soliciting a servant to do so.

A master has no power whatever to beat such servants of whom we are now speaking, for any cause whatever. But masters and servants may justify assaults upon third persons in defence of each other.

The liability of the master for the servant's conduct and acts towards third parties will be more properly considered under the subject of PRINCIPAL AND AGENT.²

Where the term of service is not completed, if the servant absent himself, any person enticing or harbouring him is, after notice, liable to an action for the detainer, *per quod servitium amisit*.

¹ A master may sue for the seduction of his female servant.—*Fores v. Wilson*, Peake, 55.

² See *Chandler v. Broughton*, 1 Cr. & M. 29; *MacLaughlin v. Pryor*, 4 Man. & Gr. 48.

By the 6 Geo. IV. c. 16, § 48, it is enacted, that when any bankrupt shall have been indebted, at the time of issuing the commission against him, to any servant or clerk, in respect of wages or salary, it shall be lawful for the commissioners, upon proof thereof, to order so much as shall be due, not exceeding six months wages, to be paid to such servant or clerk out of the estate; and such servant or clerk shall be at liberty to prove under the commission for any sum exceeding such last-mentioned amount. Upon this statute it has been held, that a son serving his father as clerk, at a salary of two guineas per week and two suits of clothes per annum, was a servant within this act;¹ and it has been extended to servants of persons who had been in trade only two months before the bankruptcy. But it seems only to apply to those who are yearly servants, and not to those who are retained weekly or by the month.²

Giving Characters of Servants.—In no case can a master be compelled to give a character; but if he do so, and it be a false one, and a loss by robbery &c. ensue to the party hiring him, the former master is liable to an action for damages to the extent of the loss. And if a bad character be given maliciously of a servant, the servant may maintain his action for slander. By *malice* in law is understood an act not merely arising from moral bad feeling, but from the want of due care and caution; but a mere erroneous character is not sufficient to justify the action, for express malice must be shown.

By 32 Geo. III. c. 56, if any one personate the master, and give a false or counterfeit character of a servant, or falsely assert that a servant has been hired for a period of time in their employ, or in service with another person, or was discharged at any other time, or had not been hired in any previous service, contrary to the fact, or any person offering himself knowingly under such false representations, shall, on conviction, forfeit 20*l.*, or may be committed for three months; and the informer, who is entitled to half the penalty, is declared a good witness. But offenders discovering accomplices before conviction are indemnified.

III. DOMESTIC OR MENIAL SERVANTS.

Little remains to be said of this class of servants in particular, most of the law relating to them being contained in the preceding general observations. Magistrates have no peculiar jurisdiction over these servants, although it has been erroneously supposed to be otherwise. The amount of their wages is always regulated by the contract between the parties; but if there be no express or implied agreement upon the subject (as if the servant came merely on trial), he can claim none; and it has been therefore held that a slave coming to England, thereby gaining his freedom, and continuing with his master without any stipulation as to wages, is not entitled to demand any. So if a servant comes in upon the understanding, that the amount of wages is to be settled thereafter, or that they should be such as the master should think fit, and no contract is subsequently made, no claim can arise for any wages. And if a servant has left his master's service for a considerable time without claiming wages, the presumption is, that all wages have been paid, till the contrary be shown.

¹ Exp. Humphreys, 3 Dea, Chit. Rep.

² Exp. Skinner, 1 Mont. & Bli. 417.

Breakages.—A master cannot, without an express agreement to that effect, set off or deduct from the amount of wages the value of goods lost or broken by the servant's carelessness, however gross; but the master's remedy would be by cross action.¹

Clothes.—Where a servant was engaged for a fixed sum and a suit of clothes *per annum*, and was provided with a livery suit on entering into service, and was *wrongfully* turned away before the conclusion of the year, it was held that he could not maintain an action of trover for the suit of clothes, as he had no property in the clothes till he had served the year. Lord Tenterden said, that if the plaintiff was dismissed without reasonable cause, whereby he was prevented from becoming entitled to this suit of clothes, he has his action for that.²

IV. ARTIFICERS, LABOURERS, JOURNEYMEN, AND WORKMEN.

By 5 Eliz. c. 4, all unmarried persons, and all married persons under a certain age, not possessed of certain property, or not filling certain situations therein specified, are compellable to go into service; those who have been brought up to trades, in those trades; and those who have not been used to trade in husbandry. And, by the same statute, labourers and artificers are obliged to work between March and September from five in the morning until between seven and eight o'clock at night, with the exception of two hours and a half for their meals in the meantime; and in the other months, from sunrise to sunset. All labourers and artificers may be compelled by the justices to work during the harvest months, on pain of 40s. And persons going out of their parish to work in harvest may be required to have a certificate from their parish, so that they shall not gain a settlement in any circumstances in the district to which they go. In order to prevent these kinds of servants improperly quitting any service in which they are engaged, and to free the party subsequently hiring them, it is necessary that they should have testimonials from their master to quit his service. Labourers improperly quitting service, and fleeing into another county, are liable to be taken up on process of *capias*, and to be imprisoned till they find sureties to perform the lawful service. But the provisions of this statute, though remaining unrepealed, have in a great measure fallen out of use, having been superseded by later regulations, or by a general acquiescence in their disuse, as being no longer adapted to the circumstances of the times.

There are many statutes relating to workmen in general, as well as to those of particular trades. Thus, the payment of their wages, though the amount of them is left to their contract, is especially provided for. They cannot be paid in bank notes of any kind, unless the servant agree, tacitly or otherwise, to accept them. Neither can they, by agreement or otherwise, be paid by goods in lieu of wages, under a heavy penalty on the master. Between clothiers and other workmen, the penalty is 20*l.*; and between masters and workmen in the hat, fur, hemp, flax, mohair, silk, linen, woollen, fustian, cotton, lace, or iron manufactures, or leather trade, it is 10*l.* A fine of 5*l.*, to be paid to the master, is imposed on workmen of any kind leaving their work unfinished, except for non-payment of wages, or with the master's consent.

¹ 4 Camp. 134.

² 3 Car. & P. 470.

The 5 Geo. IV. c. 96, after repealing former statutes on the subject, substitutes new regulations for settling disputes between masters and workmen, respecting wages, the hours of labour, the finishing of work, the finding of implements, and the compensation to be given for any new or altered manufacture; which may be either by submission to a justice of peace according to mutual agreement, or by arbitrators nominated, and whose award may be enforced, by justices.

With respect to *combinations among workmen*, an entire repeal of most of the old statutes has taken place, and the law has been remodelled by the 6 Geo. IV. c. 129. This statute provides, that if any person shall, by *violence* to the person or property, or by *threats* or *intimidation*, or by any other *molestation*, compel any journeyman to leave his employment, or not to return to his unfinished work, or prevent him from hiring himself, or compel him to belong to any club founded for that purpose, or to pay fines thereat, or by such means endeavour to bring about any alteration in the settled mode of conducting the manufacturing business in any way, he shall suffer imprisonment and hard labour for any time not exceeding three months.

But this is not to extend to meetings at which the master is present, to fix the rate of wages or the hours of work, nor to such meetings among masters only for these latter purposes. Offenders against this act may be compelled to give evidence against others *in pari delicto*, upon being indemnified from the consequences of such offence; and justices may summon offenders, and, on the neglect to appear, may issue warrants for their apprehension, and impose the penalties of their crimes. And, by 9 Geo. IV. c. 31, § 25, persons committing assaults in pursuance of a conspiracy against the above act may be imprisoned, with or without hard labour, for any time under two years.

The system of the employment of children in factories has lately undergone legislative revision and considerable amendment. The 3 & 4 Wm. IV. c. 103 provides, that children under eighteen years of age are not to be employed, except in lace manufactories, and in the *packing* of goods, between the hours of half-past eight at night and half-past five in the morning, nor more than twelve hours a day, and except where in a watermill time has been lost by want of water, which may be fetched up by three additional hours per day, and in other similar cases of accident. An hour and a half in the day is to be allowed for their meals. No child under ten years old is to be employed, except in silk mills; and children under thirteen are only to work nine hours a day, and ten in the silk manufactories. They are to have holidays on Christmas-day and Good Friday, and eight other half days during each year. With every child employed the master is to have a medical certificate of its ability to perform bodily labour. For the purpose of enforcing these regulations, inspectors are appointed.

Children under thirteen are directed to be sent to school by the master, &c., who is to deduct the expences (not more than 1*d.* in each shilling) out of their wages. The manufactory is to be well limewashed in the interior once a year, unless the consent of the inspector is obtained to the contrary; and heavy penalties are imposed on the master and his servants for breach of any of these regulations.

This act has been amended by 7 & 8 Vic. c. 15; and similar provisions are enacted as to calico print works by 8 & 9 Vic. c. 29.

CHAPTER XI.

Of Principal and Agent.

I. THE DUTIES AND RESPONSIBILITIES OF AGENTS.

THE relationship of principal and agent is constituted whenever one person, having power to do any act, authorizes another person to do it for him in his name. In such a case the delegated authority cannot in general be again delegated by the agent to a third person, though it may in some cases, as we shall see hereafter. An infant, or a married woman, though generally speaking incompetent to appoint an agent, is not incapacitated from being an agent.

Agency, how created.—The agency is *created* either by parol or by writing; and it is either *general*, to do all acts; or *general and special*, to do all acts relating to a particular transaction; or *special*, to do one single act. And the authority is *limited*, as where he is tied down to obey the particular instructions of the principal; or *unlimited*, as where he is entitled to use his own discretion.

If his instructions are limited, he is bound strictly to follow them. If he exceed them and a loss ensue, he is liable, unless the principal adopt his act by any conduct on his part. If a gain accrues from the agent overstepping his authority, the principal shall in all cases have the benefit of it.

An agent is bound to use all diligence and care in the execution of his trust, and to possess a competent skill in ordinary cases for the accomplishment of what he undertakes; otherwise an action may be maintained against him. This observation applies to every kind of agent, be he broker, attorney, surgeon, or any other professional agent; though it is questionable whether it would apply to a barrister or physician, since these are honorary professions, the members of which have no legal right to demand remuneration for their agency.¹

In the absence of particular instructions, the agent is bound to follow the known *customs of trade*, as applicable to the particular circumstances of his duty.

His responsibility to his principal extends to all actual damage that the latter sustains, and to that only; for a supposed or probable injury is not sufficient. If an act be omitted, which, if done, would not have entitled the principal to any benefit, or if it would have been a fraud on others, or in any way illegal, the omission forms no ground of action against the agent.

A *gratuitous* agent even, that is, one who receives no remuneration for his trouble, is sometimes liable for the consequences of want of due care and caution on his part; as where a gratuitous agent received the money of his principal, and placed it in his banker's hands mixedly with his own, and the bankers failed, he was held liable for the loss.² And all benefits which an agent receives beyond his mere commission generally belong to and are liable to be refunded to the principal.

¹ See Tidd's Practice, 9th edit. p. 85, and note f.

² Massey v. Banner, 4 Mad. 413; 1 Jac. & W. 241.

Factors and Brokers.—The preceding observations apply to all agents; but there are agents of a mercantile description on whom other special duties attach; as *factors* and *brokers*. The former are generally entrusted with the possession as well as the disposal and management of the property; the latter term seems in general (for the term has never yet been strictly defined) to apply to those who are engaged merely in the negotiation of contracts between parties.

A *factor* is bound to take such reasonable care of the goods entrusted with him as a man of average prudence would take of his own property, and such care only. He is not liable in cases of robbery, fire, tempest, or damage from accident which he could not have averted, unless the goods either ought never to have been in the place or situation in which the accident happened, or ought to have been removed thence before that time. If he deposit the goods in a safe warehouse according to the custom of the trade, he is not liable to any damage.¹

Factors, and consignees who act as factors, are in general bound to insure property entrusted to them to a proper amount and with a sufficient policy, unless directions are given to the contrary; and if they do not, they are liable to the loss; but if the insurance office fails, they are not accountable, if they had used reasonable care in the selection. Again, it is the duty of factors to see that all the custom duties on goods are duly paid, or else they may be liable for the consequences of a seizure.

If an agent is employed to sell any thing for his principal, it is his duty to get the best price he can under the circumstances; and to this end he is bound to exert that degree of vigilance and intelligence which might be expected from a prudent man in the management of his own business. If it be the usage of trade that he may sell upon trust, he is not liable to a loss in consequence, unless he knew the vendee to be a person of low credit. But in all cases the length of credit must be reasonable and customary. When the contract is ended, the principal ought to have as speedy a notice of it as possible. If the agent

The agent is only liable to his principal for the money arising from a sale from the time he actually receives it, unless he gave credit improperly; but if the agent owing the vendee money sets off his debt against the price of goods sold, he is stopped from saying he has not received the money.

If goods are shipped by an agent abroad to this country other than such as the principal ordered, it is the principal's duty to give notice to his agent, and to return them.

It is a fundamental rule, that an agent employed to sell cannot be a purchaser, nor *vice versâ*; because, if he were allowed, he could not have his mind wholly unbiassed, so as to give every advantage to his principal, as his duty required; and this rule, we shall see, extends to all persons in fiduciary situations, to trustees, mortgagees, assignees in bankruptcy, or even a solicitor for the party.

A *del credere* commission is one in which an agent, in consideration of an additional premium, engages to insure to the principal, not only the solvency of the vendee, but the punctual discharge of the debt; and

¹ Goods in the possession of a factor cannot be distrained for rent. Gilman, v. Elton, 3 Brod. & King, 75.

therefore he is liable for it in the first instance, without prior demand upon the debtor; and in such case he is answerable for the produce of the sale or performance of the contract absolutely. A broker, though not acting under *del credere*, may by his mode of dealing become liable directly to his principal; as, where he drew in his own name a bill on the purchaser in favour of the principal, and transmitted it to his principal, he was held liable as the drawer of the bill; or where the broker does not discover the name of the principal or of the purchaser, he may make himself liable.

If an agent be imposed upon by a forged order, and induced to pay the principal's money, the agent is liable to pay it over again; but not if he give credit in the usual course of trade, which afterwards proves bad. Again, a loss occasioned by an unauthorized disposal or adventure of the principal's money, not prescribed by the usage of business, though intended for his benefit, falls on the agent; and if an agent having received money, either improperly deposit it in an unsafe custody, or, being authorized to deposit it, do so mixedly with his own money in his banker's hands, and without any distinguishing mark, and the banker fail, the agent is liable.

Another of the most principal duties of agents is to keep accounts regularly, and render them to his principal. If he has made interest or profit of the principal's money, he must account for that also, and can take nothing for himself, save his stipulated reward. Even when an account has been dated and delivered, and a balance paid, upon a suggestion of either fraud or specific errors pointed out, the Court of Chancery will open the account within a reasonable time.

Joint agents and joint principals are each considered as but one person; and therefore one joint agent is liable for all the acts of his partner, even though the business were transacted wholly by the latter with the knowledge of the principal.

How compelled to account, and Remedies against them.—Agents may be compelled to account, sometimes by a special action of *assumpsit* or of account,¹ where there is a mutual account; but if there is any intricacy or difficulty in the account, a bill in equity is the more usual and suitable proceeding to compel it. But the bare relation of principal and agent is not sufficient to entitle the former to relief, if the matter is fairly triable at law; and therefore a bill filed for an account, and an injunction, must disclose a case of open and unsettled items, and not such merely as would form a ground of set-off to an action at law, otherwise the bill will be demurrable.

For misconduct, neglect, or disobedience of instructions, the remedy is either an action on the case as for a wrong, or of *assumpsit* on the implied undertaking; and in one or other of these actions the principal may recover compensation in damages for the injury suffered.

With respect to the recovery of specific property in the hands of an agent, or wrongfully disposed of by him, an action of *trover* will lie against him in general. If, however, the agent becomes bankrupt, the case is materially altered; for, by the 6 Geo. IV. c. 16, § 72, it is enacted,

¹ The law presumes a promise on the part of a factor to account for goods sent to him. Where therefore he refuses to account for sales, the consignor may maintain *assumpsit* (*Topham v. Braddick*, 1 Taunt. 372); or he may have an action of account. See 1 Archbold's *Nisi Prius*, 142.

that if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels, whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same: provided, that nothing herein shall invalidate or effect the transfer or assignment of any ship or vessel, or share thereof, made as a security for any debt, either by way of mortgage or assignment, duly registered.

It has, however, been long settled that this does not apply to the case of a bare factor; though it may, notwithstanding this general principle, become a question of fact, whether the factor, by the reputed possession of the property, acquired a degree of false credit which imposed on the world, so as to bring him within the provision of the statute. If the factor's assignees, therefore, detain the principal's goods, an action of trover will lie, subject to any lien the factor had before his bankruptcy; or if they have been sold, and notes payable at a future day received by the factor, these, or even money which can be sufficiently ear-marked and distinguished, may be recovered from the assignees, as following the nature of the property which produced them. This exemption from the effect of bankruptcy is not confined to goods alone; but specific securities deposited with an agent for any specific purpose, as to answer former bills outstanding, follow the same rule; and these in like manner may be recovered by action of trover, or by petition in bankruptcy. But money which has been actually received by a bankrupt agent, and mixed with his own funds without ear-mark, cannot be separated from the bankrupt's estate, but the principal must come in and prove his debt like any other creditor.

II. THE RIGHTS OF AGENTS.

Their Remuneration.—With regard to the rights of agents, their commission is either regulated by contract, or by usage, or by act of parliament. By the 12 Ann. stat. 2, c. 16, the rate of brokerage to be taken by brokers or solicitors for procuring a loan is limited to 5s. for every 100*l.*, or $\frac{1}{4}$ per cent, under 20*l.* penalty; and by 17 Geo. III. c. 26, 10s. is allowed them for procuring a loan on an *annuity*. But it has been held, that a solicitor advancing his own money is not entitled to any such commission. If there is no usage adapted to the case, and there is no contract express or implied, no commission whatever can be recovered; and that even when labour was performed under a resolution, "that any service to be rendered by him should be taken into consideration, and such remuneration made as should be deemed right."

If the contract or business which the agent is employed to manage be illegal, and in seeking the recovery of any reward the proof of that illegality must necessarily come to the knowledge of the court before which the question is tried, the illegality of the transaction will at once form an obstacle to the recovery of commission. The right to reward might also be forfeited by the conduct of the agent, as by negligence or unskilfulness, whereby no benefit arises to the principal from the transaction, or even the neglect to keep accounts, or if he depart

from the character of an agent, and act adversely to him in any part of the transaction. So also if the agent be made the principal's executor; or if a servant engaging to devote his whole service to his principal, hire out his services to another party.

By the usage of trade, a ship-broker is not allowed to charge a ship owner for commission unless the charter-party be actually entered into, although it might be the fault of the principal that it was not completed; and if, for executing a charter-party, the commission is to be a per-centage on the freight earned, if nothing is earned nothing can be recovered.

Bankers are usually allowed a per-centage for agency above 5*l.* per cent for interest on advances, if made *bonâ fide*, and not as a mere cloak for usury. Where the lender was not a banker nor engaged in trade, and although the money lent was the agent's, and not that of a third person, yet he was allowed to charge commission also.¹ And where a bill broker, in order to get a bill discounted at 4*l.* per cent, took upon himself the responsibility of indorser, and charged his principal with 5*l.* per cent discount, which was the lowest sum for which he could have done the business except for his indorsement, it was held that, although he also charged 10*s.* per cent for his trouble, it was not usury, and that he was entitled to charge it as his *del credere* commission.²

Advances by them.—Agents are also entitled to be reimbursed all advances made in the regular course of a legal employment, as for duties paid, warehouse-room, &c.; and for any advances made in cases of urgency, where the advice of the principal could not be obtained in time, and they were necessary. He cannot recover for mere voluntary and officious payments, or if they become necessary by reason of his own prior unwarranted acts; and therefore it may be taken as a general rule, that, to entitle the agent to indemnity, the disbursement made must be justified by express or *implied* instructions, or by the subsequent acquiescence of the principal. And payments made to third persons, *after notice of an act of bankruptcy* of the principal, are not recoverable.

Lien.—Agents have a general lien on the property of the principal in their hands, for any thing that is due to them from him. We shall consider this subject more fully in a subsequent part of the work.³

III. THE AGENT'S AUTHORITY; AND THE OBLIGATIONS OF PRINCIPALS, IN RESPECT OF THEIR AGENTS' ACTS, TO THIRD PERSONS.

The authority of agents must sometimes be by writing, and it may sometimes be given by parol. Corporations aggregate must, in general, appoint their agents in the former manner; but merely for its inferior or ordinary services, as those of a servant &c., or to do such acts as are in the ordinary course of its business as a corporation, parol is sufficient. Thus, the Bank of England may without deed authorize agents to make and sign in the name of the corporation bank notes, bills, &c., being in the ordinary course of their business. A parol appointment without deed is sufficient for a receiver; and so is an appointment of auditors. In such manner a corporation may also appoint a bailiff to distrain; but a corporation cannot authorize the seizure of forfeited goods, except under the common seal. But they may appoint an attorney upon record without deed. In bankruptcy, by 6 Geo. IV. c. 16, § 40, corpora-

¹ Exp. Gwyn, 2 Dea. & Ch. 12. ² Exp. Goss, 2 Den. & Ch. 240. ³ See *post*, 392.

tions may prove by an agent, of whose appointment the only proof requisite is his own oath; but no agent can vote in the choice of assignees, except under a power of attorney.

An agent cannot, in general, bind his principal by his signature to a deed, unless his appointment were also by deed, even though the principal admit the appointment. And under the Statute of Frauds, 29 Car. II. c. 3, an agent's appointment must be in writing to enable him to make or create leases, estates, or interests of freehold, or terms of years, or any uncertain interest, other than leases under three years, in messuages, lands, tenements, or hereditaments, or for surrendering the same, except copyhold interests. But by § 4, for the purpose of charging executors or administrators out of their own estates, or to charge any person for the debt or default of another, or upon a marriage agreement, or on any *contract or sale* of lands, tenements, hereditaments, or interests in and concerning them, or upon any agreement not to be performed within a year, although the instrument must be in writing and signed, the agent signing need not be *authorized* by deed. And therefore, although a lease or other document creating interests as in the first three sections must be signed by an agent authorized in writing, yet such written authority is not requisite to render valid a *contract* or agreement for a lease &c. So it is also in the common case of an auctioneer, who binds the parties, by his signature to the *contract*, to the future execution of the *deeds* requisite to complete the purchase. In other cases a parol, or at most a written authority, is in general sufficient without a deed.

An authority may sometimes be created by implication merely, as from previous employment of the agent in similar acts; and in this instance the agent rather assumes the position of a servant towards his master, and the act of the servant is regarded as the act of the master himself, upon the principle that he who accredits another by employing him must abide by the effect of that credit. Thus, if a master always sends his servant to buy things with ready money, the master is *not* responsible for things ordered by the servant wrongfully on credit, although they afterwards come to the master's use; but it is otherwise if the master generally sends his servant to order goods on credit, or sometimes on credit and sometimes for ready money; for in these latter cases the master will be liable to whatever extent the servant surreptitiously orders goods, and although the goods do not come to the master's use, as the party giving credit has no mode of distinguishing for what he is to give the master credit, and for what not. This principle applies equally to all other cases where authority is impliedly given to the agent; as if a clerk is in the habit of drawing or accepting bills in his employer's name; or if a broker, usually employed to buy goods, sells them again, the master or principal is in both cases bound.

Such being the obligation of the principal, he may in general in like manner incur responsibility after the agency is ended, unless there be actual or constructive notice to the party giving credit; and therefore in all important agencies the termination of them should be advertized in the Gazette, or by circular letters. An authority may also be presumed from subsequent acquiescence or assent.

We have before shown, that an agent's authority cannot in general

be delegated to another by him; and it follows, that an authority given to A, B, and C jointly cannot be executed by any of them without all joining in it.

As to the *form* in which the authority is to be exercised:—If it be under power of attorney, it must be done in the name of the principal. If it be a bare act, as the surrender of a copyhold, or the execution of a deed, it is sufficient if it be stated to be done by the agent for or on behalf of the principal. But with regard to a contract entered into by an agent, it should appear that the principal does the act, and therefore it should be made in his name.

The authority of an agent to bind his principal continues only during the agency, except as before mentioned; and the determination of it may take place by revocation, by effluxion of time, or by performance of the commission. A power of attorney is in general revocable at pleasure, unless it is coupled with an act giving the agent an interest in the transaction, as where it forms part of a security. The death or bankruptcy of the principal will, in general, be an absolute revocation of a power of attorney, unless, as before observed, it be coupled with an interest.

An authority is to be so construed as to include all necessary and usual means of executing it with effect; but a power of attorney is always to be performed to its very letter, the law giving it a strict interpretation.

The employment of an agent or factor under general terms being exclusively to buy and sell, he had formerly no right to *pledge* the property; and it was repeatedly decided, that a principal might recover back goods on which an advance of money had been made by a third party, without being bound to repay such advance, and that notwithstanding such third party was wholly ignorant that the individual pledging the goods held them as a mere factor or agent. It had also been held, that the purchasers of goods from factors or agents not vested with a power of sale, though that fact was unknown to the purchaser, might be liable to pay the price of the goods a second time to the real owner. To remove these hardships, and to place the contracts between factors or agents and third parties on a sounder footing, the 4 Geo. IV. c. 83, and 6 Geo. IV. c. 94, were passed; by which it is provided, that any person in possession of any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant, or order for delivery of goods, shall be deemed the true owner of the property, so far as to give validity to any contract for the sale or disposition of the same, or for the deposit or pledge thereof as a security for any money or negotiable instrument advanced thereon, with any person who shall not have notice, by such documents or otherwise, that he is not the real owner. And, by § 4, any person may contract with an agent entrusted with goods for the purchase of them, and may receive and pay for the same to such agent, and such contract and payment shall be binding against the owner, notwithstanding notice that the person making the contract is an agent, provided such contract and payment be made *in the usual and ordinary course of business*, and the purchaser at the time of the sale or payment had no notice that the agent was not authorized to sell such goods or to receive the said purchase money.

But, notwithstanding these acts, the law did not afford that facility and security to transactions with *agents* which the interests of commerce appeared to require. The system of making advances on goods had become an usual and ordinary course of business, especially with regard to foreign trade; and it was deemed desirable that parties dealing with agents having possession of goods, or documents entitling to goods, should be protected as against the principals with respect to any advances they might make thereon. By the 6 Geo. IV. c. 94, the sales of goods by agents as such were, with some limitations, protected; but an equal protection was not afforded to *advances* made on the security thereof. Moreover, the law did not allow such advances to be made on the possession of goods, but only on the possession of documents entitling to goods. Neither did it protect the exchange of securities; and, besides, many uncertainties existed with respect to the construction of the law, which had given rise to much litigation. To supply these deficiencies, therefore, and to place the law on a more clear and certain basis, the 5 & 6 Vict. c. 39 has been recently passed, which, from its great importance, we shall here give at length.

The deficiencies of the former law are first stated in the preamble, which recites that "Whereas by the act 6 Geo. IV. c. 94, validity is given under certain circumstances to contracts or agreements made with persons entrusted with and in possession of the documents of title to goods and merchandize, and consignees making advances to persons abroad who are entrusted with any goods and merchandize are entitled under certain circumstances to a lien thereon; but, under the said act and the present state of the law, advances cannot safely be made upon goods or documents to persons known to have possession thereof *as agents only*: and whereas by the said act it is further enacted, 'that it shall be lawful for any person to contract with any agent entrusted with any goods, or to whom the same may be consigned, for the purchase of any such goods, and to receive the same of and to pay for the same to such agent, and such contract and payment shall be binding upon and good against the owner of such goods, notwithstanding such person shall have notice that the person making such contract, or on whose behalf such contract is made, is an agent, provided such contract or payment be made in the usual and ordinary course of business, and that such person shall not, when such contract is entered into or payment made, have notice that such agent is not authorized to sell the same, or to receive the said purchase money:' and whereas advances on the security of goods and merchandize have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bonâ fide advances* upon goods and merchandize as by the said recited act is given to *sales*, and that owners entrusting agents with the possession of goods and merchandize, or of documents of title thereto, should, in all cases where such owners by the said act or otherwise would be bound by a contract or agreement of *sale*, be in like manner bound by any contract or agreement of *pledge* or *lien* for any *advances bonâ fide* made on the security thereof: and whereas much litigation has arisen on the construction of the said act, and the same does not extend to protect ~~as~~

or in accepting or procuring such advance as aforesaid, shall be deemed guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court shall award, as hereinbefore last mentioned. Provided nevertheless, that no such agent shall be liable to any prosecution for consigning, depositing, transferring, or delivering any such goods or documents of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of any bills of exchange drawn by or on account of such principal, and accepted by such agent. Provided also, that the conviction of any such agent so convicted as aforesaid shall not be received in evidence in any action at law or suit in equity against him. And no agent entrusted as aforesaid shall be liable to be convicted by any evidence whatsoever in respect of any act done by him, if he shall, at any time previously to his being indicted for such offence, have disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioner of bankrupt.

Section 7 provides also, that nothing herein contained shall prevent such owner as aforesaid from having the right to *redeem* such goods or documents of title pledged as aforesaid, at any time before such goods shall have been sold, upon repayment of the amount of the lien thereon, or restoration of the securities in respect of which such lien may exist, and upon payment or satisfaction to such agent, if by him required, of any sum of money for or in respect of which such agent would by law be entitled to retain the same goods or documents, or any of them, by way of lien as against such owner, or to prevent the said owner from *recovering* of and from such person with whom any such goods or documents may have been pledged, or who shall have any such lien thereon as aforesaid, any balance or sum of money remaining in his hands as the produce of the sale of such goods, after deducting the amount of the lien of such person under such contract or agreement as aforesaid. Provided always, that in case of the bankruptcy of any such agent, the owner of the goods which shall have been so redeemed by such owner as aforesaid shall, in respect of the sum paid by him on account of such agent for such redemption, be held to have paid such sum for the use of such agent before his bankruptcy; or in case the goods shall not be so redeemed, the owner shall be deemed a creditor of such agent for the value of the goods so pledged at the time of the pledge, and shall, if he think fit, be entitled in either of such cases to prove for or set off the sum so paid, or the value of such goods, as the case may be.

By sect. 8, in construing this act the word "person" shall be taken to designate a body corporate or company as well as an individual.

By sect. 9, it is provided, that nothing herein shall be construed to give validity to or in anywise to affect any contract, agreement, lien, pledge, or other act or thing made or done before the passing of this act.

As between the principal and a third person dealing with the agent, the former cannot in general be discharged from liability by agreement between him and his agent, unless the conduct of the third party testifies a dealing with and trusting of the agent rather than the principal. If an agent do not disclose the name of his principal, the third party, supposing the agent to be principal, on discovering before payment the true state of the case, may either elect to regard the agent or principal as his debtor; but not if he lie by after the disclosure, and suffer the principal to settle with the agent. But if the third party know the agent to be such, but not for whom, it is questionable how far he may come against the others.

Representations of agents, to bind the principal, must be made at the time of and with reference to the particular transaction; and notice to an agent is notice to his principal, even where he acts for both parties; and this, whether the notice is expressed or implied. So an agent's declarations and admissions are sufficient.

If money is due upon a written security, it is the duty of the debtor, if he pay it to an agent, to see that the latter is in possession of the security; if he be not, he may be called on to pay the money a second time. When not on written security, the authority of the agent depends on the principles already shown in regard to general agency, and payment to an agent properly authorized is sufficient; and in like manner delivery of goods to an agent is sufficient.

The principal is, like a master, in general *civilly* liable for the neglect or fraud of the agent. Thus, a master is liable for the unskilfulness of the agent, as a master smith for the injury to a horse, the exercise of an unruly horse, unskilful driving, &c. &c.; and that although a third or fourth party be employed through the first agent. As, where A employed B to repair a house, who contracted with C to do the work, and C contracted with D for the materials, and D left them in the road, so that an accident happened to E; E recovered against A. But whether, where A hires for the day a carriage and horses and coachman of B, and an accident happens by the driver's neglect, A or B is liable, is unsettled, and was the occasion of the memorable conflict of opinions between Chief Justice Abbott and Justice Littledale on the one hand, holding A not liable, and Justice Bayley and Justice Holroyd on the other.¹

The responsibility of the master only extends to those acts within the scope of the agent's employment; neither is he liable for the *wilful* misconduct of the agent. The master is not liable for the criminal acts of his agent, unless the latter were expressly commanded by him to do the act.

The law of libel, however, introduces an exception to this rule; for where the proprietor of a publication was so far absent at the time, that it was morally impossible he could have sanctioned the insertion of the libel, he was nevertheless held liable on an indictment for his servant's act.

As to the *benefit that enures to the principal from his agent's acts*, it may generally be taken as a rule, that where the principal would be bound by the agent's acts, he would also be entitled to take advantage of them.²

¹ *Laugher v. Pointer*, 5 Barn. & C. 547, in which case all the authorities are fully gone into.

² See Paley's *Principal and Agent*.

CHAPTER XII.

Of Attorney and Client.

ATTORNEYS-AT-LAW and solicitors, are another species of agents, who form with their clients a relationship to which most of the foregoing general remarks on Principal and Agent are applicable; there are, however, some particular duties arising from this connexion which require a separate consideration.

Formerly the parties to a suit were not permitted to appear by attorney without the king's special warrant, but were required to attend the court in person. But by the statute of Westminster, 13 Edw. II. c. 10, a general liberty was given to all persons for this purpose. Attorneys increased in number very rapidly thenceforth; and therefore by 3 James I. c. 7, § 2, it was enacted, that none should be admitted unless *brought up* in the courts; and at length, by 30 Geo. II. c. 19, with other prior statutes, that no one should act as attorney in any law proceedings, in any court where attorneys are usually admitted and sworn, unless he had been bound by contract in writing to serve as clerk for the space of five years to an attorney duly admitted, and had been examined, sworn, admitted, and enrolled, under penalty of 50*l*.

The law relating to the admission of attorneys and solicitors has been lately consolidated by 6 & 7 Vic. c. 73, all former acts on the subject being thereby repealed. This act enacts, that no person shall act as an attorney or solicitor, or as such sue out any writ or process, or commence, carry on, or defend any action, suit, or proceeding in any court of law or equity, in England or Wales, or act as such in any matter civil or criminal, without having been admitted and enrolled, and otherwise duly qualified according to the regulations of the act.

In order to such admission and enrolment, the party must have been bound by contract in writing to serve, and have duly served, as clerk for five years to a practising attorney or solicitor; during the whole of which service he must have continued and been actually employed in the proper business, practice, or employment of such attorney or solicitor.

It is provided, however, that a clerk bound for five years may serve part of the time (not exceeding one year) as pupil with a practising barrister or a certificated special pleader, and also in addition thereto, or instead thereof, a year with the London agent of the attorney or solicitor to whom he was bound.

It is also provided, that a person who has taken the degree of Bachelor of Arts, or of Laws, at either of the universities of Oxford, Cambridge, Dublin, London, or Durham, may be admitted after having served a clerkship of three years only, one year of which may be with the London agent of the attorney or solicitor to whom he was bound.

An affidavit of the due execution of the articles must be made by

the attorney or solicitor to whom the clerk is bound, and filed within six months after their date with the proper officer; who enrolls and registers them, making at the time a memorandum of the date of filing both upon the affidavit and the articles. This affidavit, as well as an affidavit of due service under the articles, must be produced at the time the clerk applies for admission.

Before admission, the clerk is examined as to his fitness and capacity to act as an attorney or solicitor by persons appointed for that purpose by the judges, called Examiners. Upon their certificate of his competency, a fiat is issued for his admission, which takes place before one or more of the judges of the court, by whom the necessary oaths are administered and his admission is signed; and his name is then entered on the rolls of the court.

When thus entered and enrolled, before beginning to practise as an attorney or solicitor, he must take out the necessary certificate from the Stamp Office, and this must be renewed annually. Persons practising without such certificate are unable to recover for any business done by them; they are, moreover, liable to a penalty of 50*l.* by the Stamp acts.

No attorney or solicitor is allowed to have more than two clerks under articles with him at the same time, nor to take or retain any clerk after he shall have left off practising, or whilst employed himself as a writer or clerk by another attorney or solicitor. If he become bankrupt or insolvent, or remain in prison for twenty-one days, the clerk may be discharged from his contract, or assigned to another person, upon application to a court of law or equity.

An attorney duly admitted in any one of the superior courts of law at Westminster is entitled to be admitted and practise in any other court upon signing the roll thereof; in like manner a solicitor admitted in the Court of Chancery may practise in any inferior court of equity, or in the Court of Bankruptcy, upon signing the roll of such court.

No attorney or solicitor can, either in his own name or in the name of any other, sue out any writ or process, or commence or prosecute or defend any action or suit, while a prisoner in any gaol or prison, or in the rules thereof, upon pain of being deemed guilty of a contempt of court, besides being incapable of recovering his fees.

Attorneys are not to act as agents for, or suffer their names to be used by unqualified persons, on pain of being struck off the rolls; and the unqualified person may be committed to prison. And they cannot enter into partnership with unqualified persons.

An attorney duly admitted and enrolled becomes an officer of court, and has many *privileges*. He is presumed to be always present in his court. He may always, when plaintiff, sue in his own court, and may lay and retain the venue in Middlesex. When defendant, he must be sued in his own court; but he cannot change the venue.

An attorney is also exempt from many offices, such as sheriff, constable, &c.; but not from militia service, as he can serve by substitute. He cannot be a justice of the peace for any county; but this does not extend to cities or towns, whether counties of themselves or otherwise.

These privileges are, however, confined to practising attorneys, since they are rather for the benefit of his clients than of the attorney himself. And the privileges as to the mode of being sued are generally gone by the plaintiff being also attorney of another court.

They are also subject to some disabilities. A practising attorney cannot hold the offices of under-sheriff, sheriff's clerk, or bailiff of sheriff or of liberties, or clerk of the peace, nor be lessee in ejectment, nor bail for any defendant, nor a justice of the peace, nor a commissioner of land tax. Attorneys who embezzle their clients' money are in general excluded from the benefits of the Insolvent Debtors act; and while in prison for debt &c., they cannot practise. But bankruptcy has not such an effect.¹

An attorney has no right to interfere with the duties of a magistrate in his own justice room; and therefore, where a criminal information was moved for against two justices, on the ground of their having deprived the defendant of legal assistance by excluding his attorney from the justice room (no corrupt motive being imputed to the magistrate), the Court of King's Bench refused to interfere. Bayley J. said, it might be a different thing where counsel are employed, but an attorney at all events has no right to be present.²

And in *R. v. Barron* (3 B & A. 432), it was decided by the Court of King's Bench that an attorney has no right to be present during the investigation of a charge of felony before a magistrate. The presence of an attorney on such occasions is often permitted as a matter of courtesy; his assistance is sometimes desired; and if his advice or opinion is asked, it is proper for him to give it; but he is not to take leave, uninvited, to obtrude his comments upon the case.³

So also in *Cox v. Coleridge* (1 B. & Cres. 37) it was decided that a prisoner, when examined before magistrates on a charge of felony, is not entitled, as of right, to have a person skilled in the law present as an advocate on his behalf, it being a preliminary investigation only, and not conclusive upon him.

But an attorney has a right to be present on behalf of a party accused or otherwise on the hearing of an information, which is a judicial proceeding.

We now proceed to discuss briefly their duties towards their clients. Care, skill, and integrity are required of them, as of other agents. They are not liable for mere mistakes and errors of judgment more than counsel are, where they act with care and integrity; but, without these, they are liable for a loss in consequence falling on the client. If the attorney's conduct be gross, the courts will in general interfere summarily against him; but not otherwise.

Where an attorney once appears for a party, he cannot withdraw himself, even although the client neglect to provide him with money. Neither in *charity*, if he refuse to go on with the suit, has he any lien on papers so as to obstruct the course of the suit, nor any lien for his costs on the fund in court. Thus, in equity, a solicitor was ordered to pay all the costs occasioned by his refusing to appear for defendant at the hearing pursuant to his undertaking, and the costs of the appli-

¹ *Exp. Brown*, 2 Ves. J. 68.

² *R. v. A. & B. Js. of Staffordshire*, 1 Chit. Rep. 217.

³ *Per Abbott C. J.*, S. C., 3 B & A. 488.

cation;¹ and where the plaintiff changes his solicitor, the former solicitor has no right to stop him from proceeding till his costs are paid.²

A solicitor refusing to act longer in a cause was ordered to permit the client to inspect papers in his possession at all reasonable times, without any undertaking on his part to proceed to taxation of his bill;³ and he will be ordered, though his bill of costs is not paid, to deliver up the papers to the present solicitor of the party, the latter undertaking to hold them subject to the former solicitor's lien, for what shall be found due to him on the taxation of his bill. An offer on the part of the former solicitor, after the motion made to proceed with the cause, will not prevent the court from ordering him to deliver up the papers on the terms above mentioned.⁴

A solicitor, having refused to allow a deed in his possession to be proved on behalf of plaintiff, because he had a lien on it for costs due from defendant, was ordered to produce the deed at his own expence, and pay all costs consequent on his refusal.⁵

A solicitor has no lien upon the will of his client, and cannot refuse to produce a deed executed by the client in his favour, containing a reservation of a life interest, and a power of revocation.⁶

Generally, a solicitor discharged by his client, or his representatives, is not bound to produce the papers in his possession for the purposes of the cause, his bill of costs not being paid.⁷ But where a party has a pressing necessity for papers in the hands of his solicitor, the court will order them to be delivered up, upon a deposit being made, sufficient to cover the amount of the solicitor's bill and the costs of the taxation.⁸

A solicitor having declined to act for his client has no lien for his costs upon a fund in court.⁹ But on a party changing his solicitor, the former solicitor has a lien for his costs upon papers in his hands; but he cannot otherwise stop the progress of the cause till he is paid.¹⁰ Nor is he entitled to compel payment of his costs by refusing to permit such inspection of the papers in his hands, or such production of them before the court or the master, as may be necessary in the conduct of the cause.¹¹

A clerk in court and solicitor refusing to continue the conduct of a cause until his fees were paid, was ordered to produce an office copy of the bill to be marked by the six clerks, so that an answer might be filed.¹²

When writings come to an attorney's hands in the way of his business as attorney, a court of common law, *on motion*, will rule him to deliver them back on payment of what is due; but otherwise if they come to him in another capacity, as steward of a manor, especially where there are disputed accounts between the parties, such being the proper subject of a *bill in equity*.

¹ Cook v. Broomhead, 16 Ves. 133.

² O'Dea v. O'Dea, 1 Scho. & L. 515.

³ Moir v. Mudie, 1 S. & S. 282.

⁴ Colegrave v. Manley, 1 Turn. & R. 400.

⁵ Brassington v. Brassington, 1 S. & S. 455.

⁶ Balch v. Symes, 1 Turn. & R. 87; and see Tyler v. Drayton, 2 S. & S. 309.

⁷ Lord v. Wormleighton, 1 Jac. 580; Medfearn v. Sowerby, 1 Swan. 84.

⁸ Clutton v. Pardon, 1 Turn. & R. 304.

⁹ Creswell v. Byron, 14 Ves. 271.

¹⁰ Merrewether v. Mellish, 13 Ves. 161. Twort v. Dayrell, Id. 195.

¹¹ Commerell v. Poynton, 1 Swan. 1.

¹² Mayne v. Hawkey, 3 Swan. 93.

A solicitor has a lien for his costs on a fund in court produced by his exertions; and therefore when, on a bill for discovery in aid of a defence at law, an injunction was granted on terms, one of which was the payment of money into court, and an answer was afterwards filed, and the action at law being subsequently tried a verdict was found for the defendant; it was held that the solicitor for the defendant in equity had a lien on the fund for the costs of the discovery. But where the solicitor putting in the answer was removed, and his demand was paid, and another solicitor employed, it was considered that the fund was exonerated to that extent, and the latter solicitor had not any lien for the costs of the former solicitor, though paid by him.¹

Where plaintiff's solicitor, with notice, suffers the defendant to satisfy the demand of his client, without making effectual provision for payment of his costs, the court will not suffer him to proceed in a suit against the defendant for recovery of them.²

The lien of a solicitor upon a fund in court which is the result of the proceedings cannot be defeated by the subsequent insolvency of the client.³

A solicitor has a lien on papers delivered to him as such, but not on those delivered to him as steward.⁴

A solicitor claiming lien on a deed cannot be compelled to produce it at the hearing of the cause, without a *subpcena duces tecum*.⁵ But whether the proceedings under a commission of bankrupt that has been superseded are subject to the solicitor's lien, *qu?*⁶

Whether a solicitor's lien for his costs on a fund in court is general, or is confined to costs of a particular suit, *qu?* In *Lann v. Church*⁷ it was held that he had not. Solicitor having in his possession the instrument on which his client's right to the fund rests, he has a general lien on the fund.⁸ But a solicitor's lien does not extend to debts that are not due to him in his professional character.

If an attorney (being concerned as well for mortgagor as mortgagee) has been appointed receiver of rents and profits of mortgaged estates, and on the order made for delivery of possession there is found to be a balance remaining in his hands beyond what is sufficient to satisfy the mortgagee, he will be ordered to pay such balance into court, notwithstanding the general report has not yet been made, on which there may possibly be found to be a greater sum of money due to him than the balance in his hands.⁹

Though order be made on petition in bankruptcy, directing costs to be paid to petitioner personally, solicitor does not thereby lose his lien.¹⁰

A solicitor is bound to produce papers of his client for him, or in bankruptcy for his assignees, though not employed by them, in the cause for the purposes of which he received them; but is not bound to deliver them up or produce them in any other business without payment.¹¹

¹ *Irving v. Viana*, 2 Y. & J. 70.

² *Morse v. Cooke*, 1 McClell. 211; S. C. 13 Price, 473.

³ *Exp. Moule*, 6 Mad. 462.

⁴ *Champernown v. Scott*, 6 Mad. 93.

Busk v. Lewis, 6 Mad. 29.

⁵ *Exp. Shew*, 1 Jac. 270.

⁶ 4 Mad. 391.

⁷ *Worrall v. Johnson*, 2 Jac. & W. 214.

⁸ *Lewes v. Morgan*, 5 Price, 42.

⁹ *Exp. Bryant*, 1 Mad. 49.

¹¹ *Ross v. Laughton*, 1 V. & B. 549.

Deeds deposited with a solicitor for a particular purpose, and after that had failed, permitted to remain with him, are subject to the general lien.¹

Solicitor's lien on papers is superseded by taking security.²

Where there are costs in equity and at law due from the opposite parties, the court will not set off the costs at law against those in equity, if the solicitor in equity claims his lien on the latter.³

A client cannot compel the executor of his attorney to produce his papers &c. in court, though only for the purpose of using them there, unless the testator's bill of costs be paid or secured.⁴

Solicitor prosecuting a suit to a decree has a lien on the estate recovered in the hands of the person recovering, for his bill, but not in the hands of the heir. But if the suit be revived, the lien revives. Committee of a lunatic has a lien on the lunatic's estate, and the solicitor employed by the committee was declared to stand in his place.⁵

Voluntary release by a party to his adversary, is not to defeat the clerk in court of his lien for costs. If the suit had ended on a *bona fide* compromise for a reasonable consideration paid, it would have been otherwise.⁶

A solicitor who is in disburse for his client, has a right to be paid out of a duty decreed to an administrator, and has a lien upon it before the bond creditors of the deceased; nor can the administrator controvert this rule, by insisting on applying the assets in a course of administration.⁷

A solicitor may detain title deeds as against client till payment of his bill, but not against persons who have antecedent rights.⁸

A solicitor has a lien for his costs on all papers that come into his hands for the purpose of business, as well as on papers in the cause in which he makes the demand.⁹

But a solicitor has no lien against remainder-man on deeds put into his hands by tenant for life.¹⁰

Whenever a client is bound to produce a deed for the benefit of a third person, so also is his solicitor, though the latter may have a lien on it for costs against his client.¹¹

Upon an act of bankruptcy by lying two months in prison, joint and separate commissions issued; the former being established and the latter superseded, the attorney employed by the bankrupt in sustaining the latter against the former has no lien upon papers delivered to him by the bankrupt after the arrest; and, upon petition of the joint creditors, he was ordered to deliver them up.¹²

When an attorney is charged by affidavit with any fraud or malpractice in his profession, contrary to the obvious rules of justice and common honesty, the court *on motion* will order him to answer the matters charged; and in general, if he positively deny the malpractices, they will dismiss the complaint; but otherwise they will grant an attachment.

¹ Exp. Pemberton, id. 282.

² Cowell v. Simpson, 16 Ves. 275. Id. Balch v. Symes, 1 Turn. & R. 92.

³ Smith v. Brocklesby, 1 Anst. 61.

⁴ Magrath v. Muskerry, 1 Ridgw. P. C. 477; Vern. & Scriv. 171.

⁵ Barnesley v. Powell, Ambl. 102. Exp. Price, 2 Ves. 407.

⁶ Anon. 2 Ves. 25.

⁷ Turwin v. Gibson, 3 Atk. 720.

⁸ Marsh v. Bathoe, Ridgw. 256.

⁹ Exp. Nesbitt, 2 Scho. & L. 279.

¹⁰ Id. ibid.

¹¹ Furlong v. Howard, 2 Scho. & L. 115.

¹² Exp. Lee 2, Ves. J. 285.

Where he has been fraudulently admitted, or convicted subsequently of felony, or other offence rendering him unfit to act, or has knowingly suffered his name to be improperly used by an incompetent person &c., or signed a fictitious one, or forged a counsel's name to any proceeding, or has otherwise grossly misbehaved himself (or falsely represented that an injunction had been obtained,¹) he is liable to be struck off the rolls, which is in general, though not always, considered a perpetual disability.

An attorney is sometimes struck off the rolls at his own instance, as for the purpose of being called to the bar. But in this case an affidavit is always required that no other person is about to apply for the same purpose, as this mode of striking him off is never regarded as a perpetual disability.

When the relationship is once fairly created, the client is bound by any consent given in court, either by the attorney or the counsel, if they are aware of all the circumstances, although they had no instructions for such consent; and at all events, to counteract it, the parties ought to apply without loss of time.² But if a solicitor institutes unnecessary proceedings, the court will take care that the client shall not suffer by the course adopted.³

A solicitor may, in the exercise of the general authority given him by his client, defend a suit, but cannot institute one without a special authority for the purpose.⁴

Whether notice to an attorney in one transaction shall be notice to him in another transaction, must, in all cases, depend upon the circumstances.⁵

A solicitor is not absolutely restricted from taking any reward from his client beyond his mere costs (although many cases go to establish the contrary) in the same manner as a trustee; but it is always incumbent on him to show that he has taken no undue advantage of his situation.

Whenever an attorney is called on to give his services to his client, whether to prepare a deed or will, the law imputes to him a knowledge of all the legal consequences to result, and requires that he should distinctly and clearly point out to his client all those consequences from whence a benefit may arise to himself.

Another peculiarity in this relationship is that relating to *professional confidence*. In general, any person is liable to be called on to discover the whole of his knowledge in a particular transaction. But not so an attorney; for, for the benefit of the client, he cannot be made to disclose matters communicated to him in connection with a cause. But this does not extend to matters where the solicitor was not professionally employed; and in this the court always uses its own discretion.⁶

With respect to costs between the solicitor and client, the former is bound, before he commences any proceedings for their recovery, to deliver a bill to him, and suffer one month to elapse. The client is, in general, entitled to have the bill taxed; and if more than one sixth is taken off, the costs of the taxation fall on the solicitor.⁷

¹ *Kimpton v. Eve*, 2 Ves. & B. 352.

² *Furnival v. Bogle*, 4 Russ. 142.

³ *Wood v. Wood*, 4 Russ. 558.

⁴ *Wright v. Castle*, 3 Mer. 12.

⁵ *Mountford v. Scott*, 1 Turn. & R. 280.

⁶ See *Chit. Eq. Ind.* p. 1258.

⁷ See generally, 1 *Tidd. Pr.* 60—90, &c. ed.

CHAPTER XIII.

Of Bailor and Bailee, or the Law of Bailment.

BAILMENT is defined to be the delivery of a thing for some special object or purpose, upon a contract, express or implied, to conform to that object or purpose. The party bailing property is the *bailor*; and the party who receives it is the *bailee*.

The first duty of a bailee is to keep the thing entrusted to him with such care as persons of ordinary discretion would take of their own property under the like circumstances. It is impossible to lay down any less general rule as to the degree of care requisite; for in all cases it must depend on the nature of the property, and other circumstances, as time and situation. In some places, as in the country, a degree of care would be sufficient, which in others, as in town, might be insufficient. So as to the time, the same degree of care observed in the day-time might be deemed insufficient in the night. And again, the quality of the thing bailed may require more or less care to be bestowed on it, as a sack of corn and a bag of money. The bailee is, of course, liable to the consequences of want of due care.

If the benefit from the bailment is equal to the bailor and the bailee, no more than ordinary care is required. If the bailor receive the only benefit, the bailee is only liable for gross neglect. If the bailee receive all the benefit, he is answerable even for slight neglect.

There are five different sorts of bailments, each of which we will consider in due order.

I. Where the Property is deposited with the Bailee for no particular purpose, and without any Recompence to him.—Here he is only bound to take ordinary care, and is not liable for a loss by accidents over which he has no controul and not arising from any misconduct of his. If, however, he is entrusted with jewels &c. of value, and suffers them to lie indiscriminately about a room, without being under lock and key, and they are stolen or lost, he will be liable; or if he put a horse into a strange and dangerous field at night, though perfectly safe to his own cattle which are accustomed to it, he would be liable. Or if, being entrusted with a box of valuables known to him as such, and, on a fire happening, he saves his own property of considerably less value, he is liable; though if nearly equal in value, he may save his own first. A bailee of this description should always be prepared to re-deliver the property. He cannot dispose of it by sale, pawn, or otherwise; yet he has such an interest in it that he may bring an action against a third person for an injury done to it. A banker comes under this description of bailees; and it seems, if bills are entrusted to him for *safe custody* only, or money which is locked up in a box, he cannot dispose of or use them.

II. Bailments for some particular purpose, without any Recompence.—Here, besides the care requisite in the foregoing description of bailments, he is bound to take all care in order to execute the particular

purpose for which the goods were pledged. As if a person, without pay, assume safely to remove several casks of brandy from one cellar to another, but manage them so negligently that one cask is staved, he is liable. But more or less will be required according to the skill that is reasonably to be expected of him; as if a farrier undertake to shoe a horse gratuitously, and lame him, he is liable; but if a person unused to that trade undertake to do as much, he will not in general be responsible for his want of skill.

III. *Where Property is bailed gratuitously, and the Bailee is to have the Use of it for his own benefit.*—This is, in fact, a lending of property for use, but not for consumption; and the bailee is liable for loss that a *very careful and vigilant* man could have avoided. It has been said that he is liable for the loss &c. by any accident save by the act of God or the queen's enemies. He is therefore in general liable to make good the loss. He cannot lend, let, sell, or pawn this kind of bailment to any other person.

IV. *Bailments in Pledge or Pawn.*—Here the bailment is beneficial to both parties, yet the pawnee, or person in whose possession the property is placed, is bound to take more than ordinary care of it. If it be taken away from him by stealth or by want of due care, he will be liable. This pawnee cannot dispose of it, unless under the express or implied consent of the owner, or by express statute, as in the case of pawnbrokers. Neither can he use it, unless the nature of the property require it; as if a horse, cow, dog, &c. If the deposit is to secure a debt, the inference is, that if the debt be not paid, he may reimburse himself out of the deposit. But when the particular object for which it was deposited is accomplished, the pawnee is bound to re-deliver it to the owner. The law relating to pawnbrokers will hereafter be more fully considered.

V. *Bailments for Hire, or for work, labour, and care to be bestowed upon the property, or to be carried from place to place, and where both Bailor and Bailee receive a benefit therefrom.*—These are the most common sorts of bailment in daily use; and of these we shall inquire—

1. *Of Bailments by letting to Hire.*—Here the bailee acquires a temporary qualified property, and is only bound to take such care as a prudent man would take of his own property, and may in general make use of it as if it were his own property. As, if it be a horse, he may lend it to a person who has an ordinary degree of skill in riding; or if a musical instrument, he may remove it to a place for public performance on it, without being liable for any loss or damage which it may sustain. If it be a carriage, and a man and horse are hired with it, he is not liable for the consequences arising from the negligence of such man; but it is otherwise if his own man has the charge of it.

2. *Where the Property is bailed to have some labour or care bestowed on it, with reward to the Bailee.*—Here the bailee is bound to use more than ordinary care, the same as the borrower of property without reward to the lender should do. A workman, for instance, is bound to secure the property placed in his hands in the way of his trade, so as to protect it against depredation by persons in his employ.

Of a *warehouseman* or *wharfinger* reasonable and common care of any commodity entrusted to his charge is exacted; he is not, like an

innkeeper or carrier, bound by any custom of the realm, nor is he to be considered as an insurer, unless he also unite the character of a carrier; he stands therefore, in general, in the situation of an ordinary bailee for hire, and is answerable only for ordinary neglect. He is not answerable for a theft committed by his servants, if he can prove that the goods were lodged in a place of security, and that he has not been guilty of positive negligence, nor exercised less care towards them than towards his own property. He is not answerable for destruction by rats, reasonable care having been taken to prevent such mischief. Neither is he liable for loss arising from robbery, or any accident, unless the same be occasioned by his gross default or negligence. In cases where the warehouseman or wharfinger has insured the property from fire, and it is burnt, if the warehouseman has received the amount of the insurance, the owner may recover it from him. The responsibility of a warehouseman or wharfinger commences directly the goods are delivered into his custody, indeed from the moment that his tackle is applied to the goods for the purpose of lifting them into his warehouse; and it is no excuse for any injury done in raising them from the cart, that the owner's carman refused to secure them in the manner which the warehouseman pointed out. And the responsibility ceases only when the goods are delivered by the warehouseman or wharfinger out of his possession according to the owner's express or implied directions. Where it is proved to be the custom of wharfingers, when goods are sent to be forwarded coastwise, to deliver them to the mates of the coasters, and not to ship the goods themselves, or make any charge for shipping, the responsibility of the wharfinger ceases with the delivery to the mate, though the goods are lost before they are carried off the wharf.

Wharfage seems only to be due when the goods are laid upon the wharf for the purpose of being loaded or unloaded; it differs from *anchorage* or *moorings*, which are charges incidental to the ship. In London the duty for wharfage and crantage is created by statute 22 Car. II. c. 11, which directs that the amount thereof shall be regulated from time to time by the king in council.

A wharfinger, having the mere custody only of goods, cannot by an unauthorized sale affect his employer.

With respect to *factors*, *attorneys*, *auctioneers*, and *bailiffs*, when their undertaking lies in feissance, and not merely in custody, more or less diligence is required according to the nature of the business; and their reward is the reason of the obligation to use a degree of diligence adequate to the performance of the work. The question as to what amounts to reasonable care is to be left to a jury to decide.

Innkeepers fall also under this class of bailees; but of these we shall treat separately.

3. *Where Property is to be carried from place to place, with Reward to the Bailee.*—Common carriers and stage coachmen fall under this description; and we shall take occasion to treat of them in a distinct chapter.¹

¹ 3 Chit. Com. Law, 354—386.

CHAPTER XIV.

Of Common Carriers,

BY LAND AND BY SEA.

We shall consider—

1. WHO ARE COMMON CARRIERS.
2. WHAT ARE THEIR DUTIES AND OBLIGATIONS.
3. WHAT ARE THE RISKS FOR WHICH THEY ARE LIABLE.
4. THE COMMENCEMENT AND TERMINATION OF THEIR RISKS.
5. WHAT WILL EXCUSE OR JUSTIFY A NON-DELIVERY OF THE GOODS.
6. THE GENERAL RIGHTS OF CARRIERS.
7. THE RIGHTS, DUTIES, AND OBLIGATIONS OF CARRIERS OF PASSENGERS.

1. *Who are deemed Common Carriers.*

A private person may contract with another for conveying his property from place to place without becoming a common carrier, but only incurring the responsibility of an ordinary bailee for hire; for, to constitute a person a common carrier, he must exercise it generally as a public employment. A common carrier is therefore one who, for hire and reward, undertakes to convey the goods of any who will employ him from place to place. These are of two descriptions, *viz.* carriers by land, and carriers by water.

Among the former are stage-coach and waggon proprietors, truckmen, carters, and porters for hire; among the latter are ship and steam-vessel owners and masters, lightermen, hoymen, barge owners, ferry-men, canal boatmen, and the like.

It seems that a proprietor of a stage coach who merely carries the luggage of passengers is not a common carrier, but is liable for want of the due care which is required of ordinary bailees for hire. Yet this doctrine is not quite settled; for in a late case (*Brook v. Peckwick*, 12 Moore J. B. 447, 4 Bing. 218) Best C. J. seems to have considered them as common carriers. This last observation applies likewise to water carriers of passengers.

In order to charge persons as common carriers, it is not necessary that a specific compensation should have been agreed on, as they are entitled to demand a reasonable one. When several persons are engaged in the business of common carriers, and by contract between them one finds carriages and another horses, or one works one part of a road and another the other, all are liable as partners. The same principle applies where there are partners in a coach or waggon office.

They are responsible for any contract made partly by them and partly by their servants; as where a parcel was booked, and on account of its value the bailor feed the guard extra, to insure its greater safety; but otherwise if the contract were entirely with the servant.

2. *The Duties and Obligations of Common Carriers.*

They are bound to receive and carry all goods offered for transportation, on receiving suitable recompence; and if they refuse, they are

liable to an action. If, however, the carriage is full, or there is extreme danger to their safety from public disturbances, these or such like reasons will afford a sufficient excuse. They are bound to take the utmost care of the goods from the time of receiving them (but they need not receive them till they are about to start on their accustomed journey), to obey the directions of the bailor in respect of them, and to carry and deliver them safely; consequently they are bound to procure proper vehicles and equipments, and servants.

It is as well here to remark, that certain restrictions are, for the sake of public safety, placed on the carriage of gunpowder generally, not only by common carriers, but by any other person. The 12 Geo. III. c. 61, § 18 provides, that no person shall carry at one time more than 25 barrels of gunpowder, of 100 lbs. weight each, in any carriage by land, or more than 200 barrels by water (except in vessels with gunpowder imported from or to be exported to any place beyond sea, or going coastwise), and prescribes the description of covering the carriage is to have, and that vessels must be close-decked, and the package covered with raw hides or tarpaulins as soon as packed, under pain of its being liable to be seized by any person.

It need hardly be said, that a carrier is not liable to an action for refusing to carry any thing which would constitute an illegal act.

By the 3 Car. I. c. 1, no common carrier can use his calling on Sundays, under 20s. penalty. And the driver of a van between London and York was held to be within the act, and liable to be stopped and convicted for travelling on that day.¹

It has been holden, that if a carrier *embezzle* an entire package, he is only liable to a civil action; but if he break open a package and take part of its contents, with intent to steal, it is felony. And if, after he has determined his former responsibility, he regain possession with intent to steal, he is guilty of felony, just as a stranger would be. So if, instead of delivering the goods at the proper place, he takes them to another and converts them to his own use, he is guilty of felony, it is said. In any of the above cases, if the misappropriation of the property is the act of the servant, and not of the carrier himself, it is a felony.

3. *What are the Risks for which they are liable.*

Carriers are liable for all losses, except those arising from the queen's enemies, or by natural accidents, as lightning, earthquakes, tempests, &c. The queen's enemies are foreigners at war with us, and pirates, but not mere robbers on the highway, or riotous mobs, &c.; since, it is said, by a contrary doctrine a combination between carriers and common robbers might be encouraged.

But as to carriers by water, the 7 Geo. II. c. 15,² has provided, that ship owners shall not be liable for the loss of any goods by embezzlement &c. of the master or mariners without their privity, further than the value of the vessel with her appurtenances, and the full amount of freight due or to grow due for the voyage. And the 26 Geo. II. c. 86, § 3, provides that the owners in such case shall not be liable at all, unless the shipper of the goods at the time of shipment, insert in his

¹ Exp. Middleton, 3 B. & C. 164; 4 D. & R. 824.

² Corrected and amended by 53 Geo.

III. c. 159.

bill of lading, or otherwise declare in writing, their true nature, value, and quality. And, by § 2 of the last act, the owners are exempted from loss &c. by fire. Carriers by water are, as we have already seen,¹ bound to take a pilot on board in certain cases; and the 6 Geo. IV. c. 125 provides, that owners of vessels shall not be liable for loss by reason of not having a pilot on board, unless upon refusal to take one in.

Before the passing of the act 11 Geo. IV. & 1 Wm. IV. carriers frequently endeavoured to limit their responsibility, by giving public notice that they would not be responsible for more than a certain sum (usually five pounds) on any one parcel the value of which had not been declared and paid for accordingly. But in all cases, to avail himself of this defence, it was necessary for the carrier to show that the bailor or his servant was acquainted with this limitation at the time of delivering the goods. Hence arose much litigation and uncertainty; and, to obviate the inconveniences arising from this state of things, the above-mentioned statute was passed; which declares, that carriers *by land* shall not be liable for the loss of certain articles specified in the act when their value exceeds *ten pounds*, unless the *nature* and *value* of such articles be stated at the time of their delivery to the carrier, and an increased charge paid or agreed to be paid upon the same; and it further declares, that no publication of any notices by carriers shall have power to limit their responsibility at common law for any other articles except those specified in the act. As it is an act of great importance, we shall give its provisions more at length.

From and after the passing of this act (23d July, 1830), no mail contractor, stage-coach proprietor, or other common carrier by land for hire, shall be liable for the loss of or injury to any article or articles or property of the descriptions following, viz. Gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the Bank of England, Scotland, or Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any package delivered either to be carried for hire or to accompany any passenger in any mail or stage coach or other public conveyance, when the value of such property shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house of such carrier &c., or to his servant, the value and nature of such property be declared by the person sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving it.

And when any package containing any of the articles above specified shall be so delivered, and its value and contents declared, and such value shall exceed the sum of ten pounds, such carriers may demand and receive an increased rate of charge, according to a notice to be

¹ See *ante*, tit. *Pilots*.

affixed in some conspicuous part of the office, warehouse, or other receiving house, stating the increased rates of charge required above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles; and all persons sending or delivering parcels shall be bound by such notice, without further proof of the same having come to their knowledge.

When the value has been so declared, and the increased rate of charge paid, or an engagement to pay the same accepted, the person receiving it shall, if required, sign a receipt for the package (not liable to stamp duty), acknowledging the same to have been insured; and if such receipt shall not be given when required, or such notice shall not have been affixed, the carrier shall not have any benefit under this act, but shall be responsible as at common law, and be liable to refund the increased rate of charge.

. And after the 1st September, 1830, no public notice or declaration theretofore made or thereafter to be made shall be deemed to limit or in anywise affect the liability at common law of any such mail contractors, stage-coach proprietors, or other public common carriers, in respect of any articles or goods to be carried and conveyed by them; but they shall be liable, as at common law, to answer for the loss of or injury to any articles or goods in respect whereof they may not be entitled to the benefit of this act.

For the purposes of this act every office, warehouse, or receiving house used by any such carrier for the receiving of parcels to be conveyed as aforesaid, shall be deemed to be the receiving house, warehouse, or office of such carrier; and any one or more of such mail contractors, stage-coach proprietors, or common carriers shall be liable to be sued by his, her, or their name or names only; and no action or suit commenced to recover damages for loss or injury to any parcel, package, or person, shall abate for the want of joining any co-proprietor or co-partner in such mail, &c.

Nothing in this act is to affect any special contract between such carrier and any party for the conveyance of goods and merchandize.

Where the value and contents of any parcel shall have been declared as aforesaid, and the increased rate of charges paid, if the same be lost or damaged, the party entitled to recover damages shall also be entitled to recover back such increased charges so paid, in addition to the value of the parcel or package.

The act is not to protect any carrier from liability to answer for any loss or injury arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his own personal neglect or misconduct.

The carriers are not to be concluded, as to the value of any parcel, in case of loss, by the value so declared, but may require proof of the actual value by the ordinary legal evidence; and in actions brought against them may pay money into court.

Carriers continue liable as we have seen, for the felonious acts of their servants; and also for their own misfeasance or gross negligence. It is not possible to lay down any general rule as to the circumstances which constitute this offence. Differing as they do in almost every

case, the question when raised, must be left to a jury. It has been decided, however, that the *mis-delivery* of a parcel, or its *non-delivery within a reasonable time*, is a misfeasance. In like manner, the sending of a parcel by a different coach from that directed by the bailor, and the removing it from one carriage to another, are misfeasances. Where a parcel is directed to a person at a particular place, and the carrier, knowing such person, delivers the parcel to another who represents himself as the consignee, such delivery is gross negligence. Leaving parcels in a coach or cart unprotected in the streets is also gross negligence.

In all cases of loss, the *onus* lies on the carrier to exculpate himself.

4. *The Commencement and Termination of the Risk.*

The risk commences from the delivery to the carrier or his servant. But a mere leaving of the property at an inn or yard where the carrier puts up, or at a wharf, without the knowledge of the carrier, is not sufficient. The risk also terminates with the due delivery at the proper place of destination, but not before. If the goods are directed to one place, and the owner requests the carrier to allow them to remain in another, as in the carrier's warehouse, till he call or send for them, and while there a loss arises, the carrier's liability has ceased.

5. *What will excuse or justify a Non-delivery of Property.*

The acts of God and of the queen's enemies have been already shown to be a sufficient excuse in this case; to which may be added the throwing goods overboard in a storm for the purpose of saving human life, if done with prudence. If the goods perish by some internal defect, he is excused; as if horses &c. in a storm become unruly, and damage themselves. He is also discharged by waiver on the part of the consignee or bailor, as we have already seen. So if the goods are seized by reason of any illegal act by the bailor. And the responsibility ends when the goods are stopped *in transitu* by any party entitled so to do, or where an adverse superior title is set up.

6. *The General Rights of Carriers*

When once delivered to him, the carrier has such a property in the goods that he may maintain an action or indictment against any person (even the owner) injuring or taking them away; and he has such a lien that he need not deliver them without being paid a fair remuneration, even though the bailor applies for them before they are carried, waiving the carriage of them. He is entitled to demand the price of the carriage, in fact, before he receives the goods. Formerly there was a power given to justices at sessions to fix the rates of carriage; but this does not now exist. In *Harris v. Packwood* (3 Taunt. 272), Lawrence J. said, "There is nothing unreasonable in a carrier requiring a greater sum when he carries goods of greater value; for he is to be paid not only for his labour in carrying, but for the risk which he runs, which is greater in proportion to the value of the goods. I would not, however, have it understood that carriers are at liberty to charge whatever they please. A carrier is liable by law to carry every thing which is brought to him, for a *reasonable sum* to be paid for the same, and not to extort what he will."

We may here add the rights and liabilities of *carmen* and *porters*, being common carriers, in London.

RATES OF CARTAGE, in the City of London.

All Goods, Wares, and Merchandize whatsoever, weighing 14 cwt. or under are deemed *half a load*; and from 14 to 26 cwt., are deemed *a load*, and are chargeable with the following Rates for the carrying thereof:—

	Half a Load.	A Load.
For any distance within and to the extent of Half a mile	2s. 2d.	3s. 6d.
Not exceeding One mile	2 9	4 4
— One mile and a half	3 6	4 11
— Two miles	4 4	5 7
— Two miles and a half	4 11	6 4
— Three miles	5 7	7 0
— Three miles and a half	6 4	7 9
— Four miles	7 0	8 5

And so after the same rate to the extent of ground limited by act of parliament.

For all Merchandizes and Commodities that cannot be divided, weighing above 26 cwt., the Carman shall, over and above the rates above-mentioned, receive and be paid after the rate of 2d. per cwt. for every cwt. exceeding 26 cwt., and so in proportion for any weight less than a cwt.

For the Carriage of all dry Goods, Wares, and Merchandize, which shall not weigh 10 cwt., and which shall be taken up in the city of London, and shall not be drawn up hill, and shall be carted by any licensed cart, within the distance of a quarter of a mile, 1s. 10d.

The carmen of the city of London are constituted a fellowship by act of common council. The rates which they are allowed to charge, and the regulations by which they are guided, are settled at the quarter sessions. In other respects they are subjected to the rule of the President and Governors of Christ's Hospital, to whom the owner of every cart pays an annual licence duty of 17s. 4d. Every licensed carman is to have a piece of brass fixed upon his cart, on which is engraved a certain number, which is registered, together with his name and place of abode, at the Hospital.

Carmen are to help to load and unload their carts; and any carman exacting more than the regular fare shall, upon proof before the lord mayor or any two magistrates, suffer imprisonment for twenty-one days.

Carmen riding upon the shafts of their carts, or sitting within them, not having some person on foot to guide the horses, shall forfeit 10s.

RATES OF PORTERAGE for conveying Parcels from Inns, &c.

By the London Portrage Act, 39 Geo. III. c. lviii., no person shall charge, within London, Westminster, Southwark, and the suburbs thereof, and other parts not exceeding half a mile from the end of the carriage pavements, for the portrage of any parcel not exceeding 56 lbs. weight, more than the following Rates:—

For any distance not exceeding		Not exceeding One mile	0s. 6d.
a quarter of a mile	0s. 3d.	— One mile and a half	0 8
Not exceeding half a mile	0 4	— Two miles	0 10

And so in like manner the additional sum of 3d. for every half mile.

Any person or porter demanding more than the above rates for any parcel not exceeding 56 lb. weight to forfeit 20s. or not less than 5s. Any inn or warehouse-keeper neglecting to send a ticket with every parcel, containing the name or description of the inn or warehouse from whence the same is sent, with the christian and surname of the porter who is to deliver the same, and the carriage and portrage marked thereon, forfeits 40s. or not less than 5s.; and the porter not leaving the ticket with the parcel, or altering or wilfully obliterating any thing written thereon forfeits 40s.; and if he demands more than is written on such ticket, 20s. Every parcel arriving by coach must be delivered *within six hours* after such arrival, if not after four in the afternoon, or before seven in the morning, and then within six hours after seven in the morning; or by waggon, *within twenty-four hours* after such arrival; or the innkeeper forfeits 20s. or not less than 10s. Parcels directed "*To be left till called for*," are to be delivered on payment of carriage and 2d. warehouse-room for the first week, and 1d. for each week after, on forfeiture of 20s. or not less than 10s. Every porter misbehaving forfeits 20s. or not less than 10s. These offences are cognizable before any justice of the district.

The porters of London have the exclusive privilege of taking up and carrying parcels within the city, and the employment of any one else is punishable by fine. Any other person may bring goods into the city; but he is liable to fine if he take up or carry any therein.

7..Of Carriers of Passengers.

We have already, in other parts of this work, shown some of the regulations provided for stage coaches and other carriers of this description. We will now notice the rules which more particularly relate to them and their passengers, &c.

1. *Carriers of Passengers by Land.*—In the first place they are bound to carry all passengers who offer themselves, provided they have room for them; and in a late case¹ it was held, that if several persons have contracted to go inside a coach in company, the carrier has no right to separate them. In this case the coach had two bodies, in one of which there might have been room for all the party. The party consisted of a lady and her three daughters, and it was necessary that all should go together for the protection of the younger ladies. Another passenger had, on the arrival of the above party, fixed himself in that part where there might have been room for the party, so as to exclude the possibility of accommodating the party together. They therefore performed their journey by post-chaise, and the coach proprietor was held liable to repay their expences. It may here be observed, that proprietors are always in like manner liable to the expences a passenger is put to by travelling post or otherwise where they do not find sufficient accommodation, or such as they had contracted for, or when there is a breach of any of their duties.

The proprietor is bound to provide a vehicle and harness &c. sufficiently strong &c. for the journey, and is always to examine the same previous thereto. He is to provide a steady and competently skilled coachman, who has a knowledge of the road, with steady horses, and lights by night. He is bound to see that the coach is not overloaded, so as to endanger an upset (which is independent of the statutory regulations), and to take as much baggage of passengers as they are usually allowed. If a passenger has more, he is still bound to take it if there is room, for which he may charge extra; and he must remove parcels not belonging to other passengers, it seems, in order to make sufficient room.

In the progress of the journey the coachman is bound to stop at the usual places, and to allow the usual intervals for refreshment, which they cannot vary at their mere caprice; to drive with all due precaution; and although the coach is not actually upset, if a passenger leap off the coach from any real danger of an upset &c., and an injury happen to him, the same degree of liability ensues. He is generally bound to observe the laws of the road, which are by usage these; *viz.* In meeting from an opposite direction another vehicle, each is to keep on his own left side; in passing or overtaking, the foremost vehicle is to bear to the left, and the carriage in passing is to drive on the other's right side. In crossing, the driver coming transverse shall bear on the left hand so as to pass behind the other carriage. But where there is sufficient space he is not absolutely bound to follow these rules. In London, it has lately been laid down by Sir Peter Laurie, that if there is a long line of carriages, and in consequence of a stoppage one carriage backs upon the others, those behind him are bound to stand their

¹ Long v. Horne, 1 Car. & Payne, N. P. Cases, 610.

ground if possible, and, rather than move, to suffer their pole to break the panel of the carriage backing, and for so doing they would ~~not~~ be held liable.

Before booking a place, they may demand the whole fare, or refuse to book it; but it is usual to demand only half; and even if the whole is paid, and the seat is not used, they generally return half the money. They have a lien on the passenger's baggage for the fare, but cannot detain his person nor the clothes on him.

2. With regard to *carriers by water*, the same rules in general apply. We shall therefore only notice those which particularly relate to the prevention of the collision of vessels.

In all cases of collision, the essential question is, whether proper measures of precaution were taken by the vessel which has unfortunately run down the other. This is partly a question of nautical usage, and partly of nautical skill. If all the usual and customary precautions are taken, then it is treated as an accident, and the vessel is exonerated. If otherwise, the offending vessel and its owners are deemed responsible. Some rules, however, which probably had their origin in the customs of navigation, are now adopted as positive rules of law. Thus, the law imposes upon the vessel having the wind free the obligation of taking proper measures to get out of the way of a vessel that is close-hauled, and of showing that it has done so; otherwise the owners will be responsible for any loss which ensues. Therefore, a vessel sailing with the wind must give way to one sailing by the wind, and the vessel sailing by the wind is not obliged to alter her course. Another rule is, that the owner of a vessel entering a port or river where other vessels are lying at anchor, is bound to make use of all proper checks to stop the headway of his vessel, in order to prevent accidents; and if, from want of such precautions, a loss ensues, he and his owners are responsible. Another rule is, that when vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack is to persevere in her course, while that on the larboard is to bear up or keep more away before the wind. And in respect to steam boats, as they do not receive their impetus from sails, but from steam, they are capable of being kept under greater command; and therefore it seems, from their greater power, they ought always to give way to vessels using sails only.¹

Railway and Canal Companies.—In the Railway Clauses Consolidation Act, 8 & 9 Vic. c. 20, as well as in the various special acts authorizing the construction of railways, provisions are inserted empowering the respective companies to carry passengers and goods at such charges as they may think proper, not exceeding the tolls by the special act authorized to be taken, with the same liabilities and privileges as common carriers and stage-coach proprietors:

And the 8 & 9 Vic. c. 42, reciting that greater competition for the public advantage would be obtained if similar powers were granted to canal and navigation companies, enacts, that such companies may carry as common carriers for their own profit, and that all the provisions in force relating to common carriers shall apply to such companies.

¹ Jones on Bailment, by Theobald, Appendix i. to xxxv.

CHAPTER XV.

Of Innkeepers.

WE have already shown what the law is with regard to *licences* to keep an inn.

An *inn* may be defined to be a house in which travellers, wayfaring men, and other such like casual guests, are provided with victuals, lodging, and accommodation for themselves, their horses, &c.

An *alehouse* is a house in which ale is sold by retail, to be drank or consumed on the premises, but does not necessarily lodge guests.

Every inn is not an alehouse; but if an inn uses common selling of ale, it is then also an alehouse, and becomes subject to the laws respecting alehouses; and if an alehouse lodges and entertains travellers, it is also an inn.

A *coffee-house* is a house where coffee is sold to be drank on the premises, and is not of itself an inn; but it has been held, that a house of this kind in London, where beds, provisions, &c. are furnished to any person paying for the same, although no common stage &c. stop there, and to which there are no stables &c., is to be considered an inn. But a house where guests are furnished with these accommodations under a prior special contract or arrangement is not an inn, although stabling is also provided.

An *hotel* is a place for the accommodation of occasional lodgers, who are provided with apartments hired for the night or week, and is generally regarded as an inn.

A *tavern* is a place where wines and liquors as well as beer are sold, and drinkers are entertained. And a *victualling-house* is where victuals are supplied, but no lodging is provided. The keepers of both these fall under the denomination of innkeepers or alehouse-keepers.

It seems, an innkeeper may be indicted, like any other person, for selling unwholesome provisions of any kind; and they are prohibited from making horse-bread, unless no baker resides in the same town. Their charges must be reasonable for horse provender. All measures in which exciseable liquors are sold must be of the standard measure. They are prohibited from keeping disorderly houses, or from harbouring thieves or offenders against the revenue laws; and in case of an internal riot, constables may break open doors. The licences of persons suffering unlawful meetings to be held in their house will be forfeited; and the same penalty attaches for suffering immoral or seditious books to be read in their houses. In case of public riots, two justices may order the doors of public-houses to be closed; or one justice may so order in case of a licence granted under the 1 Wm. IV. c. 64. Gaming, music, dancing, &c. are also forbidden in any inn; but this depends on whether the amusement be for the profit of the landlord, or the mere entertainment of the guests; and where it is at the request of a particular party, as in the case of a

country assembly-room, it is not within the prohibition. Innkeepers are to do their best to prevent tippling and drunkenness in their houses; and voluntary drunkenness in any person is punished with 5s. fine, and on a second offence 10l. sureties are required.

An innkeeper is at all times bound to receive guests, with their horses and goods, provided he has room for them, (except reputed thieves &c.), and to supply them with victuals and lodging, upon a reasonable price being tendered to him, or an action or indictment may be brought against him; but he is not absolutely bound to provide post-horses, though duly licensed for that purpose.

An innkeeper is bound to keep safely all such things as his guests deposit within the inn or the proper outbuildings, or in his custody as an innkeeper, and is liable for all losses which may happen otherwise than by the act of God or the queen's enemies, unless he can show that it was by the guest's own fault or acts that the loss happened. It is necessary for this liability that the party be a guest at the time of the loss; we must therefore see who is a guest. A guest is one who eats and drinks, or sleeps (except as hereafter mentioned), at the inn. Where a party brings goods to an inn, and asks leave to deposit them there, and the innkeeper refuses, but the party afterwards sits down and eats &c., thereby becoming a guest, and while there his goods are stolen, the innkeeper is liable. And if a party becomes a guest, and is absent for a time, with a known intention of returning at night, the innkeeper must take proper charge of his goods in the meantime, especially if the latter derive any profit from the custody, as the keep of a horse, even although the absence be for several days. And if one merely comes to an inn, and puts up his horse or other property, from which the innkeeper meantime derives a benefit, the owner is a guest, although he never go into the inn himself; but if from the property the innkeeper derive no benefit, it is otherwise. A soldier quartered at an inn is a guest. The owner may recover for the loss of goods deposited by his servant or agent who is a guest, although the owner himself be not a guest.

Next, let us see who are not guests. If a party come to an inn and take an apartment merely, under a *particular previous contract*, as a lodger, and do not eat and drink there, his mere lodging will not render the innkeeper liable to a loss. But if he come in the ordinary way, and sleep there, it would seem the innkeeper would be liable. A person invited as a visitor to dine or sup with the innkeeper, and afterwards, on account of the lateness of the hour, sleeping there voluntarily, is clearly not a guest in the present acceptation of the word, but a mere visitor.

It will of course be understood that an innkeeper, by taking a reward for property left in his custody, may render himself a bailee in another sense, although not under liability as an innkeeper.¹

No absolute delivery of the property of a guest into the innkeeper's custody is necessary; though he would not be liable if the goods were left in an improper part of the premises, as in an open court yard, unless it was the innkeeper's duty to have removed them to a proper place.

Any special agreement as to the custody of the goods does away with the innkeeper's general liability; and if a guest takes upon himself the exclusive custody of the goods, as if a room be hired as a shop for

¹ See *ante*, BAILEE for Hire, p. 295.

goods, and the key of it offered to the owner, the landlord's liability ceases. But a traveller merely desiring the goods to be taken into the common commercial or coffee-room, and not to his bed-room, is not such a taking of the exclusive custody.

An innkeeper cannot in general discharge himself of his liability by refusing to take charge of the goods, and telling the guest to take the key of the room and lock his door, if the guest refuses to do so. But it is otherwise if he accepts the key, and thereby takes exclusive custody; or if the innkeeper be desirous of locking the goods up, saying, he cannot otherwise warrant them, and the guest opposes it, the liability of the former seems at an end. Neither is an innkeeper bound to take in the guest's goods if the house be full. Insanity, infancy, illness, or absence, are no excuse from an innkeeper's general liability.¹

By the statute 6 Anne, c. 31, it is enacted, "that no action, suit, or process whatsoever shall be had, maintained, or prosecuted against any person in whose house or chamber any fire shall accidentally begin, or any recompence be made by such person for any damage suffered or occasioned thereby." This act seems to exonerate bailees in general from liability to make good losses arising from fire beginning in a house or chamber; and extends over the whole kingdom. By the 14 Geo. III. c. 78, § 86, this relief is extended, as far as respects places within the bills of mortality, to losses arising from fire beginning in any house, chamber, stable, barn, or other building, or on any person's estate. This latter provision, however, does not extend further than to fires happening within the bills of mortality; and it seems to have been considered that innkeepers or carriers in general are not within the protection of this statute.²

If an innkeeper be guilty of gross overcharge, the guest may tender him what he is fairly entitled to; and the innkeeper may be indicted and fined, it seems, for an act of extortion.

By the 24 Geo. II. c. 40, § 12, it is provided, that no person shall recover any sum of money, debt, or demand on account of spirituous liquors, unless it shall *bonâ fide* have been contracted at one time to the amount of 20s. or upwards; nor shall any particular article in any account for distilled spirituous liquors be allowed, where the liquors delivered at one time shall not amount to the full value of 20s., nor where any part of the liquors so sold shall have been returned or be agreed to be returned directly or indirectly; and if any retailer, with or without a licence, shall take any pawn by way of security for payment of any money for such spirituous liquors or strong waters, he shall forfeit 40s. for every pawn or pledge so taken, to be levied by warrant of one justice, half to the poor and half to the informer; and the owner shall have such remedy for recovering such pawn, or the value thereof, as if it had never been pledged. Under this act it has been held that an innkeeper cannot recover the amount of items in his bill for spirits &c., unless each item amounts to 20s. at one time.³

The commonest remedy an innkeeper has for his remuneration is by a *lien*. It is very doubtful whether he can detain the *person* of a

¹ Chit. Burn. J. 102—105. 3 Chit. Com. Law, 365—368.

² 3 Chit. Com. Law, 367, 8.

³ Gilpin v. Rendle, 1 Selw. N. P. 61; Burney v. Hutchinson, 5 B. & A. 241.

guest; but on his horse he has a *special lien* for the amount of the horse's feed &c. only. Other goods of the guest may be detained as a lien for a debt then incurred, unless there is any agreement to give credit, in which case nothing can be detained. If, before the lien on the horse is discharged, the horse is taken away, the innkeeper *eo instanti* may pursue and retake it. But if the horse is detained and the owner agree afterwards to leave him in pledge, the innkeeper gains a special property in the horse, and may retake him at any time. If the horse is once removed by consent, the right of lien is gone.

If an innkeeper detains a horse or other property, he has no right to use him otherwise than is especially requisite for the horse's benefit. Neither can he sell him. But in London there is a custom, that a horse may, on appraisement by four neighbours, be sold when the price of his keep amounts to his value.

Besides the remedy by lien, an action will lie for the guest's bill.¹

CHAPTER XVI.

Of Husband and Wife.

By marriage the husband and wife become as one person in the eye of the law, the very being or legal existence of the woman being by the common law suspended during the marriage, or at least incorporated with and consolidated in that of the husband, under whose protection she performs every thing. Modern times have introduced exceptions to this doctrine, as we shall presently see; but the general rule still continues. The reasons upon which the law virtually suspends the existence of the wife during coverture appear to be these: first, for her husband's safety, to deprive her of the power to injure him by any act without his assent, express or implied; and secondly, for her own security, to guard against her husband's influence over her, by disabling her from disposing of her own property, except by those methods and with those solemnities which the law itself prescribes. In treating of this relationship we shall consider—

I. CONTRACTS TO MARRY, AND THE CONSEQUENCES OF A BREACH THEREOF.

II. THE MARRIAGE ITSELF.

III. DIVORCE.

IV. THE CONSEQUENCES OF THE MARRIAGE.

I. CONTRACTS TO MARRY, AND THE CONSEQUENCES OF BREAKING THEM.

The contract must be mutual, that is, one party must offer matrimony and the other accept the offer, so that either party may sue or be sued on it. Thus a man may sue a woman for breach of her engagement, as well as the converse. An infant, however, cannot be sued, unless after coming of age the engagement is continued; though he or she may sue for breach of an engagement. Neither can a person *non compos mentis* be sued, because he is incapable of contracting, unless it is proved to

¹ See Chit. Barn. J. 56—101.

have been during a lucid interval. It is not in any case necessary to prove an express contract *in totidem verbis* to marry; for whether such engagement had existed is a question to be left to and determined by a jury from the connecting circumstances. The engagement is binding, though no express time be fixed or stated for its completion; as the law will presume it to be within a reasonable time. If the marriage would have been illegal, as being within the degrees prohibited,¹ the contract is void, and no action is maintainable: but because the other party had made a similar promise to a third person forms no excuse. A discovery, however, that the other party is substantially a person of bad character, from facts capable of proof, seems sufficient to bar any action that may be brought.² A bill in equity will lie to discover a promise to marry, although not to enforce specific performance thereof, the only remedy being an action for damages.

Lawful marriage is always regarded with favour by the law. Hence contracts or wagers tending to the restraint of marriage are declared void. So also contracts in procuration of marriages are void, in equity at least; and the offence of procuring the marriage of a ward of court is punishable by imprisonment for contempt of the court, and also by indictment for the conspiracy.³

II. OF THE MARRIAGE ITSELF.

The acts at present in force for regulating marriages in England are the 4 Geo. IV. c. 76, and the 5 & 6 Wm. IV. c. 85. The former act relates solely to marriages solemnized according to the rites of the established church; and before the passing of the last-mentioned act none other could lawfully be had in England, except where both the parties were either Quakers or Jews. It provides, that banns of matrimony shall be published in an audible manner in the parish church, or in some public chapel in which they may be lawfully published, of or belonging to such parish or chapelry wherein the persons to be married shall dwell, according to the form of words prescribed by the rubric prefixed to the Office of Matrimony in the Book of Common Prayer, upon three Sundays preceding the solemnization of the marriage, during the time of morning service (or of evening service, if there be no morning service on such days) immediately after the second lesson; and when the persons dwell in different parishes, the banns shall be published in both parishes; and the marriage shall be solemnized in one of the parish churches where such banns have been published.⁴

Notice of the names and place and time of abode of parties is to be given to the minister seven days before publication.

Ministers are not punishable for marrying infants without the consent of parents &c. after such publication, unless they have notice of dissent; but if dissent is publicly declared, the publication is void.

Republication of banns is necessary if the marriage be not solemnized within three months after the first publication.

No licence is to be granted by any archbishop, bishop, or other ordinary, to solemnize any marriage in any other than the church or

¹ See the Common Prayer Book.

² Chit. jun. on Contracts, 167—169.

³ Chit. Bla. Com. 433, note 2.

⁴ As to the publication of banns and solemnization of marriages in district churches or chapels, see 7 & 8 Vic. c. 56.

chapel of the parish or chapelry within which the usual place of abode of one of the persons to be married has been for the space of fifteen days immediately before granting the licence. And if a caveat is entered, no licence is to be granted until the matter is examined into by the judge. And before such licence is granted, one of the parties shall personally swear before the surrogate &c. that he or she believeth that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony according to the tenor of the said licence, and that one of the said parties hath, for the space of fifteen days immediately preceding such licence, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized; and where either of the parties (not being a widower or widow) shall be under the age of twenty-one years, that the consent of the person or persons whose consent to such marriage is required under the provisions of this act has been obtained thereto: provided always, that if there shall be no such person or persons having authority to give such consent, then upon oath made to that effect by the party requiring such licence, it shall be lawful to grant such licence notwithstanding the want of such consent.

The father, if living, of a party under twenty-one years of age (such party not being a widower or widow), or if the father shall be dead his or her guardian lawfully appointed, and if no guardian then the mother if unmarried, and if no mother unmarried then the guardian appointed by the court of chancery, shall have authority to give consent to the marriage of such party; and such consent is required for the marriage of a party so under age, unless there shall be no person authorized to give such consent.

If the father, or guardian, or mother be *non compos mentis*, or abroad, or shall unreasonably or from undue motives refuse or withhold consent to a proper marriage, then any person desirous of marrying may apply by petition to the lord chancellor &c., who may proceed thereon in a summary way. If, upon examination, the marriage appears to be a proper one, the lord chancellor may declare it to be so, and the consent of the other persons is dispensed with.

If the marriage is not solemnized within three months after the date of the licence, a new one must be obtained.

The right to grant *special* licences to marry at any hour or place is reserved to the archbishop of Canterbury.

If marriages are solemnized in any other place than a church or lawful public chapel, or at any other time than between the hours of eight and twelve in the forenoon unless by *special* licence, or without publication of banns unless by licence, either *special* or common; or if any person not in holy orders shall solemnize matrimony according to the rites of the church of England, the parties offending are guilty of felony, and liable to transportation for fourteen years. But prosecutions must be commenced within three years. And all marriages solemnized in any place other than a church or chapel where banns may be lawfully published (except by *special* licence), or without due publication of banns or a licence, or by any person not being in holy orders (the parties thereto knowing of such circumstance), are wholly void.

If the marriage of a minor is procured without the proper consent, either by licence obtained on a false oath, or by undue publication of banns, the offending party may be debarred from any property which would accrue from such marriage, by a bill to be filed by the attorney general in the court of chancery or exchequer, at the relation of the party whose consent was necessary; and such court may settle and secure the property to the benefit of the innocent party and the issue of the marriage, or, if both parties be guilty, for the benefit of the issue only. But proceedings for this purpose must be commenced within twelve months after the marriage, and within three months after it came to the knowledge of such relator.¹

After the marriage, it is not necessary in support thereof to give proof of the actual dwelling of the parties, &c.; nor will any evidence be received to prove the contrary in any suit touching its validity.

All marriages must be solemnized in the presence of two witnesses besides the minister. Immediately after the celebration, an entry is to be made in the register book, expressing whether the marriage was celebrated by *banns* or *licence*; and if the parties be under age, not being a widow or widower, whether it was *with consent of the parents or guardians*; and the entry must be signed by the minister, and also by the parties married, and attested by two witnesses.

Persons making a false entry, or forging &c. any entry, or any licence, or destroying the register, are guilty of felony, and liable to transportation for life or not less than seven years, or to imprisonment for not exceeding four nor less than two years.²

The 5 & 6 Wm. IV. c. 85 (Dissenters' Marriage Act) was passed for the relief of those who do not approve of the ceremony of marriage as laid down in the Rubric. It leaves the religious part of the ceremony to be conducted in whatever form may best suit the religious tenets of the parties, provided the marriage be solemnized in a place of worship duly registered under the act; or marriages may be had without any religious ceremony whatever, if the parties please, at the office of the superintendent registrar of the district. The only requisites essentially necessary are, that a *certificate* be previously obtained from the superintendent registrar of the district; that the marriage be solemnized in the place mentioned in such certificate, with open doors, between the hours of eight and twelve in the forenoon, in the presence of a registrar and two or more credible witnesses; and that in some part of the ceremony each of the parties repeat the following words:—

"I do solemnly declare, that I know not of any lawful impediment why I, *A.B.*, may not be joined in matrimony to *C.D.*

And each of the parties say to the other—

I call upon these persons here present to witness, that I, *A.B.*, do take thee, *C.D.*, to be my lawful wedded wife [or husband.]

The certificate is to be obtained by giving twenty-one days previous notice of the intended marriage to the superintendent registrar of the district within which the parties shall have dwelt for at least seven days previously; or if the parties have lived in different districts, to the superintendent registrar of each district. A fee of 1s. is paid on entering the notice, and another of 1s. on receiving the certificate.

¹ As to the wife's property being ordered to be settled upon her and the issue of her marriage, by reason of the forfeiture of the husband under this statute, see Attorney Gen. v. Mullay, 7 Beaver, 351.

² 11 Geo. IV. & 1 Wm. IV. c. 66, § 20.

The *certificate* of the superintendent registrar, like the publication of banns in the parish church, is intended to prevent hasty and clandestine marriages by securing proper publication thereof; and for this purpose the superintendent registrar (who is generally the clerk to the board of guardians for the union, and with the limits of which his district is generally co-extensive) is required to read all such notices at every meeting of such board held during the twenty-one days after the notice and before the issuing of the certificate.

Such certificate is required as well in the case of marriages where both parties are Quakers or Jews as in other cases, although these religious sects were exempted from the operation of former Marriage Acts. It may also be substituted for the publication of banns with respect to a marriage to be solemnized in the parish church according to the rites and ceremonies of the Church of England, if the parties choose.

Where parties are desirous of having their marriage solemnized within a less period than twenty-one days, the superintendent registrar is empowered to grant a *licence* of marriage, upon the payment of three pounds above the value of the stamps, which will entitle the party to receive a certificate *seven* days after the notice has been given. In order to obtain such licence, one of the parties must appear personally before the superintendent registrar, and make oath (or solemn affirmation) that he or she believes that there is not any impediment of kindred or alliance, or any other lawful hindrance to the marriage, and that one of the parties has lived for the space of fifteen days within the district within which the marriage is to be solemnized; and if either party (not being a widower or widow) be under twenty-one years of age, that the consent of the person or persons whose consent is required by law has been obtained, or that there is no person who has authority to give such consent, as the case may be. Such licence and declaration are respectively liable to the same stamp duties as licences for marriage granted by the ordinary of a diocese and the affidavit required to procure the same; and the superintendent registrar is entitled to a fee of three pounds upon granting such licence. But no such licence shall warrant the solemnization of a marriage in a church or chapel belonging to the church of England. Nor can any superintendent registrar grant a licence for a marriage to be solemnized out of his own district.

The marriage in all cases must take place within three months after the notice has been entered with the superintendent registrar, or a fresh notice must be given.

The registrar before whom any marriage is solemnized is entitled to ask of the parties the several particulars required to be registered respecting the marriage, and to receive the sum of 10s. if the marriage be by licence, and the sum of 5s. if without licence.

In case either party is under age (not being a widower or widow), the consent of the same persons is required under this act as under the 4 Geo. IV.; and such persons may forbid the issue of the certificate by writing the word *Forbidden* opposite to the entry of the notice of the intended marriage in the Marriage Notice Book of the superintendent registrar, with his or her name and place of abode, and the relation in which he or she stands in respect to either party, and by

which he or she is authorized to interfere. But any person forbidding the issue of the certificate by any wilfully false representation is subject to the penalties of perjury.

And any party whose consent is not required by law may, upon the payment of five shillings, enter a caveat against the grant of a certificate or a licence for marriage; and in such case the superintendent registrar shall not grant the same until he shall have examined into the ground of objection, and shall be satisfied that it ought not to obstruct the issuing thereof. If the caveat be considered frivolous or vexatious the party entering it is liable to an action for damages.

Marriages in other countries are recognized by the law of England if they are valid by the law of those countries. Hence marriages at Gretna Green in Scotland are recognized by the law of this country, because they are not deemed invalid by the law, though certainly celebrated in a manner contrary to the general usage, of that part of the kingdom. So a marriage in Ireland performed by a clergyman of the church of England in a private house was held valid, although no licence was granted for that purpose.

Before the 5 & 6 Wm. IV. c. 54, marriages between persons within the prohibited degrees of kindred were not absolutely void, but voidable only by sentence of an ecclesiastical court during the life-time of both the parties. This act, after legalizing marriages previously celebrated between persons within the prohibited degrees of affinity (but not affecting those within the prohibited degrees of consanguinity), enacted, that all marriages thereafter celebrated between persons within the prohibited degrees either of consanguinity or affinity, should be absolutely null and void to all intents and purposes.

III. DIVORCE.

In the first place, no marriage can be dissolved, although a sentence of divorce may be repealed in the spiritual court, after the death of either party.¹ But, in effect, the ecclesiastical court can declare a marriage to be illegal after that event. Thus, where on the death of a man his reputed wife applies for and takes out letters of administration, on a prior wife applying to the court they may revoke the first letters, and decree them to the first wife; and this was done in a late case,² at the Bedford summer assizes, 1832, and the jury on a trial at law found the second marriage to be illegal from the result of their verdict.

Divorces are of two kinds; the one *à vinculo matrimonii*, which means an absolute discharge from the bonds of marriage, as though none had ever taken place; and the other *à mensâ et thoro*, signifying a cessation of the obligation of the parties to continue to live together, which is a partial divorce.

The divorce *à vinculo* is grounded on some disability or other cause existing before the marriage, and the issue in this case are illegitimate. The corporeal impotence or imbecility of the husband pre-existing at the time of the marriage, and continuing to exist, is a sufficient ground,³ so is a relationship within the canonical degrees of affinity. Upon this divorce the wife, it is said, shall receive again her property if it be in existence; but if spent or gone *bonâ fide*, without

¹ Chit. Bla. Com. 440, 441, and notes 34. 35. 3 Bla. Com. 93. ² MS.
See 1 Rob. 379.

fraud on the part of the husband, her remedy is at an end. It also enables the parties to marry again, and to do all other acts, as if they had never been married; and the husband is not liable to the future debts of the wife.

The divorce *à mensâ* is where the marriage was primarily lawful, but from some supervenient cause it becomes impossible or impolitic in the eye of the law that the parties should continue to cohabit or live together. Though usually decreed in the ecclesiastical court, it may be sometimes obtained, as in the case of adultery of the wife, by an act of parliament.¹ The grounds for it may be cruelty in either party, even in a single instance, when it really endangers life, limb, or health; and even words menacing such dangers are sufficient. So if the husband has been convicted of an unnatural crime. But mere insult, irritation, coldness, unkindness, ill-temper, or even desertion, are not sufficient grounds, although Blackstone seems to say that "intolerable ill-temper" is sufficient. Adultery is always a sufficient ground.²

In cases of divorce *à mensâ et thoro*, an allowance is usually given to the wife out of the husband's property, depending on circumstances, and this even in case of adultery, where the divorce is obtained by act of parliament; for the justice of the legislature has provided that she shall not, for the want of pecuniary means, be driven to continue in a course of vice;³ though where the sentence is obtained in the ordinary mode, it seems otherwise.⁴ And it is settled, that where the husband and wife are living separate, and by deed he allows trustees for her use a sum of money for maintenance, she does not forfeit it on adultery.⁵ This allowance is termed *alimony*. Courts of equity consider it as separate and independent of *pin-money*, which the wife by agreement on marriage may be entitled to; so that the latter cannot be deducted from the former.⁶ Sometimes courts of equity may decree alimony;⁷ and after it is decreed, either by a court of equity or by the ecclesiastical courts, they will, when any portion of it is due, prevent the husband's evasion by quitting the kingdom, by issuing the writ of *ne exeat regno* against him.⁸

IV. THE CONSEQUENCES OF MARRIAGE.

1. *Rights acquired by the Husband in the Property of his Wife, and his Power over it.*

As to the Wife's Real Estate.—By marriage the husband takes a freehold interest in the wife's real estate during her life; and if they have any child born, from that moment the husband takes an interest for his own life also as *tenant by curtesy*, of which he is not divested though the child die the moment after. In order to support this estate in him, there are four requisites: 1. The marriage must be legal; 2. The wife must be seised of the estate; 3. The issue must be

¹ See the modes of proceeding in both these cases, 1 Chit. Bla. Com. 441, notes 39, 40.

² 3 Chit. Bla. Com. 94, notes, 14, 15.

³ Per Best J., 4 D. & R. 17, and per Bailey J., id. 94.

⁴ 1 Bla. Com. 442; 3 Id. 94.

⁵ Jee v. Thurlow, 2 Barn. & C. 347;

S. C., 4 D. & R. 11.

⁶ Rall v. Coutts, 1 Ves. & B. 292; Colmer v. Colmer, Mos. 121.

⁷ Angier v. Angier, Prec. Chan. 496; Gulb. Eq. Rep. 152.

⁸ See Cases in Chit. Eq. Index, 522; and see further 2 Roper on Husband and Wife 309, notes.

capable of inheriting, supposing it to live; and 4. The death of the wife must precede the husband's.

The husband cannot be tenant by curtesy of a mere right, title, condition, or personal inheritance &c. of the wife. But he may of manors, lands, and tenements, of which actual seisin may be obtained by the wife, and of various hereditaments, such as rents, tithes, commons, advowsons, offices of inheritance, trusts, equities of redemption, &c.

When the wife's estate is capable of seisin, actual seisin must be had during her life, to entitle the husband to be tenant by curtesy. If the wife be disseised before marriage, and there is no re-entry during marriage, no such title can arise to the husband; though a disseisin after marriage cannot affect his title. So, if the freehold is suspended during the marriage, the husband gains no title, unless the suspension is by a mere term of years, in which case the termee is regarded as holding possession for the wife. No curtesy arises from the wife's seisin for her life merely, or as tenant at will, nor of copyholds, except by special custom, which must be strictly followed. Nor is the seisin of a reversion sufficient. If a wife is entitled to an estate for life, then A.B. to have it for life, and then to the wife in reversion; if A.B. die before the wife, the husband is entitled as tenant by curtesy on her death; but not if A.B.'s estate takes effect; though if A.B.'s interest had been less than freehold, as for a term of years, the husband's title would not have been affected. No title in curtesy arises where the wife and another are entitled as joint tenants; but otherwise if in coparcenary, or as tenants in common.

Where there is no possibility of actual seisin of property, as of rents, advowsons, and the like, no seisin is required other than a legal or equitable seisin; although as to equitable seisin, where the husband takes any thing under the wife's will, and any intention of hers is apparent that he shall not have the estate by curtesy and also the benefits of the will, equity will in general put him to his election, to choose which of the two he will abide by.

If real property is given by deed or by will to husband and wife as joint tenants, he cannot, unless she join in the disposition thereof, divest her of the interest which after his death she would take in the whole property. This is contrary to the ordinary relation of joint tenants, as we shall hereafter see when we come to treat of the laws relating to estates. Neither is her interest affected by treason in the husband; for, in legal phraseology, they take by entireties, and not in moieties.

The husband, as he and the wife are one, cannot give &c. any thing direct to his wife, except by his will, or by any particular local custom, as in York, or as a *donatio mortis causâ*, which is a gift made by him while upon his death-bed, and can only take effect in case he die from that illness, and therefore does not pass to her till after the marriage is dissolved by his death. But by intervention of trustees this may be done; for the husband can give any thing to them upon trust that the wife shall have the benefit of it. And a purchase by the husband in the name of his wife is presumed to be a gift to her, which, in general, she shall take and enjoy after his death.

The husband may, in general, alien the property of the wife without her assent during his own life; but she or her heirs, after that, have the

power, by process of law, of re-entering ~~of the~~ property so aliened, if the remedy be pursued promptly after his death. Copyhold estates of the wife are however, in general, incapable of being so aliened. So also courts of equity will in general relieve the wife from the effects of an act of forfeiture committed by the husband of the wife's copyhold estates.

As to the Husband's Power to grant Leases of the Wife's Estate.—The statute 32 Hen. VIII. c. 28, although in other respects it provided for the relief of the wife and her heirs against the alienation of her estates by the husband, yet, for the encouragement of industry, it insured to the lessees of the husband and wife the lands of the wife during the term granted; and, in doing so, the statutes rendered firm and obligatory the contracts jointly made by them during the marriage.

The husband is also entitled to exercise a power contained in any deed to lease the wife's property conjointly with her, but the precise terms of the power must be strictly and literally followed.

Again, the husband alone may charge his wife's real estate with the payment of his debts during their joint lives; and if he be the survivor, and entitled to be tenant by curtesy, he may further charge them during his own life. And a security to any extent on the wife's estate, which she and her husband may effect, will be good.

If, however, the wife join in these acts to raise money for the husband's use, she will be entitled to exoneration to that extent out of any real estate or assets he may have; but it seems that the claims of other creditors would be preferred to her's. If, however, the money is raised to pay a debt contracted by the wife before marriage, she is not entitled to any exoneration; nor where it is connected with a contract on the marriage for settling her estate. Evidence is admissible to show for what purpose the money is raised. But parol declarations of the wife of her agreement to make a gift of the money to her husband are inadmissible; although she may exclude herself from the right of exoneration out of his assets if she, by professions that she did not intend to assert her right, induced his executors to administer his personal estate.

The mere reservation of the equity of redemption in such cases in the husband and wife and the survivor will not charge the wife's interest therein; but when the limitations of the property are distinct from the bare transaction of the incumbrance, then it will.

His Interest in her Chattels Real, as Terms of Years &c., and in the Rents due at his death, she being then alive; and his Liability to the Charges affecting such Chattels.—This is only a qualified title, viz. an interest in right of his wife, with a power to alienate during the coverture. If he do so alienate them, the alienation is effectual against the wife whether she survive him or not; but if he do not, and she survive him, then she continues to be the owner thereof as effectually as if she had never been married. If, without any alienation, the wife die first, then they belong absolutely to the husband by marital right, and not merely by his taking out administration. If leasehold property of the wife is underlet by the husband, or by both, and the rent is reserved payable to him, and he die leaving his wife surviving, his executors seem to be entitled to the rent due at his death: but if

reserved to both, it seems they belong in such event to the wife, though upon this point there is some difference of opinion.¹

When the husband by survivorship becomes entitled to such chattels real, he takes them subject to all the charges and equities with which they were affected in the wife's possession. The husband's acts of forfeiture, as by waste, outlawry, or attainder for felony, or *felo de se*, form as effectual a bar to the wife's claims as any other disposition thereof made by him. And on insolvency or bankruptcy, or upon a writ of *fi. fa.*, the wife's interest may be sold for the benefit of his creditors.

Of the Husband's Interest in and over his Wife's Personal Estate.—

A woman is not permitted to dispose of her property in fraud of her contemplated marriage. This, in general, resolves itself into a mere question of fraud; for before marriage a woman is at liberty to dispose of her fortune, provided it be done with no improper motive, as to deceive the man who is then addressing her with a view to their union. But deception will be inferred, if after the commencement of the treaty she should attempt to dispose of her property without his knowledge or concurrence; and under no circumstances will any such *voluntary* disposition of her property be binding upon her subsequent husband. Where, however, such settlement is made on her children by a former husband, the cases on the subject go to decide that such would be valid; though this is certainly contrary to the principle on which the preceding doctrine is founded.

By marriage all the personal property of the wife, of which she is actually or beneficially possessed at the time, becomes the property of the husband absolutely. His disposition of them by will or otherwise will therefore be good; and he may also empower her to dispose of them by her will, either generally or in any particular manner. But this is only good as against her next of kin in case she dies before her husband.

But marriage is no gift to him of property belonging to the wife as administratrix or executrix, though he may, in her right, administer such property, and dispose of it in the same manner in which she might; and therefore he may release debts due to the estate to be administered. The wife cannot administer without his consent; but property coming to her executrix &c. she may bequeath by will without his consent. And if any action is brought in relation to such matters, the wife must in general be joined with the husband.²

As to the wife's *chores in action*, such as debts owing to her at the time of her marriage, arrears of rents, legacies, residuary personal estate, money in the funds, &c., the husband, to gain any property in them, must during his life reduce them into possession, that is, obtain the actual controul of them by recovering them, or by their being transferred into his name, &c. The mere intention to reduce them into possession is not sufficient; and therefore a mere appropriation of the fund by him to any particular purpose is not such a reduction.³

As to the assignment by the husband of the wife's *chores in action* to which she is only entitled in *reversion* or *expectancy*, it is now pretty well settled that it can only stand good in case he survive her; and

¹ See 1 Roper, *Husb. & Wife*, 144. See also *Harrison v. Andrews*, 13 Sim. 595.

² As to what constitutes such reduction, see Roper, 210 &c.

that even although she join in the assignment. At the same time she may confirm it after his death; but her merely reciting such assignments in a deed executed by her after his death, is not such a recognition. Nor does she debar herself from the right to set aside such assignment by forbearing to claim it till after a particular event.¹

This saving of the wife's rights is only confined to such as, in order to reduce into possession, he must sue for in a court of equity, and not to those over which the common law imparts the power to him.

Where the husband, in order to reduce the wife's property into possession, is obliged to resort to a court of equity, the court will oblige him to settle some portion of it on her and her children. The portion to be thus settled depends upon the circumstances of each particular case; and, though generally half, it is never the *whole* fund. She may, where this fund is subject to equitable cognizance, file a bill in equity to enforce her right to settlement by means of her next friend against her husband. If she die before any steps are taken to secure her allowance, her children have no power or claim to do so; although if any steps are commenced, they may continue to prosecute them. The wife also, by her waiver of right, may bar her children.

The wife's equities to a portion of the fund sought by the aid of a court of equity equally follow the property whether it is sought to be recovered by the husband or by his assignees, by contract or in bankruptcy. But if the money be already paid to such purchaser before steps are taken to enforce her right to settlement, her right is gone.

So the court of equity will restrain the husband from obtaining the wife's portion by any process in the ecclesiastical courts until he has made a settlement on her.

Adultery on her part is generally a bar to her equity in this respect, except in the instance of a ward of court.

The husband, although he may refuse to make any such settlement, is yet entitled to the interest of her fortune, but not to the capital; and his assignees may take the yearly income, subject to making her an allowance. But if the husband desert his wife, and leave her destitute, or compel her by his cruelty to leave him, the court will deprive him not only of the capital, but of the interest also; and out of this property, although generally the husband is personally liable to all her debts, the court will order her creditor for advances to be repaid.

In case of a ward of court married without the previous approbation of the lord chancellor, the husband, besides being liable to imprisonment for the contempt of court, is punished by a settlement being made most strictly debarring him from taking any benefit in her property.

Effect of Settlements on and after Marriage.—By a settlement before marriage the husband may, by an agreement therein to that effect, be entitled to her *choses in action*, present or future; but without such a clause he is only entitled to her then property, under such restrictions as to her *choses in action* as have been before pointed out.

¹ The cases of *Mitford v. Mitford* (9 Ves. 387), *Hornaby v. Lee* (2 Madd. 16), *Purdew v. Jackson* (1 Russ. 1), *Honner v. Morton* (3 Russ. 63), and *Stamper v. Barker* (5 Madd. 157) have established the unqualified right of a married woman surviving her husband to all her *choses in action* not reduced by him into possession, and to her

reversionary and contingent interests in personal chattels not vesting in possession during the coverture, against the assignee of the husband for valuable consideration, or his general assignee in bankruptcy or insolvency. The husband cannot bind his wife's reversionary interest in personality, either with or without her consent.

If after marriage any accession takes place to her property, he, on taking it, may (unless the settlement has already provided for such a possibility) be made to execute an additional settlement on her in respect thereof; and he then becomes a purchaser of such property, which renders the post-nuptial settlement valid against creditors, provided it is in other respects fair, and the assignees must perform the covenants of the settlement before touching her property.

Settlements before marriage are always good against creditors or purchasers. But, unless under the foregoing circumstances, settlements after marriage are in general invalid against prior creditors, and purchasers also, even if they have actual notice thereof. They are good if made in pursuance of previous articles agreeing to settle in writing; and they are always good against the husband and others claiming under him. And post-nuptial settlements made for value, either on an accession of fortune to the wife, or on her giving up some right, as to jointure, dower, &c., or by order of courts of equity, are good.

2. *Wife's Rights over the Husband's Property.*

DOWER.—The law in respect of dower has undergone great alterations by the late act 3 & 4 Wm. IV. c. 105.

By marriage the wife (unless by agreement otherwise) is entitled to a life interest, at her husband's death, in one third of his estates of inheritance of which he has been seised during the coverture. For this purpose a valid, or at least not a void, marriage is necessary; for if it is only voidable, and it has not been set aside during his life, it is too late after his death to dispute it, and all the consequences of a good and valid marriage attach.

Dower attaches on all corporeal hereditaments, and out of rents, estovers, commons appendant or in gross (if certain), advowsons, fairs, bailiwicks, profits of a park-keeper and of courts, tithes, woods, mills, piscaries, tolls of a navigable river (unless the act expressly provides against it), and the like, and of mines opened, but not of those unopened.

An estate in dower is an estate for life which the law gives a widow in the third part of the lands, tenements, and corporeal and incorporeal hereditaments, of which the husband was solely seised or entitled in law or equity (though before the 3 & 4 Wm. IV. equitable seisin was not sufficient), in fee or in tail, in possession, at any time during the marriage, and to which estate the issue of such widow might have inherited. Thus, if an estate be limited to a man and the heirs of his body by his then wife, and he marry again, the second wife is not dowable out of that estate, for her heirs could not by possibility inherit. A seisin in law was sufficient; thus, if land descended to the husband, who died before entry, yet dower attached: but now, by § 3 of the 3 & 4 Wm. IV. c. 105, seisin is declared not to be necessary. The wife is not entitled to dower of a remainder or reversion expectant on a freehold created before marriage; but there is dower if the remainder or reversion depend on a term of years. There is no dower of a seisin for an instant merely, as where there are two joint tenants, and one makes a feoffment in fee; nor of both the lands given and taken in exchange, but she must elect which to take dower out of. She shall have a third of the profits of

such things as cannot be divided, as fairs, offices, and the third presentation to an advowson. She shall have no dower of an estate of which her husband was mortgagee in fee, nor if he be attainted of treason; but she shall not be barred, if he be attainted of felony only. Neither is dower lost by divorce *à mensâ et thoro* for adultery; though it is if she quit her husband's house in company of the adulterer. The widow of an idiot or *non compos* has dower. But the widow cannot enter till the heir has assigned her dower. If he refuse, she must bring a writ of dower, and the sheriff must assign it by metes and bounds, unless the husband were tenant in common, then she has an undivided third share of her husband's interest. Therefore, before assignment and entry, the freehold is not in the widow. But before entry she has a right only, which may be conveyed (*i. e.* extinguished) by lease and release to the person having the freehold in possession; and after entry it may be conveyed &c., like other freehold estates. And during the husband's life the wife may bar her right to dower by the new mode prescribed by 3 & 4 Wm. IV. c. 74, in lieu of fine or recovery.

By gavelkind custom, she is entitled to half the land so long as she continues a widow and chaste.

The tenant in dower is subject to an action for waste, and liable to forfeiture. Her concurrence was necessary to make the tenant to the precipe, she not being within the 14 Geo. II. c. 20.

The methods by which dower may be prevented from attaching are as follows. As the husband must be solely seised, by making him a joint tenant; or by putting the fee in remainder, as to the husband for life, remainder to B during life of husband of &c., remainder to husband in fee. The best way is by the usual uses to bar dower, as now most generally practised. Dower may be barred in law by the woman accepting a jointure under the 32 Hen. VIII. c. 28. A provision made by will of husband in lieu of dower is so far a bar to dower, if the intent be clear, as to put her to her election. And so in equity, by accepting other considerations, such as fall not within the statute, as a yearly sum &c., though not charged on any particular fund.

The 3 & 4 W. IV. c. 105 having effected considerable changes in the law of dower, the provisions of it are here subjoined.

No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

All partial estates and interests, and all charges created by any disposition or will of the husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

A widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when by his will, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

The right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband duly executed as aforesaid.

Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

No gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will.

Provided always, that nothing in this act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them.

Nothing in this act shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies.

No widow shall hereafter be entitled to dower *ad ostium ecclesie*, or dower *ex assensu patris*.

This act shall not extend to the dower of any widow who shall have been married on or before the 1st January 1834, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said 1st January 1834, the effect of defeating or prejudicing any right to dower.

JOINTURE.—Dower may also be barred by jointure, which is a provision made by marriage settlement in lieu of it; and which, though by fine and proclamation of the husband, or by forfeiture for waste, or by the alienation of the wife, it may be barred, yet is not (as dower is) forfeitable by elopement and adultery, nor by the husband's treason or felony. Coke says, a strict *legal* jointure requires that—1. The provision for the wife must take effect, in possession or profit, immediately after the husband's death. 2. It must be for the term of her own life, or more. 3. It must be in satisfaction of the *whole*, and not of part of dower. 4. It must be expressed or averred to be in satisfaction of dower. It may be made before or after marriage; but if made after marriage, she may waive it, and claim her dower. If made before marriage, she will be barred whether adult or infant, even if not a party to the deed of jointure; but Mr. Cruise thinks,¹ that, if under age, she or her guardian must have notice, or she would have relief in equity. If she be an *infant*, the provision must be as certain as her dower.

The Wife's Interest in the Husband's Personal Property.—When the husband dies possessed of property, and without leaving any will, and, after paying his debts, there is a surplus, the wife under the Statute of Distributions, is entitled to one third where there are children or their lineal descendants living; and where not, to one-half of such surplus.² And, by the custom of London and York, when his estate exceeds 2000*l.*, she is entitled to 50*l.*, or if under 2000*l.*,

to the furniture of the widow's bed-chamber and apparel. And where the children have been advanced in the world by the father during his life-time, the value of that advancement will be brought into account with the widow, which is called "*hotchpot.*" Settlements on the widow will sometimes bar her right under these customs. The wife also may take interests, limited to her by marriage settlement, or by covenants therein, to leave her property at his death by his will.¹

3. *The Effects of Marriage upon the Acts and Agreements of Husband and Wife prior to Marriage; and the Husband's Liability in respect of them.*

When married, the wife cannot, without the husband's consent, make or appoint an attorney to do any act; and on the same principle, if she has done so before marriage, the act of marriage is a revocation of it. But if a warrant of attorney is made to her, it is not revoked; nor is marriage a determination of a lease at will made to or by her before that event. However, she is in general incompetent to make a will; and one made before marriage is revoked by it, although the husband consented to it. A submission to arbitration by the wife is revoked by marriage. And in some instances marriage is a release from obligations contracted by her previous thereto, as where she has given a bond to her husband, unless the debt thereunder cannot become due till after her death. The husband is *generally* liable for all her debts contracted prior to or during the coverture;² but for those contracted before marriage he ceases to be liable when the coverture ceases; though if he receives assets from her as administrator after her death, he continues liable to the extent of such assets.

A bond given by a man to his intended wife without the intervention of trustees is revoked on the marriage; but otherwise if trustees are interposed, or if the terms are to be performed after the coverture ceases. For where such a bond is made, and the husband becomes bankrupt, proof is allowed of it under the bankruptcy.³ But the husband cannot settle *his own* property on his wife, so as to belong to her in the event of his bankruptcy, though he may settle *her property* in that mode. The marriage of an executrix with a debtor to the estate does not release his debt.

4. *The Disabilities of Coverture, and the Exceptions to them.*

A married woman has a variety of rights and disabilities with respect to the exercise of powers.* As to purchases of real estate by her, they seem to depend more on the assent of the husband, without which she may sometimes treat them as nullities after his death. A wife's receipt for money is void against the husband, unless she act with his authority, either express or implied. Neither can she release a debt, or give or negotiate any security. Neither can she in general contract debts to bind her husband, unless they be for necessities supplied to herself proportioned to their sphere in life, or for goods for the use of the family, or, not being necessities, unless they afterwards come to the

¹ See 2 Roper, 1--66.

² See *post*, as to his liability for debts during marriage.

³ See Exp. Tindal, and cases there referred to, 1 Dou. & Cr. 391.

* See 2 Roper, 35.

husband's use; and though the necessities were for her children by a prior marriage, if they are living with the husband, he is liable. Where the husband makes an allowance to the wife for necessities,¹ which fact is known to the tradesman trusting, the husband is not liable. Nor is he liable for money lent to the wife, even though applied by her to the purchase of necessities. However, in equity, the lender would be entitled to stand in the place of the party furnishing such necessities, and so be entitled to recover from the husband. If the wife buys necessities on credit, and pawns them before they come to the husband's use, he is not liable; nor if the credit is solely given to her, unless by any subsequent act he acknowledges the debt. His liabilities, however, cease if she leave him without some sufficient reason, as cruelty or substantial ill-treatment; but in this case he ought to give *particular* notices to tradesmen not to trust her,—a general notice, unless brought home to the party's knowledge, being of no avail. If he drive her away from her home without sufficient cause, and give actual notice to tradesmen not to trust her, he is still liable for necessities supplied to her. But if she afterwards commits herself, his liability ceases from that time. Her elopement or adultery will also discharge him; but if he afterwards receives her again, his liability is thereby revived. She, however, could not be arrested for those debts from which the husband is released; or rather, if she were arrested, she might, on application to a court of common law, have been released on what is termed common bail.¹

By the custom of London, however, she may be considered as a *fieme sole*, and, as such, may trade, and become subject to the bankrupt laws.

Other exceptions which are allowed to the general disabilities of the wife by means of marriage are those of *pin-money*, *gifts* or *allowances* to her to keep house &c., and her *paraphernalia*.

Although gifts by the husband immediately to the wife are void *at law*, yet in equity they are supported, provided they are fair and reasonable. But it is to be observed that a gift of the whole property of the husband during his life-time is void, even in equity, against his creditors.

Pin-money, &c.—This is money given for her clothes and ornaments, or other separate expenditure. It may be given either by the marriage agreement, or by gift independent and subsequent thereto. The former is good in every respect; but the latter is void as against his creditors, unless under circumstances already pointed out, as, for instance, a future accession on her part to property. If she suffers her pin-money to run into arrear, she can seldom claim arrears for more than a year past; but if she demands it without success, she will not be considered as having waived it; neither can the presumption of waiver arise if she be *non compos mentis*. If the husband provide her with the articles for which the pin-money was intended, her claim to the latter will be regarded as thereby satisfied.

Gifts &c. to keep House.—These are supposed to be a certain sum; and if, by saving any part of it, she accumulates a fund, she is considered to hold it for *her own* use; but this, as well as pin-money, if in consequence of an agreement *after* marriage only, is liable to the husband's creditors.

Paraphernalia.—This term comprehends such articles of dress and

¹ Freestone v. Butcher, 9 Car. & P. 647; Lane v. Ironmonger, 18 Mee & W. 368.

ornament as are bought by her husband for her use, or are given to her by strangers, and are suitable to her condition in life. They are not absolutely the property of either party; so that neither can dispose of them by *will* during the life of the other, but they pass to the survivor. Although the wife cannot during his life do so, *he* may sell or give them away during *her* life-time; and on the same principle they are liable to his debts, except, perhaps, where given by strangers. If, however, the husband die indebted, and her paraphernalia be taken by his specialty creditors after the general personal estate is exhausted, she will be allowed to stand in the place of such creditors to reimburse herself out of the real estate in possession of the *heir*, to the amount of her paraphernalia, and will be entitled to precedence in payment of their value to legatees. The right to paraphernalia may, however, be barred by settlement, or, as against her administrators, by her acquiescence in her husband's otherwise unwarranted disposition of them.

The Wife's Power to enjoy separate Estate.—Courts of equity have also relaxed the rule, that a married woman cannot have any separate estate without the *actual* intervention of trustees, in another instance. Thus, although it would be better to interpose trustees, if land or personalty be devised, bequeathed, or settled by a stranger to or upon a married woman for her separate use, yet, without giving it to trustees, the intention of such stranger will be effectuated, and the wife's interest protected in courts of equity, by their regarding the husband as a trustee for her; and there are instances where courts of law would not interfere in such case against the wife's interest. Such separate enjoyment is supported when the words in the will or deed are, that she "*shall enjoy and receive*" the property; or, that it shall be "*for her livelihood*;" or, that "*her receipt shall be a sufficient discharge*;" or, that it "*shall be paid into her hands*;" and in many other such cases.¹

Again, where the wife is, by the agreement of the husband, or by the custom of London before mentioned, and in other instances, allowed to carry on a separate trade from her husband, the property thereof is her separate property. However, as in general no separate action can be maintained against her, she cannot (except by the custom of London) be made a bankrupt in respect of any such separate trading.

Such separate property, if *real* estate, may, by agreement between husband and wife *before* (though not *after*) marriage, be disposed of by the wife during coverture so as to bind her *heir* at law; and if personal estate, she may dispose of it without such power, just as if she were single. If, however, property is given her to enjoy during her life, with a power to dispose of it by her will &c., care must be taken that the terms of the execution of the power are strictly complied with.²

Such separate property is also in some instances rendered liable to her debts and engagements after her death, independent of the liability of the husband.

SEPARATION.—This, though unknown to the common law, was, till lately, so clearly settled as to afford room for valid contracts in relation thereto. At law such deeds, if in contemplation of *immediate* separation, were good; and in equity they were good for every purpose where

¹ See *Barrymore v. Ellis*, 8 Sim. 1; *Brown v. Bamford*, 11 id. 127. See also the cases on this subject in *Western's Conveyanc.* iv. 258.

² See 1 Vict. c. 26, § 10, which must be complied with notwithstanding the power.

trustees were interposed. They were, however, in general considered at an end when a reconciliation between the parties subsequently took place.

But this doctrine has undergone a complete alteration by the late case of *Westmeath v. Westmeath*, in the House of Lords,¹ which has decided, that a prospective or any deed of separation (excepting so far, perhaps, as it may provide for children) is invalid, and may be set aside or treated as void.² Such is the modern decision; but its correctness is very questionable, and in all probability the law will again stand as it did before this case.³

If, during this state of separation, the wife be molested by the husband, she has a remedy by writ of *supplicavit* in the Court of Chancery, obtained upon proceedings called *articles of peace*; and if he attempt to seize her, or actually do so, she may have a writ of *habeas corpus*, in order to obtain security for her person or to regain her liberty.

5. *Effects of the Marriage as between the Husband and Wife.*

It would far exceed the limits of this work to enter into the detail of actions by or against husband and wife conjointly and separately, or into the consideration of whether she may sue or be sued alone, or whether she must be joined or not with her husband in an action by or against him; suffice it to observe, that in general, if the wife be injured in her person or property, she can bring no action for redress without her husband's concurrence, and in his name as well as her own; neither can she be sued without making the husband a defendant. But where the husband has abjured the realm or is transported (he being then considered dead in law), she may sue and be sued alone. These, however, are only general rules, liable to many exceptions.⁴

Inequity, by the intervention of a third person, who is termed *prochein ami*, or next friend, the wife may sue the husband. If the husband be guilty of ill usage towards his wife, she may obtain sureties from him to keep the peace, either by application to justices of peace, or to the courts of Chancery or Queen's Bench. So he is bound to maintain her, unless she elopes without good cause, or is guilty of adultery. Therefore he is liable for necessaries supplied to her; or she may obtain an order for maintenance from a magistrate, or alimony by application to the ecclesiastical courts, &c.⁵

In criminal prosecutions, the wife may be indicted and punished separately; and where she receives stolen goods, or is guilty of riot, or of assault or battery, or of many other inferior misdemeanors, and the husband does not participate therein, she is the party responsible in the eye of the law. But it is otherwise if she commit any crime by coercion on his part or in his presence, short of felony or treason; for then he is the party liable.⁶

But in trials of any sort they are not allowed to be evidence against or for each other, where their rights may in any manner be affected by

¹ Dow's P. C., N. S., 5, 18.

² 1 Chit. Gen. Prac. 58.

³ If the deed of separation be properly prepared, there is no doubt of its validity.

--EDITOR.

⁴ See 1 Chit. Bla. Com. 443, and note 49, id.

⁵ 1 Chit. Gen. Prac. 60.

⁶ 1 Ch. Bla. Com. 443, n. 49; and see further, tit. *Husband and Wife*, in the Index.

the nature of the evidence. The rule is founded upon this, that, being but one person in law, it is a maxim that a party cannot be a witness in his own cause, neither can he be his own accuser. But there are exceptions; as where the accusation against the husband is the forcible abduction of the woman, or on an indictment against him for murder or the attempted murder of his wife, she, or her dying declaration, may then be evidence against him, and *vice versâ*. And by the Bankrupt act, 6 Geo. IV. c. 16, § 37, the commissioners may examine the wife in order to discover the bankrupt's estate, &c. And cases of high treason form another exception.

Upon the same principle, also, the admissions or declarations of one cannot be made available against the other. But there are exceptions also to this rule; as where the declarations are in the nature of facts. as the declaration by her, at the time of effecting a life policy, of the bad state of her health; and also where she is allowed to act as his agent, her declarations &c. are good evidence.¹

In case of her adultery, the adulterer is liable to an action for *crim. con.*; and if the guilty parties are taken in the fact, it would, at most, be but manslaughter if the husband kill the wrong-doer.

The husband has also, in case of necessity, the right to use moderate correction or coercion towards his wife; but if he exceed due bounds, she may exhibit articles of peace against him to insure her protection. The husband may also restrain the wife's liberty in case of any gross misbehaviour; in which case his right to do so may be tried by a writ of *habeas corpus* to any of the judges.² If she leave him, he has his remedy by *habeas corpus* to bring her back again; and a suit in the ecclesiastical court may in some instances be instituted by him for restitution of his conjugal rights, the sentence in which case will operate to her perpetual imprisonment unless she submit.

These, in the words of Sir Wm. Blackstone, are the chief legal effects of marriage during coverture; upon which we may observe, that even the disabilities which the wife lies under are, for the most part, intended for her protection and benefit. So great a favourite is the female sex of the laws of England!³

CHAPTER XVII.

Of Parent and Child.

THE term *child*, in a strictly legal sense, is only applicable to those who are born legitimate; for a bastard is, in the eye of the law, regarded as *nullius filius*, or the child of no one. We shall therefore in the first place confine our observations to legitimate children, and afterwards consider those that are illegitimate.

In England, a child, to be legitimate, must be born during the con-

¹ 1 Chit. Bla. Com. 443, 444, and note 50.

² And See 1 Chit. Bla. Com. 444, 5, and notes.

³ Id.

tinuance of the coverture, or within such a time after its cessation that it can be presumed to have been conceived before the coverture ceased; and there are cases where a child born forty-one weeks and four days after the husband's death was declared legitimate.¹

I. LEGITIMATE CHILDREN.

We shall inquire into, 1. The legal duties of parents to maintain, protect, and educate their legitimate children; 2. Their powers over them; and 3. The legal duties of children towards their parents.

1. *The Duties of Parents towards their Children.*

Their *maintenance* by their parents by legal obligation has already been pointed out under the subject of the poor laws.² Independently of the enactments there referred to, there is no legal obligation on the part of parents to support their children. Therefore, unless there is either an express or an implied contract on the part of the father, he will not be liable even for the son's necessities; although at the same time there are cases in which an indictment at common law would lie against the father for neglecting to provide for his children.

A very slight degree of evidence is sufficient, however, to fix the father with an *implied promise*; and where the children of the wife by a prior marriage were received into, and held out by him to the world as part of his family, he was held liable for their necessities. But where the son was allowed money for these purposes, the presumption of contract could not be raised against the father; and if a tradesman furnishes clothes to an extravagant extent, the father is held not to be liable even for part of them. So also if the credit were given to the child alone, and not impliedly to the father. But where such credit was given to the son upon any fraudulent misrepresentation on the father's part, the latter was held responsible. In these cases the obligation on the father's part cannot arise after the child is twenty-one years old. But we shall see hereafter how far the infant himself is liable after he comes of age for debts contracted prior thereto.³

If a parent die without making a valid will, then indeed, by the Statute of Distributions, if a wife is also left, two thirds of his personal property go equally to the children and their lineal descendants, except such children, not heirs at law, who have an estate by settlement in the parent's life-time; if only children and no wife, are left, then it all goes to them, whether they are such by one, two, or more wives. Grandchildren only take between them the share to which their parent (father or mother), if living, would have been entitled to, and do not share equally with the children of the intestate, their aunts or uncles. Beyond this there is no obligation on a parent to leave his child any thing by his will.

If a father is possessed of real estate absolutely in fee simple, he may disinherit his heir; but courts of equity always regard heirs with compassion, and will always, if fairly possible, put a construction on a will unfavourable to disinheriting them. Further, an heir may in general, unless he is clearly debarred, have an issue *devisavit vel non*, as it is termed, directed by the Court of Chancery to be tried at law, in order

¹ See, as to this, 1 Chit. Bla. Com. 445, note 17.

² See *ante*, p. 223, 4.

³ 1 Chit. Bla. Com. 448, and notes.

to ascertain the validity of the will, whereby he is so apparently disinherited; and he is in other ways much favoured in equity, as by the power of inspecting the title deeds &c. disinheriting him.¹

The law also favours bequests of property in favour of children before other persons; and a marriage and birth of a child is a revocation of a will made prior thereto. Courts of equity favour children in many other instances; as where a father having taken a security from a son for money advanced, destroyed the security, the court regarded it as a release of the debt.²

Purchases of the father in the name of the son, if not done with a view to defraud creditors, are regarded as purchases for the son's benefit; and though in some cases a legacy left to a creditor is regarded as a satisfaction of the debt, yet the slightest circumstance is taken hold of to prevent that construction where the son is his father's creditor.³

Where under statutory enactments the father is, as before observed, bound to maintain an infant, an indictment may be preferred for the neglect, or an order of maintenance obtained from a magistrate. But the mother is in no case bound to support her children during their father's life-time. Thus, where the father was not of ability to support the children, and although the mother was, yet the Court of Chancery directed a portion of the children's property to be advanced for their maintenance;⁴ and that, though their father was dead, and the mother had married a second time.⁵ Among the higher classes of society, where proper maintenance and education are withheld, the Court of Chancery is the proper court to apply to.⁶

As to the *protection* of children: this the law permits rather than enjoins, feeling that nature in this respect requires rather to be controuled than forced. A father has such an interest in the person of his child, that at any age he may justify his defence, even by forcible means. And where a man's son was beaten by another boy, and the father went near a mile to find him, and there revenged his son's quarrel so that death involuntarily happened, the father was held only guilty of manslaughter, and not of murder.⁷ He has generally a right to the custody of his infant son and daughter, and may legally retake them, or may have an *habeas corpus* to restore them to his custody. He may support an action of trespass for the seduction of his female child whilst resident with him, *per quod servitium amisit*; but not in respect of the mere parental right, for no such action can be supported, unless it occasion an actual loss to the parent, as in strictness no damages are recoverable in any case for an injury merely to parental feelings; and yet it has been held to be no ground for a new trial, that the judge, in an action for debauching a daughter, admitted evidence of a promise of marriage, though such proof probably increased the verdict, without evidence of any real greater damage to the parent in the character of master.

The taking away a daughter under the age of sixteen, or the stealing of a child under ten years, are punishable, the former as a misdemeanor, the latter as a felony.⁸

¹ See Chit. Eq. Index, 435.

² 2 Sm. & S. 254.

³ See Chit. Eq. Index, 733, 4.

⁴ Mad. 275.

⁵ 1 Bro. C. C. 268.

⁶ 1 Chit. Gen. Pr. 65.

⁷ 1 Chit. Bla. Com. 449, 50.

⁸ 9 Geo. IV. c. 31.

The parent has also, in general, a right to direct and controul the education and care of his child, so as to compel him to receive his education at a particular school or college, and may delegate that care to other proper persons; and a court of equity will lend its aid to enforce obedience. It is an established doctrine, that a parent may justify the correction of his child either corporally or by confinement; and a schoolmaster, under whose care and instruction a parent has placed his child, may equally justify similar correction. But the correction must be moderate, and in a proper manner.¹

So also a father may maintain a suit for his infant child; as also may any person as a *prochein ami*, in equity, where the interests of the father and child are at variance; which is contrary to the general law, which provides against the maintenance of law-suits by parties not directly interested therein.²

With respect to the duties of parents to educate their children, they are not enforced by the municipal laws of this country, natural affection in general forming a sufficient inducement to the observance of them; the only exception to this act of non-intervention being that whereby poor children may be bound as parish apprentices, as we have already shown.³ And we may as well here remark, that where a child is a ward of the Court of Chancery, that court will take care that the child is educated in a style suitable to its expectations.

2. The Powers of Parents over their Children.

Under this head (having already pointed out, under the subject of the protection of children, the coercive powers of parents) we may here make the only remaining observations upon this topic, namely, how the power of parents may be controlled by the Court of Chancery &c., the Court of Queen's Bench having no power directly to do so;⁴ and we will add a few observations on wards of court generally.

The consent of parents is necessary, as we have already shown, to the marriage of infants.⁵

A father has no power over his child's estate, being considered as a mere trustee, and liable to account to the child when he arrives at the age of twenty-one; but he is entitled to the profits of a child's labours so long as he is living with his parent, till he is of age. But he has no common law right to bind him apprentice against his consent. And all power ceases at the age of twenty-one; but till then, as we shall presently more fully show, the father, on his death, has the power to appoint a testamentary guardian (as he is termed) by his will.

The crown is the general guardian of all children, and its care is delegated to the Court of Chancery, neither of the other courts having any authority over them. The Court of Chancery may therefore appoint for an infant a guardian *ad litem*, that is, to sue or to defend a suit. It may also appoint guardians to consent to their marriage, and in other instances of necessity. This court, however, only exercises its powers where they have property, and are made wards of court; for which purpose it is merely necessary to file a bill in equity in their behalf.

¹ 1 Chit. Gen. Prac. 63, 4.

² See Chit. Eq. Index, tit. *ChamPERTY*, p. 200.

³ See *ante*, p. 273.

⁴ 5 East, 221; 10 Ves. 58, 59.

⁵ See *ante*, tit. *MARRIAGE*, p. 309.

This done, the court has very large powers for the infant's benefit. It will go so far as even to remove a child from its father's custody, where it may be prejudicial to its general good to suffer it to remain with the parent, as was done in the late case of *Mr. Wellesley*.¹ And the court will also restrain the father, under circumstances sufficiently strong, from taking his child out of the jurisdiction of the court, as for instance to Scotland,

Where a child is in the sole custody or control of the father, or of any person by his authority, or of a guardian after the death of the father, provision is made by a recent act, 2 & 3 Vict. c. 54, for the mother's access to it, at such times and under such regulations as the lord chancellor or master of the rolls shall order, upon the hearing of the petition of the mother; and if the child be under seven years of age, it may be delivered into her custody until it attain that age. But neither the custody of the child, nor access to it, can be thus granted to a mother against whom adultery has been established.

With respect to *testamentary guardians*, the 12 Car. II. c. 24 enables the father (though not the mother) to appoint such guardians by his will until the child be twenty-one years of age, whose power continues in the case of a son until that period even though he marry; but in the case of a daughter, her marriage puts an end to the guardianship. The father's power of appointment extends to all his legitimate children under twenty-one, and unmarried at his decease, or born after; but not to a natural child, though the court will, unless a sufficient reason be given for the rejection, adopt this nomination.

A testamentary guardian has all the powers of a father, and is also subject to the controul of the court in case of misbehaviour. So if several guardians are appointed and one dies, the other stands in his place; for the party dying could not in any manner delegate or assign his authority to another. A stranger cannot appoint such guardian; though if he attempts to do so, the court will take care that the child is educated according to his expectations. Neither has a grandfather power to make such appointment. At the same time any party may leave property to an infant on condition of the father's acquiescing in the donor's appointment; but if the father refuse to accede, then the infant's interest is forfeited; though if there be a gift in the will to the father also, and he accept it, knowing the consequences, the father's assent is presumed, and the appointment will stand good.

Before acting, which is virtually an acceptance of the office, the guardian may refuse to take the burden of the office upon him, though not after he has acted; and in case of a refusal before acting, new guardians are appointed by the court on petition.

There are cases in which the property of the infant being inconsiderable, a guardian has been appointed (the father being an improvident person) without a bill filed, and merely on a petition; and sometimes it is done without even a reference to the master to inquire if it be expedient, which is in general ordered. The conduct of an ordinary guardian may be called in question before the court by petition, but the testamentary guardian will only be displaced on a bill filed. A testamentary guardian, and still less an ordinary guardian, cannot change

¹ 2 Russel, 1; 2 Bl. N. S. 124; 1 Dow, N. S. 154.

the nature of the infant's estate; he cannot sell real estate, and convert it into personal; nor with the personal estate buy real, and so convert it into real. If he do so, the money produced in the former case, on the child's death, passes to the representatives of the infant as real estate; and in the latter case the real estate purchased passes as the personal would. Otherwise, great injury might arise to the infant's heir or next of kin.

The guardian is the proper judge at what school to place his ward; and the court will not indulge the infant in being put with a private tutor, or in changing his school; and if he should refuse to go to school, will compel him. But in the case of a female ward above the age of puberty and marriage, some weight will be given to her inclination, as to with whom she should reside and be educated.

If guardians disagree as to the management of their ward, the guardianship devolves upon the court; and where there were differences between guardians as to the education of the ward, parol evidence was held to be admissible of the intent of the father. Indeed, in such cases, all sorts of evidence, it has been said, are received, to govern the court in its discretion.¹

The court, unless the *father* is of ability to do so by his own means, usually directs part of the interest of an infant's property to be devoted to the maintenance and education of the infant; the amount so applied being proportioned to the value of the property. This allowance is given to the father and mother, or other person who has the charge of the infant, for its maintenance; and in some instances the court has allowed even the capital itself to be broken in upon for a child's advancement and putting out into the world; but this always requires the sanction of the court.

With regard to the *marriage* of infant *wards of court*, the sanction of the court is always requisite, or the parties concerned in its completion may be severely punished, there being nothing of which the court is more jealous than its protection of infants and their marriages. And where, upon the slightest evidence, there is an anticipation of an attempt of this nature, the court will restrain the least communication between the parties by letter or otherwise. It will remove a guardian who gives the least sanction to such an event; and all persons abetting are guilty of a contempt of the court, and may be punished by imprisonment, or even indicted. The husband also may be imprisoned and debarred of his wife's visits till he conform and make such settlement of the wife's property on her as the court shall approve of, which sometimes goes the length of depriving the husband (as in case he has no property) of any participation whatever in the *ward's* fortune.

Infant Mortgagees, &c.—Arising out of the general incapacity of infants is the doctrine of infant trustees and mortgagees. Before the 7 Ann. c. 19, if an estate descended to an infant as a trustee or mortgagee, as he had no power to execute any deed or conveyance, the *cestui que trust*, or the mortgagor, was put to the incalculable inconvenience of having to wait till the infant came of age before he could have his estate re-conveyed to him. To remedy this, the above and subsequent statutes have from time to time been made, and finally the

¹ *Mad. Chan.* 311.

1 Wm. IV. c. 60, which consolidates them, and provides, by § 4, that, by the direction of the Court of Chancery, such infants shall be empowered to convey as effectually as though they were of full age, and by § 5, where the property is situate within a county palatine or in the principality of Wales, by the direction of the palatine court. If they refuse to convey, then the court is empowered by § 22 to appoint new trustees for the purpose. This, however, only extends to what are termed *bare trusts*, namely, where the infant trustee has no interest, nor any duty to perform beyond that of merely conveying.

3. *The legal duties of children towards their parents* lie in a very narrow compass. They are, as we have already shown,¹ bound to maintain their parents, in case of their ability to do so, where the latter are unable to maintain themselves. And children are justified in defending their parents by force, or maintaining a suit or cause for them.

II. BASTARDS.—1. *Who are Bastards.*

A bastard is a person who is not only begotten, but is born also, out of lawful matrimony. If he be begotten before marriage, and the parties marry, the offspring born after marriage is not a bastard, but is regarded as a child of the husband, whether in fact so or not. If an infant is born so long after the death of the husband that it could not have been begotten by him, the infant is a bastard. We have already shown that no precise limit is fixed as to this time, and we mentioned the case of a child born forty-one weeks and three days after her husband's death having been held to be legitimate.

Where a widow is or pretends to be with child after her husband's death, his collateral heir may, in order to ascertain the fact, have a writ *de ventre inspiciendo*, on which the widow's person is examined by a jury of matrons, who determine whether she is with child or not; and if she be so, she may be kept within proper restraint till the birth. If not, such collateral heir is entitled to have the estate, though liable to lose it again if a child be born within forty weeks from the death of the husband, or such further time as that, in the course of nature, the child could have been begotten during wedlock.

If a child be born in wedlock, but by reason of the absence of the husband the impossibility of his access to his wife is shown, the child may be declared a bastard. But access is always presumed until the impossibility be shown. So where the husband is physically impotent, the wife's offspring is illegitimate. On a divorce *à vinculo matrimonii*, as the marriage is presumed illegal from the beginning, all the issue are bastards. After a divorce *à mensâ et thoro*, non-access is presumed until the contrary be shown; but on a separation by agreement, access is presumed in the first instance.

2. *The Duty of Parents towards their illegitimate Children.*

This principally consists in their obligation to maintain them.

Before the passing of the 4 & 5 Wm. IV. c. 76, when a woman was delivered of a bastard child, and charged any person on oath as being the father of it, he might, at the instance of the overseers or other parish

officers, be immediately apprehended and committed, if he did not give security to appear at the sessions, that an order for its maintenance might be made on him. He was also chargeable for the surgeon's bill and other expences attending the birth, his apprehension, and the order of filiation; though these were subject to the discretion and allowance of the magistrates or a court of quarter sessions. If, on examination, the mother refused to answer questions put to her, she might be committed; but she was not compellable to appear and be examined till the expiration of one month after her delivery. An order might be made on her alone, or on her conjointly with the man. Either the overseers or the parties charged might appeal to the sessions against the order; and it might be removed into the Court of Queen's Bench for final decision. The order could be enforced by proceeding on the recognizance, by commitment of the party, or by sale of his property if he ran away, or, upon an order of the Court of Queen's Bench, by attachment, or by indictment. Besides being thus obliged to provide for such children, the parents were liable to be committed to prison, at the discretion of justices, for any time not exceeding a twelvemonth, and not less than six months; though the woman could not be committed till a month after her delivery.

But by 4 & 5 Wm. IV. c. 76 (Poor Law Amendment Act) all former statutory provisions as to the indemnity of parishes against the charge of bastards born after the passing of that act were repealed. No sureties could be required before the birth, nor any order of filiation made upon the father after the birth. Nor could either the father or mother be punished in respect thereof. When, however, by reason of the inability of the mother to provide for its maintenance, the child became actually chargeable, the overseers or guardians might, on giving the father fourteen days notice, apply to the quarter sessions for an order to reimburse the parish for its maintenance; and if they suspected that he was likely to abscond, might summon him before a justice, who, on being satisfied of such his intention, could require him to give security for his appearance at the sessions, or in default thereof commit him until the application should be heard. If the sessions were satisfied that the party charged was really the father, it might make such order as should appear just and reasonable under all the circumstances of the case, not exceeding the actual expences incurred or to be incurred for the maintenance of the child, to continue in force until the child should attain the age of seven years; and if the court thought fit, the costs of the child's maintenance might be reckoned from the birth, if within six months of the hearing of the application, or otherwise from the commencement of the preceding six months. But no such order could be made unless the evidence of the mother were corroborated in some material particular by other testimony; and no part of the money paid by the father was to be given to the mother, or in any way applied to her support. If the court did not make an order, the expences of resisting the application were paid by the overseers or guardians; and if an order were made, the putative father might appeal against it to a subsequent sessions.

Now, however, by 7 & 8 Vic. c. 101, all previous powers of making an order upon any putative father for the maintenance of a bastard

child have been repealed, and other provisions are substituted to the following effect.¹

Any single woman being with child, or having been delivered of a bastard child, may, either before the birth, or at any time within twelve months afterwards, or at any time thereafter upon proof that the father has within twelve months after the birth of the child paid money for its maintenance, make application to a justice of peace acting for the place in which she resides for a summons to be served on the man alleged by her to be the father of the child; making a deposition upon oath, if the application is before the birth, stating who is the father of the child; and such justice shall thereupon issue his summons to the alleged father to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place for which such justice usually acts. And the 8 & 9 Vic. c. 10, reciting that doubts had been entertained as to the time to be fixed by the justice for the appearance of the man so summoned at the petty session, enacts, that the justice to whom any application is made by any such woman being pregnant shall summon the man to appear at some petty session to be held on a day after the time when the mother shall expect the child to be born: providing, that if on such day the woman shall not have been delivered, or the justices at the petty sessions shall be satisfied that she has been delivered at so short a period before such day that she cannot appear at the same session, they may adjourn the hearing until some other day, and so from time to time until the child shall have been born and the woman shall be able to attend.

And after the birth of the child, on the appearance of the person so summoned, or on proof that the summons was duly served, the justices in petty session shall hear the evidence of the woman, and such other evidence as she may produce, and also any evidence tendered by or on behalf of the alleged father; and if the evidence of the mother be corroborated in some material particular by other testimony, they may adjudge the man to be the putative father of such bastard child; and may also, if they see fit, having regard to all the circumstances of the case, proceed to make an order on him for the payment to the mother of a sum of money weekly, and of the costs incurred in obtaining the order, including, if they think proper, 10s. for the midwife, and 10s. towards the funeral expences if the child have died before the making of the order. And if the application be made before the birth of the child, or within two calendar months afterwards, such weekly sum may be calculated from the birth, at a rate not exceeding 5s. per week for the first six weeks; but in other cases not exceeding 2s. 6d. per week from the time of making the application.²

At such petty sessions the woman may be assisted, and the alleged father may appear and make answer, by counsel or attorney.³

The petty sessions may adjourn the hearing of the case as often as

¹ This act has been amended by the 8 & 9 Vic. c. 10, which provides forms to be used for the various proceedings in bastardy, the want of which had given rise to much uncertainty as to the validity of orders previously made under it.

² Any one magistrate of a police court in the Metropolitan Police District may issue summonses, and exercise all the powers in matters of bastardy, which may be done elsewhere by the justices at petty sessions.—8 & 9 Vic. c. 10, § 9. ³ *Ibid.* § 7.

may seem fit. But no order shall be made unless applied for at such sessions within the space of *forty days from the service of the summons* after the birth of the child. But the 8 & 9 Vic. c. 10, enacts, that it shall be lawful for the petty session to make an order in respect of an application made to a justice by such woman so pregnant, if she apply to the petty session within *two calendar months from the birth of the child*, although more than forty days have elapsed from the time when the summons was served.

If at any time after one month from the making of the order it be made appear to any one justice, upon oath or affirmation, that any sum due in pursuance of such order has not been paid, such justice may, by his warrant, cause the father to be brought before two justices; and in case he neglect or refuse to pay the sums due, together with the costs attending the warrant, apprehension, and bringing up, such justices may direct the same to be recovered by distress and sale of his goods and chattels, and may order him to be detained until return can be made to the warrant of distress, unless he give sufficient security for his appearance before two justices on the day appointed for the return, such day not being more than seven days from the time of taking the security. If upon the return of the warrant, or by the admission of such putative father, it appear that no sufficient distress can be had,⁴ such justices may, by their warrant, cause the putative father to be committed to the common gaol or house of correction for any term not exceeding three calendar months, unless such sum and costs with the charges be sooner paid. But if the woman have allowed the weekly payments to be in arrear for more than thirteen weeks without application to a justice, the man shall not be called upon to pay more than the amount due for thirteen weeks in discharge of the whole debt.

The putative father may appeal against the order to the quarter sessions, upon giving notice within twenty-four hours to the mother, and within seven days entering into security by recognizance or otherwise before a justice of peace for the payment of costs.⁵

On the trial of the appeal, the quarter sessions shall hear the evidence of the mother and such other evidence as she may produce, and any evidence on behalf of the appellant; but shall not confirm the order unless the evidence of the mother be corroborated in some material particular by other testimony.⁶

All money payable under the order shall be paid to the mother so long as she lives and is of sound mind, and is not in any gaol or prison, or under sentence of transportation. But in case of her death, or if she become of unsound mind, or be confined in a gaol or prison, or under sentence of transportation, two justices may appoint some person to have the custody of the child, who may apply for and

⁴ Within the jurisdiction of such justices 8 & 9 Vic. c. 10, § 3.

⁵ Notice of his having entered into such recognizance must be forthwith sent to the woman, and (unless it be entered into before one of the justices who made the order) to one at least of such justices; otherwise the appeal will not be allowed. Notice by post is sufficient.—8 & 9 Vic. c. 10, § 3.

The putative father may abandon the appeal at any time before the hearing, and save his recognizance, by giving notice in writing to the justice before whom it was taken, and to the mother, and paying her all sums then due and the expences of the appeal.—*Ibid.* § 5.

⁶ 8 & 9 Vic. c. 10, § 6.

recover all payments due under the order, so long as the child is not chargeable to any parish or union, in the same manner as the mother might have done.⁷

No order for the maintenance of a bastard child in pursuance of this act shall, except for the purpose of recovering money previously due, be of any force after the child has attained the age of thirteen years, or after the marriage of the mother, or the death of the child.

Every woman neglecting to maintain her bastard child, being able wholly or in part so to do, whereby it becomes chargeable to any parish or union, shall be punished as an *idle and disorderly person* under the 5 Geo. IV. c. 83 (Vagrant Act); and every woman so neglecting to maintain her bastard child, after having been once before convicted of such offence, and every woman deserting her bastard child, whereby it becomes chargeable to any parish or union, shall be punishable as a *rogue and vagabond* under the said act.

The settlement of a bastard born since the passing of the 4 & 5 Wm. IV. c. 76 (Poor Law Amendment Act) follows that of the mother until the child attains the age of sixteen, or acquire a settlement in his own right. And the mother, as long as she is unmarried or a widow, is bound to maintain such child until the age of sixteen, or till marriage if a female; and all relief to it is considered as granted to the mother. But if she marry, her husband will be bound to maintain all her children, legitimate or illegitimate, as part of his family, and will be chargeable with all relief granted to them until they arrive at the age of sixteen, or till the death of the mother.

3. *The Rights and Incapacities of Bastards.*

• A bastard can inherit nothing; for, being regarded *in law* as the child of no one, he can take nothing by descent, not even his surname, though he may acquire that by reputation. Nevertheless, the law prohibits him from marrying with his putative sisters or his mother; and if under age, the consent of his putative father or guardian specially appointed is necessary to his marriage by licence. The father has no right to the custody of such child during its infancy, the mother having the preference.

Neither can he have heirs, except those descending lineally from his own body; though he may be made legitimate by act of parliament. A bastard cannot take any thing under a will under the description of *children*, though he may if properly described. Neither can he take upon a limitation while *en ventre sa mere*; for he can gain no name by reputation until he is born, and the law is against the presumption of a woman being with child of a bastard. If he die seised of real estate of inheritance, intestate and without issue, the estate goes to the crown or other immediate lord of the fee. But this is usually given to his family, the crown reserving perhaps a tenth part of it.

Though in favour of children courts of equity sometimes supply defects in conveyances, as in surrenders of copyhold, yet they will not do so in favour of bastards.

⁷ The clerk to the justices making an order on the putative father, or appointing a person to have the custody of the child, shall send a duplicate of each order or appointment to the clerk to the guardians of the union or parish in which the mother resides at the time of making the order or appointment.

CHAPTER XVIII.

Of Guardian and Ward, and of Infants in General.

WE have already shown that the father is the proper guardian of a child while living, and that he has also the power to appoint guardians to his children by his will, which subject has been already fully discussed. It also seems, that if no guardian is otherwise appointed, an infant, either before or after fourteen years old, may appoint to himself a guardian, by writing or parol; but this does not preclude the Court of Chancery from appointing another. Guardians *ad litem* may also be appointed at the will of the infant, either by a court of common law or of equity, or by a judge at chambers.

A guardian has all the power over his ward which a father would have; though, like the father, he is in fact a mere trustee, accountable to the infant when of age, and responsible for all acts of wilful neglect and default, unless he act under the authority of the Court of Chancery. He can do nothing but for the benefit of the ward. Thus, he cannot purchase from or sell to the ward an estate. He cannot present to a church. But leases made by him for any period till the ward is twenty-one years old, may be good; and even if they extend beyond that time, they are only voidable, not void.

An act of partition, if otherwise equal and fair, made by a guardian, will bind the ward. A guardian ought to sell all moveables in a reasonable time, and turn them into money or land, unless the ward is near of age and may then want them. And he will be liable for interest of money in his hands which might have been put out at interest. He cannot change the nature of the ward's property without the sanction of the court, or unless it is obviously for the ward's benefit. If he take a bond for a debt as arrears of interest, where by suing &c. he might have obtained the money, he will be held responsible on the bond. He may pay out of the profits of an estate the interest of real incumbrances, though not of any other; yet he cannot borrow money for that purpose, so as to make the ward or his estate liable.

As questions of the liability of guardians so often arise, it is generally preferable for them to take the advice of the Court of Chancery before they do any important act. They are always, except in a very gross case, allowed the costs of so doing; and they may, without it, bring themselves into considerable difficulty. The answer of an infant, which must be put in by his guardian for him, and is in fact the guardian's answer, cannot be read against the ward, though it may against the guardian.

They are not allowed any thing out of the ward's estate for their personal trouble; but, in their accounts, all just allowances and reasonable expences are given to them. If they are robbed of the infant's property, or it be lost by unavoidable accident, they are not liable.

But all transactions and settlements between the guardian and ward are closely watched. Accounts settled during nonage are liable to be

gone over again; though if a receiver be appointed, his accounts with the guardian cannot. Gifts or advantages made by the ward to the guardian are in general regarded as void, the guardian being supposed to have too great a control over the ward; and this is extended to gifts &c. even after the ward becomes of age, if shortly following that event, and there is the least ground to suppose an undue influence was exercised.

It is to be observed, that a guardian may use almost any means to prevent a marriage of his ward without proper consent. He may detain her clothes, &c.; and a carrier by whom they are sent is justified in delivering them up to the guardian.¹

With respect to the full age of infants, it is different for different purposes in males and females. A male at twelve can take the oath of allegiance; at fourteen is at years of discretion, may consent or disagree to marriage, may choose his guardian, and, if his discretion were actually proved, might, before the passing of the recent Wills Act (1 Vict. c. 26), make his will of personal estate; at seventeen he may be executor, though not an administrator; and at twenty-one he is at his own disposal in all things. A female at twelve may agree to marriage, and, if of real discretion, might (before the 1 Vict. c. 26) make a will of personal estate; at fourteen she may choose a guardian; and as to the rest, the same as a male. *

The law knows in these cases no division of a day; therefore if a child is born one minute before twelve o'clock at night on the 16th February, it will be of age on the first minute after twelve on the 15th February twenty-one years thence, though in fact nearly forty-eight hours short of twenty-one years of actual existence.

Infant's General Disabilities.

These are rather immunities than disabilities, being intended to prevent them from injuring themselves by their own improvidence. Thus, as we have seen, they must sue and be sued by a guardian, or by a *prochein ami*. In criminal cases they cannot be capitally convicted under seven years of age; and it depends on the consciousness of good and evil in their minds until fourteen years old; after which time there is no doubt of their being responsible for all criminal acts.

With respect to *civil* immunities, an infant cannot be barred by non-claim or neglect of demand, nor laches, except in some very particular cases. He cannot in general bind himself by any contract, but that it is, after he comes of age, voidable. Yet he can present to a vacant benefice; and he may bind himself apprentice for seven years. And he will be liable for necessities supplied to him while under age according to his rank and condition in life; what are necessities always depending on the particular circumstances.

If, however, an infant holds any corporate character, he may in such corporate character exercise rights, and do acts, as persons of full age.

He may in general hold the office of park-keeper, forester, gaoler, sheriff, &c.; but not any offices in the administration of public justice, or of pecuniary trust, or where he cannot appoint a deputy. He cannot sit in either house of parliament, nor be a juror, nor a mayor of a corporation.²

¹ 1 Chit. Bla. Com. 63, notes.

² See 1 Chit. Bla. Com. 464—6, and notes.

CHAPTER XIX.

Of Idiots and Lunatics.

NON COMPOS MENTIS is a genus of four kinds:¹ 1. *Idiots*, who are of non-sane memory from their birth by a perpetual infirmity; and therefore persons are not such who have a glimmering of reason. But a man born deaf, dumb, and blind, is looked on in law as an idiot necessarily. 2. Those who lose their memory or understanding by the visitation of God, as by sickness or other accident. 3. *Lunatics*, who are periodically possessed of sane moments. 4. *Drunhards*.¹

By the 17 Edw. II. st. 1. cc. 9, 10, the crown has the guardianship of idiots and lunatics and their property; but the statute did not give the guardianship of their copyhold lands, on account of the prejudice which would accrue to the lord of the manor.

By the old common law there was a writ to inquire whether a man were an idiot, which was tried by a jury of twelve men; and if found *purus idiota*, the profits of his lands and the custody of his person were granted by the crown to some subject who had interest enough to obtain them.

Now the custody of lunatics &c. is generally committed to the lord chancellor, a jurisdiction not annexed to the office of the custody of the great seal, but granted to him by special authority under the queen's sign manual for this purpose. Hence no appeal lies in lunacy from the chancellor to any one but the queen in council.² Neither has the master of the rolls any jurisdiction in lunacy.³

An *idiot* is presumed in law to be incapable of ever attaining a competent degree of understanding to govern either himself or his estate;⁴ therefore the crown may grant the custody of his person and the profits of his estate during the life of the idiot, without rendering any account, except for necessaries. However, since the Revolution, the crown has always granted the surplus profits of the estate of an idiot to some of his family.⁵ But of a *lunatic's* estate the crown is merely a trustee, since such a person is presumed in law capable of recovering his understanding; the custody, therefore, of his person and estate is granted to one or more persons, styled his committee, only during the lord chancellor's pleasure; and this committee, deducting a suitable maintenance for the lunatic and his immediate family, if any, shall account to the lord chancellor for the surplus profits, and pay them over, either to the lunatic, if he recover, or to his legal personal representative after his death.⁶

A commission of lunacy is obtained by presenting a petition to the lord chancellor, accompanied by sufficient affidavits, that an inquisition may be ordered. On this a commission issued under the great seal, formerly to one or more commissioners appointed for the occasion, who thereupon sent their warrant to the sheriff to summon a jury; or, where the property was small, a less expence was incurred by a reference to a master in chancery, who declared the state of mind

¹ Roehort v. Ely, 1 Ridgw. P. C. 532, App. Chit. Burn. J. 563.

² Mad. Chan. 724, and Casca, n. (s).

³ Id., and 1 Collinson, 105.

⁴ Beverley's Ca. 4 Co. 126; 2 Inst. 11; Reg. Brev. 267; F. N. B. 532.

⁵ 1 Ridgw. P. C. 519, App. n. 1

⁶ Id. 520, App. n. 1.

of the party.¹ But, by the 5 & 6 Vic. c. 84, the lord chancellor was empowered to appoint two perpetual commissioners, who are now (8 & 9 Vic. c. 100) called "Masters in Lunacy," to whom, or one of whom, all commissions in the nature of writs *De lunatico inquirendo* are directed, and all matters connected with the persons and estates of lunatics are referred.

When a party is found lunatic, committees of his person and estate are appointed. The committee is allowed a sum certain out of the lunatic's property for his maintenance and support,² always having regard to the present comfort and interest of the lunatic, rather than to the future interest of the next of kin; though sometimes the court will order an allowance to be paid to some of the relatives.³

As to the right of the party or his friends to quarrel with the finding of the jury (which is called *traversing* the inquisition), the right exists that the party be examined by the lord chancellor in the Court of Chancery personally;⁴ and this right cannot be refused.⁵

All acts done by a person *non compos mentis* are void. He is wholly incapable of doing any act in the eye of the law; but he cannot himself avoid them.⁶ But mere weakness of mind is not sufficient to set aside an act done by its possessor, unless fraud be shewn by the other party,⁷ in which case equity will interpose, even where such weakness proceeds from drunkenness, if it be contrived by such other party.⁸ But the law does not regard *drunkenness* as a general excuse for any crime or folly, holding the maxim, "*Qui peccat ebrius, luat sobrius.*"

A lunatic may, in a sane or lucid interval, contract a marriage; but otherwise it is absolutely void.⁹ To make a will, he ought to have a disposing memory, and it must be during a lucid interval, when he is able to make a disposition of his estate with understanding and reason.¹⁰ He cannot be punished for crime, but a person inciting him thereto shall be regarded as the principal offender; but he, or rather his estate, is liable for civil offences, and in certain cases of contract, as for necessities.¹¹

The committee of a lunatic, under the authority of the court, or by act of parliament, act for him. Thus, by 11 Geo. III. c. 30, the committee, under sanction of the court, may renew leases upon lives, may execute a power of leasing,¹² and may sell or charge lands to pay debts of lunatic, or expences of the commission of lunacy. But the surplus of the sale, after the purposes thereof are answered, go to the heir or next of kin, in the same manner as the property would have done if it had not been sold. So, by 1 Wm. IV. c. 65, with such sanction, he may make agreements touching the lunatic's estate, grant leases, con-

¹ 2 Mad. Chan. 726, 732.

² See id. 740, &c.; and Chit. Eq. Index, 671, 2.

³ 2 Mad. Chan. 743; and as to the mode of the committee's passing his accounts, see id. 744.

⁴ *Exp. Southeste*, Amb. 109; 2 Mad. Chan. 726. See generally as to traverse, and by whom, cases in 1 Chit. Ind. 670; 2 Mad. Chan. 734 *et passim*.

⁵ *Sherwood v. Sanderson*, 19 Ves. 280; *Exp. Ferne*, 5 Ves. 832; *Exp. Wrang*, id. 450.

⁶ *Beverley's Case*, 4 Rep. 123; *Foster v. Marchant*, 1 Vern. 262.

⁷ *Osmond v. Fitzroy*, 3 P. W. 130; 1 H. P. C. 29, 30.

⁸ *Cook v. Clayworth*, 18 Ves. 12; *Kendrick v. Hopkins*, Cary, 33; 1 Inst. 247; 1 Hawk. c. 1, § 6; 1 H. P. C. 32; 1 Chit. Burn. Just. 100, tit. *Alchouses*.

⁹ 3 Ch. Burn. J. 665; 15 Geo. II. c. 30.

¹⁰ 6 Co. Rep. 23; 3 Ch. Burn. J. 665.

¹¹ 3 Ch. Burn. Just. 663.

¹² *Foster v. Marchant*, 1 Vern. 262.

vey in performance of contract, and surrender or renew leases. So he may transfer and convey stock belonging to the lunatic, or standing in his name as trustee, and may sell lands for payment of debts.¹

The statute 6 Geo. IV. c. 74 provides for the lunacy of trustees and mortgagees generally.

Board of Visitors of Lunatics.—As these unfortunate persons are necessarily subject to the control of others, who might sometimes be tempted to abuse the powers entrusted to them, the legislature has interfered in a variety of ways for their protection. The act 3 & 4 Wm. IV. c. 36 empowered the lord chancellor to appoint a Board of Visitors, consisting of three physicians and one barrister, with a secretary, for superintending, inspecting, and reporting upon the care and treatment of all persons *found idiot, lunatic, or of unsound mind by inquisition*; and the two commissioners, now masters in lunacy, appointed under the 5 & 6 Vic. c. 84, are *ex officio* visitors jointly with this board. Every person found idiot, lunatic, or of unsound mind by inquisition, must be visited at least once a year by one of such medical visitors, and a report made to the lord chancellor of the state of mind and bodily health, general condition, and the care and treatment of each such person. Such reports to be filed in the office of the visitors, but kept secret (being open only to the inspection of the visitors, their secretary, and the lord chancellor, or such persons as he may specially appoint), and to be destroyed on the death of the patient, or on the supersedeas of the commission. For defraying the expences of the board, the lord chancellor may order a per-centage, not exceeding $1\frac{1}{2}$ per cent, on the annual income of each lunatic, to be paid by the committee or receiver of his estate.

Lunatic Asylums, &c.—The asylums for the reception of lunatics, both of a public and private nature, have also been made the subjects of strict legislative regulation. The last statute, which, repealing all prior enactments, consolidates the law on this subject, is the 8 & 9 Vic. c. 100. By this act a board is appointed, called "The Commissioners in Lunacy," for the purpose of licensing and visiting houses for the reception of insane persons in London and Westminster, the county of Middlesex, and borough of Southwark, and every other place within seven miles of the said cities and boroughs; all which places are styled in the act "the immediate jurisdiction" of the commissioners. Elsewhere the quarter sessions have the like authority to license such houses, and appoint visitors thereof, as also to appoint either the clerk of the peace or some other person to act as clerk to such visitors.

The commissioners meet on the first Wednesday in February, May, July, and November; and persons desirous of having a house licensed for the reception of lunatics within the immediate jurisdiction of the commissioners must give fourteen clear days notice to the commissioners prior to one of such meetings. Elsewhere a like notice is to be given to the clerk of the peace previous to the general quarter sessions. Such notice must contain the name of the person applying, and (if he does not intend to reside in the house himself) the name and previous occupation of the proposed superintend-

¹ See 43 Geo. III. c. 75, § 3; 58 Geo. III. c. 78, extending these provisions III. c. 80, § 2, extending to copyholds; to Ireland; and 1 Wm. IV. c. 65.

ent, and if for a house not previously licensed, must be accompanied with a plan of the premises, on a scale of at least one-eighth of an inch to a foot, with a full description thereof, and of the greatest number of patients proposed to be received therein. In case of any future alteration in the premises, a similar notice must be given. Any untrue statement is a misdemeanor.

Licences are granted for not exceeding thirteen calendar months; and a fee of 10s. for every patient, and 2s. 6d. for every parish pauper proposed to be received, (not being in any case less than 15l.) is payable thereon, besides the stamp duty, which is 10s. But if a licence is granted for a shorter period, the commissioners or justices may reduce the payment to not less than 5l.

Every licensed house containing 100 patients must have a *resident* physician, surgeon, or apothecary; and every house containing less than 100 and more than 50 must be *visited twice a week* by a physician, surgeon, or apothecary. The commissioners or visitors, however, may permit any house licensed for less than 11 patients to be visited by the medical attendant once in four weeks, instead of twice a week. Such resident or visiting medical attendant must draw up and sign a statement once a week of the health of all the patients and of the condition of the house, to be entered in a book, called "The Medical Visitation Book," which is to be kept in every such house, and regularly laid before the visitors.

Three commissioners are to visit all licensed houses within their jurisdiction *four times* a year at least, without notice; and two visitors are to visit houses licensed ^{at} at quarter sessions *twice* a year. A book is to be kept, called "The Visitors' Book," for the result of inspection and inquiries; and another called "The Patients' Book," for observations as to the state of the patients. A copy of the plan given on obtaining the licence must also be hung up, and a queen's printers' copy of this act bound up in the Visitors' Book.

Two or more commissioners, or any two visitors, may visit any house *at night*.

No person (except a parish pauper) is to be admitted into any licensed house without an *order* under the hand of the person by whom he is sent according to the form in Schedule C, and a *medical certificate* of two physicians, surgeons, or apothecaries, who have separately examined the patient not more than seven days previous. If special circumstances, however, prevent the patient being examined by *two* medical practitioners, he may be admitted upon a certificate signed by *one*, provided it state such special circumstances, and be signed by some other medical practitioner within three days after admission. No parish pauper is to be admitted without an order under the hand and seal of a justice, or under the hand of the officiating clergyman and one of the overseers of the poor, and also a medical certificate by one physician, surgeon, and apothecary. At the time of admission of any patient a minute must be entered, in a book kept for the purpose according to Schedule E, of the name of the patient, and also of the name, occupation, and place of abode of the person by whom the patient is brought; and, within two days afterwards, the proprietor or superintendent must send a copy of the order and medical certificate,

with a notice according to Schedule E, to the commissioners, and another copy to the clerk of the visitors.

Within two days after the death, discharge, or removal of a patient, the proprietor or superintendent must make an entry in a book kept for the purpose according to Schedule G 1, and within the same time send a notice thereof and of the cause of death, according to Schedule G 2, to the commissioners, or to the clerk of the visitors, if out of the commissioners' jurisdiction.

Any person keeping a house for the reception of two or more insane persons without a licence, is guilty of a misdemeanor. And any person receiving to board or lodge in a house not licensed, or taking the care or charge of even one insane person, must have the order and medical certificate according to Schedules B and C.

The admission of a patient into any licensed house contrary to these regulations, or any physician, surgeon, or apothecary signing an untrue medical certificate, or the proprietor or regular professional attendant of such house, or the father, brother, or partner of any such, signing a medical certificate, or the proprietor or superintendent neglecting to transmit any notice, copy of order, medical certificate, or statement required by the act, is a misdemeanor.

County Lunatic Asylums.—By the 8 & 9 Vic. c. 126, provision is made for the erection and regulation of county lunatic asylums, and the more effectual care and maintenance of pauper lunatics.

For the management and superintendence of every such asylum, a committee of visiting justices is to be appointed yearly, at a special meeting of the general quarter sessions held within twenty days after the 20th of December, who shall have power to make regulations, appoint officers, and make orders upon the officers of unions and parishes for the maintenance of lunatics. To each asylum a chaplain, medical officer, and a clerk are to be appointed (removable by the committee); and the medical officer of each parish may visit the asylum three times a week. Any two justices may require any poor person deemed insane to be brought before them, and upon due examination cause him or her to be sent to such lunatic asylum.

Where the legal settlement of an insane person cannot be found, two justices may direct the charges of his removal and maintenance to be paid by the treasurer of the county; but if his legal settlement be afterwards ascertained, they shall make an order on the treasurer or overseers of the parish to which he belongs for the repayment of such expences.

If any insane person is wandering about, though not chargeable, justices may proceed as in the case of persons chargeable; but if the estate of such person be more than sufficient to maintain his family, they may order the overseers to levy sufficient to repay their expences. But nothing herein is to prevent any relation or friend from taking such insane person under their own care and protection.

All insane paupers committed to any county lunatic asylum are to be kept safely, and not suffered to quit without an order of discharge from the visitors; and any officer, servant, or assistant permitting any such person to escape, is liable to a penalty of 20*l.* or not less than 40*s.*

CHAPTER XX.

Of Corporations.

CORPORATIONS are divided into two kinds; sole, and aggregate.

A corporation *aggregate* consists of several persons, united together in one society, and is kept up by a perpetual succession of members, so as to continue for ever; as the corporation of London.

A corporation *sole* is composed of one person; as the king, or a bishop.

Corporations, again, are divided into *ecclesiastical* and *lay*. Of the former are all archbishops, bishops, archdeacons, parsons, and vicars, which are sole corporations; and deans and chapters, which are bodies aggregate. *Lay* corporations are again divided into *civil*, as any trading company, the Bank of England for instance; and *eleemosynary*, as hospitals, and other perpetual charitable institutions.

Corporations are either founded on prescription, or they are erected and created by act of parliament, or by royal letters patent.

Every corporation must have a name, by which it must sue or be sued; but neither is its name immutable, nor will a slight variation of the name in a deed, in general, be material, or fatal to its interests.

Another attribute of corporations is perpetuity; from whence, in all aggregate corporations, follows the power of electing fresh members as often as the former ones drop off. They must sue and be sued, grant and receive all things, in their corporate name, and do all other acts, as a natural person may. By the common law they could purchase lands, and hold them for the benefit of themselves and their successors: but now, since the passing of the Mortmain acts, they cannot purchase or hold lands, but by licence from the crown, or by act of parliament; though they may freely alien or lease by deed such as they lawfully hold. They have a common seal, which verifies all their acts, except some few trifling acts, which may be done by their head or other officer without deed; as retaining servants, authorizing a distress on a tenant, giving notice to quit to a tenant from year to year; and they may, under particular enactments, give promissory notes and bills of exchange, &c. They may also make bye-laws and regulations for their own governance, provided they are not against the law of the land.

A corporation can only appear by attorney, and not personally; and there are other incidents of a like nature, as its incapacity to commit assault or treason. The modes of election to a corporation, and all things consequent thereon, are generally regulated either by its charter, or else by prescription or immemorial usage. If by none of these, then it may be by bye-law. If a party be duly elected, and his admittance is refused, he may compel the body to admit him by a mandamus of the Court of Queen's Bench, or by information. And the same means must be resorted to in order to compel an election, or to force one duly elected to take upon him the office to which he is appointed.

¹ 1 Chit. Bla. Com. 467, &c., and notes; 2 Chit. Com. Law, 213, &c.

The abuses of all civil corporations may in general be redressed by the Court of Queen's Bench, which, under its authority delegated by the crown, acts as the general visitor of all such institutions.

Corporations may be dissolved either by act of parliament, or by the natural death of all its members, none having been appointed to fill up vacancies. It may also surrender its franchises, or forfeit its charter. Individual members may either be removed, or may resign of their own accord. The cause of removal is always triable by a *mandamus* by the Queen's Bench.

By dissolution, the rights and liabilities of a corporation become at once extinct; debts due from it cannot be recovered, and debts due to it in like manner are at an end; nor has any individual member afterwards any right or liability in either case.

CHAPTER XXI.

Of Friendly Societies.

THE 10 Geo. IV. c. 56, repealing all prior acts, consolidated the law on this subject, but has since been amended by the 4 & 5 Wm. IV. c. 40, and 9 & 10 Vic. c. 27.

By the first-mentioned act, as amended by the 4 & 5 Wm. IV. c. 40, it was enacted, that it should be lawful for any number of persons to form themselves into a society for raising, by subscription of the members, or by voluntary contributions, or by donations, a fund for the mutual relief and maintenance of the members, their wives, children, relations, or nominees, in sickness, infancy, advanced age, widowhood, or any other natural state or contingency whereof the occurrence is susceptible of calculation by way of average, or *for any other purpose which is not illegal*; and for the members to assemble together, and make rules for the regulation of such society,¹ and to alter and amend the same as occasion shall require. But doubts having been entertained as to what purposes might or might not be comprehended under this provision, the 9 & 10 Vic. c. 27, repealing so much of it as relates to the objects or purposes for which such societies may be formed, enacts, that a society may be established under the said acts for any of the following purposes:—

1. For the lawful insurance of money to be paid on the death of the members to their husbands, wives, or children, kindred, or nominees, or for defraying the expences of the burial of the members, their husbands, wives, or children: Provided, that no person under the age of six shall be allowed to become a member of such society, and that no insurance shall be effected on the life of any child under six years of age.
2. For the relief, maintenance, or endowment of the members, their husbands, wives, children, kindred, or nominees, in infancy, old age, sickness, widow-

¹ These societies are expressly exempted from the provisions of the 39 Geo. III. c. 79, and 57 Geo. III. c. 19 (Corresponding Societies and Seditious Meetings Acts), by the 9 & 10 Vic. c. 27, § 9.

- hood, or any other natural state of which the probability may be calculated by way of average.
3. Toward making good any loss sustained by the members by fire, flood, or shipwreck, or by any contingency of which the probability may be calculated by way of average, whereby they shall have sustained any loss or damage of their live or dead stock, or goods or stock in trade, or of the tools or implements of their trade or calling.
 4. For the frugal investment of the savings of the members, for better enabling them to purchase food, firing, clothes, or other necessities, or the tools or implements of their trade or calling, or to provide for the education of their children or kindred, with or without the assistance of charitable donations: Provided always, that the shares in any such investment society shall not be transferable, and that the investment of each member shall accumulate or be employed for the sole benefit of the member investing, or of the husband, wife, children, or kindred of such member; and that no part thereof shall be appropriated to the relief, maintenance, or endowment of any other member or person whomsoever; and that the full amount of the balance due according to the rules of such society to such member shall be paid to him or her on withdrawing from the society; and that no such last-mentioned society shall be entitled or allowed to invest its funds, or any part thereof, with the Commissioners for the Reduction of the National Debt.
 5. For any other purpose which shall be certified to be legal in England or Ireland by her majesty's attorney or solicitor general, and in Scotland by the lord advocate, and which shall be allowed by one of her majesty's principal secretaries of state, as a purpose to which the powers and facilities of the said acts ought to be extended: Provided, that the amount of the sum or value of the benefit to be assured to any member, or any person claiming by or through him or her, by any society for any purpose so certified and allowed as hereinbefore mentioned, shall not exceed in the whole 200*l.*; and that this limitation shall be inserted in the rules of every society established for any purpose so certified and allowed; and that no such last-mentioned society shall be entitled or allowed to invest its funds or any part thereof with the Commissioners for the Reduction of the National Debt.

But it is provided, that when a society is formed for any purpose in addition to that of providing relief, maintenance, or endowment in case of infancy, old age, sickness, widowhood, or other natural state as aforesaid, the contributions for every such other purpose shall be kept separate and distinct, or the charges defrayed by extra subscriptions of the members at the time such contingencies take place.—4 & 5 Wm. IV. c. 40, § 2; and 8 & 9 Vic. c. 27, § 3. And by § 4, the rules of every society established after the passing of this act shall provide, that a book or books be kept, in which all monies received or paid on account of any particular fund or benefit for which the rules of the society provide shall be entered in a separate account, distinct from the monies received and paid on account of any other benefit or provision.

The rules of every such society at its first establishment, and on every alteration thereof, must be certified by the barrister appointed for that purpose, now styled the Registrar of Friendly Societies. To this end, two copies, signed by three members, and countersigned by the clerk or secretary, (accompanied, in the case of an alteration of the rules, with an affidavit of the clerk or secretary, or one of the officers, that the provisions of the act have been complied with) must

be sent, with the fee of one guinea, to such registrar, for the purpose of ascertaining whether they are calculated to carry into effect the intention of the parties framing them, and are in conformity to law; and the registrar shall advise with the said clerk or secretary, if required, and give a certificate that the rules are in conformity with law, or point out in what parts they are repugnant thereto.

But the registrar shall not certify the rules of any society established after the passing of this act (9 & 10 Vic. c. 27) for the purpose of securing any benefit depending on the laws of sickness or mortality, unless such society shall adopt a table which shall have been certified to be a table which may be safely and fairly adopted for such purpose under the hand of the actuary to the Commissioners for the Reduction of the National Debt, or of some person who shall have been for at least five years an actuary to some life-insurance company in London, Edinburgh, or Dublin; and the name of the actuary by whom any such table shall have been certified shall be set forth in the rules, and printed at the foot of all copies of such table printed for the use of the society.

One copy of the rules, when certified, is returned to the society, and the other retained by the registrar; and the rules are binding and in force from the time they are thus certified.

The objects of the society, and the purposes to which the funds are to be applied, must be declared by the rules; as also in what shares and proportions, and under what circumstances, any member or other person is to be entitled to the benefit thereof.

It must also be provided by the rules of every society, that a general statement of its funds and effects (specifying in whose hands the same are), and of the various sums received and expended since the last account, shall be annually prepared by the proper officers, attested by two or more members as auditors, and signed by the secretary; and that every member shall be entitled to a copy thereof on payment of a sum not exceeding 6d.

The rules, when certified, can only be altered at a general meeting of the society duly convened, and with the assent of three fourths of the members present.

These societies may subscribe any part of their funds into a savings bank; or they are entitled to the same advantage as savings banks, of paying any sum, not less than 50*l.* at a time, direct into the Bank of England, to the account of the Commissioners for the Reduction of the National Debt, and of receiving interest for the same at the rate of £3. 0*s.* 10*d.* per annum.¹ Societies enrolled prior to the 28th July, 1828, under the repealed act (59 Geo. III. c. 128), are entitled to 3*d.* per cent. per diem interest.

Minors are capable of being members, and of acting as such, in the same manner as adults.

Any member of a friendly society, the rules of which do not prescribe the time when or the conditions on which members shall be allowed to withdraw themselves, shall be allowed to withdraw at any time from such society on giving written notice to the secretary or

¹ But see the exceptions to this privilege made by 9 & 10 Vic. c. 27, when declaring the purposes for which societies may be established under these acts.

other proper officer of his or her intention to do so, and on payment of all arrears due; but, after giving such notice, he shall not be entitled to have any benefit from the funds, or be liable to any further subscription or payment other than the amount of the arrears due at the time of giving such notice.—9 & 10 Vic. c. 27, § 2.

The society may appoint proper officers, who, if required by the rules, must enter into a bond (a form of which is given in the schedule to the act) to execute their respective offices duly; and the treasurer and trustee must give bond to the clerk of the peace, who is to sue in case of forfeiture, on being indemnified by the society.

Standing committees may also be appointed according to the rules to do all acts therein mentioned, and other acts described in a book kept for the purpose.

The treasurers and trustees are to lay out and invest all surplus contributions in real or heritable securities, or in the public stocks, savings banks, or government securities, &c., and apply the interest to the society's benefit.

These societies have a priority over all other creditors; and executors of officers must pay money due to the society *as such officers* before any other debts. The debt, however, must be due *officially*; and therefore if a society lend money to the officer upon any contract, it is not entitled to this priority; but the mere taking a security where a debt is incurred, and there is an impossibility or even a difficulty in obtaining the money due, does not, it seems, take away such advantage.

All actions or suits concerning the society must be carried on in the names of the trustees or treasurers. But these officers are not personally liable for any sums except those they respectively receive.

In case of neglect on the part of treasurers or trustees, application may be made on petition to the Court of Chancery. This proceeding is to be without fee or reward to any person, and the court will appoint a counsel and attorney to act also without reward.

In case a trustee or other person seised or possessed of any lands or other property of the society is out of the jurisdiction of the court, or is an idiot or lunatic, or it is uncertain whether he be living or dead, it shall be lawful for the registrar, in the name of such person, to convey, assign, or otherwise assure such property to the new trustee appointed in his stead; and where stock is concerned, the registrar may order a transfer thereof.

Cases of fraud may be determined before magistrates, who may punish the guilty party by fine and imprisonment, and levy a distress on the offender's goods to recover the money surreptitiously abstracted &c. and costs. If the rules direct reference in case of dispute to arbitration, and the society refuse to grant arbitration, justices of peace may determine the dispute; and in case a member is expelled, the arbitrators or justices may order him to be reinstated, or award him a compensation out of the society's funds.

Disputes between the trustees or managers and any member or officer, for the settlement of which, according to the laws now in force, recourse must be had to one of the superior courts of law or equity, may be referred in writing to the Registrar of Friendly Societies; and where the value of the matter in dispute does not exceed 20/.,

every such dispute shall be so referred, unless the attorney or solicitor general shall certify that such dispute ought to be decided by the judgment of a superior court of law or equity. And the award, order, or determination of the said registrar shall be binding and conclusive on all parties, without appeal.—9 & 10 Vic. c. 27, § 15.

Payments to persons who appear at the time to be the next of kin of a member dying intestate are valid, although it subsequently turn out that they were not next of kin; and the real next of kin's only remedy is against the party receiving the money. Where a member dies intestate, payment of money due, not exceeding 20*l.*, may be made by the society without requiring the production of letters of administration.

Within three months after the end of December, 1835, and so at the expiration of each subsequent period of five years, every such society is required to make a return of the rate of sickness and mortality experienced by it within the preceding period of five years, to the registrar, and according to a form prescribed by him; or on neglect thereof, after twenty-one days, it will cease to be entitled to the privileges of a society established under these acts. And by 9 & 10 Vic. c. 27, with such return must be sent a report of the assets and liabilities of the society; and this provision must be inserted in the rules of every society established after the passing of this act. A penalty of 5*l.* is imposed on the officer whose duty it is to make such return, for neglect thereof.

The rules of every such society, powers of attorney for the transfer of shares in the funds, receipts for dividends or for money paid to or by the society, bonds taken under the act, instruments on appointment of agents, certificates &c. of revocation of agency, and all instruments required by the act, are exempt from the stamp duties. And no fee is payable for oaths taken before magistrates in order to obtain payment of sick money.

The dissolution of any society, unless all the objects of its establishment are accomplished, can only take place by the consent of five-sixths in value of the existing members, and also the consent of all persons then receiving or entitled to receive relief, either on account of sickness, age, or infirmity. And, for the purpose of ascertaining the votes of such five-sixths in value, every member is entitled to one vote, and an additional vote for every five years he has been a member, but not exceeding in the whole five votes. Neither on a dissolution can the fund be divisible for other than the general objects of the society, or the party abetting the illegal dissolution is liable as in case of fraud, as already shown.

CHAPTER XXII.

Of Savings Banks.

MANY acts of parliament for authorising and regulating savings banks have been passed since the 57 Geo. III.; but the whole are consolidated in the 9 Geo. IV. c. 92, amended by the 3 & 4 Wm. IV. c. 14, and the 7 & 8 Vic. c. 83.

The object of these institutions is to enable poor persons to deposit small sums of money to a limited amount, whereon they may receive interest; and if the interest remains in the bank, it becomes principal, so that compound interest may be received. This is therefore a very convenient mode of investment for small sums, since the depositor may put in and withdraw money at any time free of expence, even for stamps.

Persons proposing to establish a bank for savings, must cause two written or printed copies of the rules, signed by two of the intended trustees, to be submitted to the barrister appointed to certify the rules of savings banks, for the purpose of ascertaining whether the rules are in conformity to law; and in the case of savings banks already established, two copies of all new rules, or alterations of original rules, must in like manner be submitted to the said barrister for the same purpose. And such barrister shall either certify on each of such copies that they are conformable to law, or point out such parts as may be repugnant thereto. When the rules and regulations have been certified by the barrister as aforesaid, one of the copies is to be returned to the institution, and the other to be sent to the Commissioners for the Reduction of the National Debt; and a copy of such rules so deposited, examined and proved to be a true copy, shall be received as evidence of such rules, and no certiorari shall be brought to remove them into any court of record.—7 & 8 Vic. c. 83, § 19.

No treasurer, trustee, or manager shall derive any benefit from such savings bank; though clerks may. Treasurers, actuaries, and cashiers, entrusted with the receipt or custody of any money, and all officers receiving salaries or allowances for their service from the funds of such savings bank, must give security by bond, with one or more sureties to be approved of by not less than two trustees and three managers, for the just and faithful execution of their respective offices.

The funds are vested in the trustees, and, on the death or removal of any trustee, vest in the succeeding trustees without any assignment or conveyance; and all actions or suits, criminal as well as civil, are carried on in their names.

Trustees or managers are not personally liable, except for their own acts, or where they are guilty of wilful neglect or default.

Persons having any of the funds or securities, books, papers, or property relating to the bank, must, upon demand made in pursuance of an order of not less than two trustees and three managers, or at a general meeting of the trustees or managers, give in their accounts, to be examined and allowed or disallowed, and, on like demand, must pay over all moneys, and assign and transfer or deliver up all securities and effects, books, papers, and property in their hands or custody, to such persons as the trustees or managers appoint.

The trustees must invest the funds, not less than 50% at a time, in the Bank of England or Ireland, and not in any other security; but this is not to prevent depositors from withdrawing their money at any time.

Central banks in towns are authorized to invest the money of branch banks in the neighbourhood of such towns in the Bank of England or Ireland; provided, that the treasurer of such branch banks certify to

the treasurer of the central bank, that the amount contributed by any one subscriber in any one year does not exceed the proportions here after limited.

If any order or declaration produced to the officer, for the purpose of paying moneys into the Bank of England or Ireland, contain any matter which is false or untrue, the sum paid becomes forfeited.

All moneys paid into the Bank of England or of Ireland on the account of savings bank are invested in Bank annuities or exchequer bills. Upon the payment of any money into the Bank by trustees of savings banks, the officer of the commissioners may issue a receipt, signed by one of the cashiers of the Bank for the amount of such payment, carrying interest at the rate of £3. 5s. per cent per annum. The interest on the money mentioned in the receipt is to be calculated half-yearly up to the 20th November and the 20th May, and carried to the account of the savings bank as additional principal; but no interest shall be paid for any fractional part of a penny.

Before the trustees make any order or draft for payment, they must execute an appointment under the hands and seals of not less than two trustees, the execution of which is attested by two managers, empowering some person to be agent for receiving the money; and every such appointment must be produced to the officer of the commissioners fourteen days at least before the payment of the money. The trustees may at any time revoke such appointment.

The trustees may draw for the whole or any part of any sum placed to their account, by drafts on the commissioners for the reduction of the national debt; which drafts being indorsed by the officer of the commissioners, and the interest added thereto, are to be paid by the cashiers of the Bank of England.

When by the interest received beyond the rate of interest payable to depositors, the joint stock or property of any savings bank shall be increased beyond what is required to meet its expences, the trustees or managers shall, within six months after the 20th of November in each year, ascertain, certify, and pay over to the commissioners the amount of such increased stock and property, reserving such portion as may appear necessary to meet current expences.

The interest payable to depositors is not to exceed £3. 0s. 10d. per cent. per annum. It may be calculated yearly, or twice a year, and added to the principal—if yearly, to be computed to the 20th November; if half-yearly, to the 20th May and the 20th November, or up to such times nearest to those periods as the interest shall be payable according to the rules.

Minors may become depositors: if under seven years of age, they may sign the declaration by proxy. At the age of fourteen or upwards, they may sign powers of attorney, except in cases of insanity or imbecility, upon proof of which repayment may be made (in the case of trust deposits) to the trustee.

The trustees may pay any sum of money in respect of any deposit by a married woman to her, unless the husband give to the trustees notice of such marriage, and require payment to be made to him.

Trustees or treasurers of any charitable or provident institution, or charitable donation or bequest, for the maintenance, education, or

benefit of the poor, may subscribe any part of the funds of such institution or society into the funds of any savings bank, to the amount of 100*l.* *per annum*, provided the amount do not at any time exceed 300*l.* in the whole, exclusive of interest. And friendly societies may subscribe the whole or part of their funds into a savings bank, without limitation. The receipt of the treasurer &c. of such friendly society or charitable institution is a sufficient discharge.

No sum can be paid or subscribed into any savings bank by any person without disclosing his name, together with his profession, business, occupation, calling, and residence. Trustees or managers may receive from a person acting as trustee on behalf of a depositor, whether such person is himself a depositor or not, any sum not exceeding the annual amount hereafter mentioned; provided that such trustee make such declaration on behalf of the depositor, and subject to the like conditions, as is required in the case of any person making a deposit on his own account; and all deposits made by a trustee are inserted in the books of the bank in the joint names of the trustee and the person on whose account the deposit is made. But no repayment can be made without the receipt or receipts of the trustee and the person on whose behalf the deposit was made, or of the survivor or survivors, or the executors or administrators of such survivor, except in case of the insanity or imbecility of the party on whose behalf the deposit was made, upon proof of which repayment may be made to the trustee.

Depositors in one bank are not to make deposits in any other; and every person on making his first deposit must sign a declaration, that he or she is not entitled to any deposit or subscription in or any benefit from the funds of any other savings bank; and if such declaration be not true, the deposit becomes forfeited to the Commissioners for the Reduction of the National Debt. But members of friendly societies and other charitable institutions, which are enabled to subscribe their funds into savings banks, are not thereby disabled from making deposits, either on their own account or as trustees for others.

The whole of any person's deposits may be taken from one bank and placed in another, upon production of a certificate of the amount from the managers of the bank from which they are withdrawn.

The amount of deposits by each depositor is limited to 30*l.* (exclusive of interest, in each year) ending on the 20th November; nor can a depositor exceed the sum of 150*l.* in the whole. And whenever the sum standing in the name of a depositor amounts in the whole to 200*l.* (principal and interest included), no interest is to be thenceforth paid on such deposit, so long as it continues at that amount.

A depositor, after having withdrawn a sum of money from a savings bank, may re-deposit, at any time within a year reckoning from the 20th November, any sum of money, provided it and the previous deposits made in the course of the year, taken together, do not exceed in such year the sum of 30*l.* additional principal money bearing interest.

By the act 3 & 4 Wm. IV. c. 14, depositors may purchase government annuities, not exceeding 30*l.* nor less than 4*l.* *per annum*: they may be granted to husband or wife separately, but no joint annuities are allowed.

In case any depositor shall die leaving not exceeding 50*l.* exclusive

of interest in the savings bank, and probate of his will or letters of administration, or notice thereof, be not produced to the trustees within a month from his death; and in the latter case, if not proved or letters of administration taken out within two months; the trustees may pay the money to the widow or party entitled to his effects; and if the depositor be illegitimate and die intestate, the trustees, with the authority of the barrister appointed to certify the rules of savings banks, may pay the money in such manner as if the depositor had been legitimate.

Every depositor must, once a year, produce his deposit book at the institution.

Powers of attorney &c. given by trustees or depositors, to make deposits, sign documents, receive money, &c., are, as in the case of friendly societies, not liable to stamp duty.

Annual statements of accounts are to be transmitted by each savings bank to the Commissioners for the Reduction of the National Debt, from which certain general accounts are prepared and laid before parliament.

By the 5 & 6 Vict. c. 71, military savings banks are established, under the control of the secretary at war; which act is amended by the 8 & 9 Vic. c. 27.

CHAPTER XXIII.

Of Insurance, and Insurance Companies.

INSURANCE, or assurance, is a contract whereby one party, in consideration of a stipulated sum, undertakes to indemnify the other against certain perils or risks to which he is exposed, or against the happening of some event. The party who takes the risk upon himself is called the *insurer*, or sometimes the *underwriter*, from his subscribing his name at the foot of the policy; the party protected by the insurance is called the *insured*; the sum paid to the insurer as the price of his risk is called the *premium*; and the written instrument in which the contract is set forth and reduced into form is called the *policy* of insurance.

The nature of this contract is throughout a contract of indemnity, and this principle ought always to be kept in view in considering questions relative to insurance.

I. SEA INSURANCES.

Who may insure.—The only disability to the party insuring is in the case of an alien enemy. From reasons of public policy, no insurance can be effected on the property of an alien enemy nor can it be enforced in law or equity, either during the war or at its termination. And though the policy be effected in the name of a British subject as trustee, or the property be of British manufacture and exported from England (in case of sea insurances), or though the war broke out subsequently, yet

the contract is *ipso facto* void. But if a war break out after the loss has happened, as well as after effecting the policy, then indeed the right to recover would only remain in abeyance, and could be enforced after the cessation of hostilities, if the crown had not (as it might do by prerogative) seized the alien's property; and if the policy were effected in the name of a trustee who was a British subject, he might recover for the loss even during the war. An alien enemy may, however, legally effect an insurance under a licence from the crown granted during a time of peace.

What may be insured.

1. *The Quality of the Subject Matter of Insurance.*—We have already seen as to the property of an alien enemy. The slave trade being now completely abolished by the law of England, it follows that any insurance on slaves, or on any property or other subject matter engaged or employed in accomplishing any of the objects or contracts in relation to the objects of slave trade declared unlawful, is not only absolutely void, but, by the 5 Geo. IV. c. 113, subjects the parties to the consequences of felony, *viz.* transportation for not exceeding fourteen years, or imprisonment and hard labour for a term not greater than five nor less than three years.

A vessel fitted out for such illegal purposes, with every thing belonging to it, and the goods of the owner on board, are forfeited and liable to seizure; and therefore no part can be insured.

The wages of seamen cannot be made the subject of insurance, on the grounds of public policy, since it might tend to produce improper conduct on the part of seamen, which would subject them, but for the insurance, to a loss or forfeiture of wages. But a seaman may insure goods purchased by wages already received, or actually due; and the remuneration or privileges of a captain of a vessel may also be insured; but if such remuneration depends on his good conduct, the policy, it seems, would be void.

2. *The Quantity and Amount of Interest.*—In order to protect against the many fraudulent losses and seizures of ships by enemies, the 19 Geo. II. c. 37 was passed, whereby it was declared that no insurance should be made on any ship, or goods therein, "interest or no interest," or "without further proof of interest than the policy," or by way of gaming or wagering, or without benefit of salvage to the assurers, and that all such policies should be void, except in the case of privateers. Therefore the party insuring must have an interest in the property insured. But this does not extend to foreign ships.

We must therefore consider what is a sufficient interest. It is not requisite that there should exist any actual property, but only an interest in the thing insured, that is, to have a benefit accruing from the existence of the thing insured, and a prejudice by its destruction, emanating from a right to the property, or a right out of some contract concerning it. It may be either absolute or defeasible; legal or equitable. Commissioners as trustees for prize vessels, and captors of prizes, have an insurable interest. The register of a ship is a material document in this case; for although four persons advance money for the ship as partners, and the names of only two are inserted in the register, those whose

names are not inserted have not an insurable interest; for the register is conclusive evidence that a person not named therein is not owner. The consignees of goods, whether as purchasers, creditors, or agents, have an insurable interest, although their title is liable to be defeated by a stoppage *in transitu*. But a consignee appointed only for the purpose of doing some act respecting the goods consigned, who has no legal property in the goods, and is in no degree beneficially interested by agency, commission, or otherwise, although he may insure for the benefit of the consignor, yet cannot insure for his own benefit. An insurable interest may also arise from expences incurred, which form a lien or charge on the ship or cargo. Freighters have in general an insurable interest; but a mere loan of money to the owner or captain for the ship's use does not constitute a valid insurable interest, unless its repayment be contingent on the safety of the ship or cargo. The freight or profit derivable from the carriage of goods, or hire of a vessel under charterparty, or other express or implied contract, clearly constitutes a good insurable interest. So expected profits may be insured. With respect to the period at which an insurable interest must be vested, it may be remarked, that it is not necessary the insured should be interested at the very time of effecting the policy, it being sufficient if there be an insurable interest at the commencement of the risk.

Different Kinds of Policies.

An *open* or common policy is where no sum is mentioned in the policy as the value of the property; and here the sum recoverable is the amount of loss *proved*.

A *valued* policy is where the property insured is in the policy valued or estimated at a certain sum. In this case the value need not be proved, but the sum mentioned in the policy is recoverable.

A *double* insurance, is where several policies are effected by or for the benefit of the same person, and upon the same subject matter. These double insurances are not void; but the person insuring can receive satisfaction only to the amount of his loss. This he may recover against which set of underwriters he pleases; and they may call upon the other set to contribute in proportion to the sums they have insured.

Re-assurance is where the *insurer*, for his own protection, insures the property in another office. The stat. 19 Geo. II. c. 37, provides that there shall be no re-assurance, unless the insurer shall be insolvent or bankrupt, or dead; in which cases, such assurers, or in case of his death his executors, administrators, or assigns, may make re-assurance to the amount before by him assured, expressing in the policy that it is a re-assurance.

Of the Voyage and Trade insured, and of Perils or Risks.

Where the voyage is illegal, the policy is void. An insurance therefore on goods purchased in a hostile state on the account of British merchants, to be imported into this country, even in a neutral vessel, is illegal, because it tends to the aiding of the enemy, and by the maritime law is a cause of confiscation; and in general it is considered illegal to touch in the course of the voyage at a hostile port, either for the purpose of trading or calling for further orders. But it seems esta-

blished, that a natural-born subject of her majesty, domiciled in a neutral state, may, in respect of his domicile, enjoy the commercial privileges of the inhabitants of such neutral state; and a trading with alien enemies under a licence from the crown may, as we have already remarked, be valid; but if the licence is in any manner qualified, it must be strictly followed, as it will be strictly construed.

Trading in violation of a blockade or embargo, or the provisions of a treaty, or royal proclamation, is illegal; and a policy thereon is also void. So is a trading on voyages which are prohibited by the navigation laws, or an infringement on the East India Company's charter, or contrary to the laws against smuggling. But a trading contrary to the revenue laws of a foreign state is not *ipso facto* void, unless the insurer be kept in ignorance of the extraordinary risk he runs.

Any illegality at the commencement of an entire voyage will render the whole illegal, and a policy intended for its protection will be altogether void; but if there are two voyages, as an outward and homeward voyage, distinct from each other, the one may be valid and the other invalid, and the policy good as to one and bad as to the other. And if one voyage is lawful, and the other is capable of being rendered so by obtaining a licence, and they are to be performed in the alternative, and that which is lawful is performed, it will be presumed that the licence would have been obtained, had it been requisite, so as to render the policy available.

The *risks* and *perils* which may be insured against are all those to which property in such situations is liable; and although an enemy's property cannot be insured, yet that of a neutral or British subject may be insured against all *unlawful* seizures or detentions by British vessels. Besides the other usual risks and perils of the sea, an insurance provides against the consequences of *barratry* of the master or mariners; and it has been determined that, under the usual policy, the insured may recover in respect of a loss by fire occasioned by the misconduct of the master and mariners. *Barratry* is any fraudulent or criminal act against the owners of ships or goods by the master or mariners, in breach of the trust reposed in them, and to the injury of the owners; as running away with the ship, wilfully carrying her out of the course prescribed by the owners, deserting convoy without leave, sinking or deserting the ship, embezzling the cargo, smuggling, or any other offence whereby the ship or cargo may be subjected to arrest, detention, loss, or forfeiture.¹

Of the Insurer or Underwriter.

Formerly no societies, or persons in partnership, could insure against losses at sea, except the Royal Exchange Assurance and the London Assurance Companies. But this prohibition was removed by the 5 Geo. IV. c. 114, and policies of insurance may now be entered into either by individual insurers, or by companies of persons united in partnership; and these companies or societies are either corporate or unincorporated. Individual insurers are called *underwriters*, the contract of insurance being authenticated by the subscription of their names.

¹ It has been recently decided, that the underwriters of a policy of insurance are liable for a loss arising from a peril insured against, though remotely arising from the negligence of the master and mariners.—*Redman v. Wilson*, 14 M. & W. 476.

The Policy of Insurance.

The policy is a written contract, signed by the insurer, or an agent on his behalf, or, in the case of a corporation, sealed with the corporate seal.

In the first place it requires a stamp, according to the circumstances. A material alteration cannot be made without the consent of both parties, or it will render the policy invalid and incapable of being enforced in any shape, independent of the circumstance of the stamp being affected thereby. But an alteration merely to correct a mistake, and make the policy conformable to the original intention of the parties, does not require a new stamp. The 35 Geo. III. c. 63 enacts, that no policy shall be stamped after it is effected; but it contains an express provision that nothing in the act shall prohibit an alteration which may lawfully be made in the *terms or conditions* of a policy duly stamped after it is underwritten, or to require an additional stamp, provided the alteration is made before notice of the determination of the risk originally insured, and if the premium originally paid exceed the rate of 10s. per cent on the sum insured, so that the thing insured remains the property of the same insured, and so that the alteration do not prolong the term insured beyond the period allowed by the act, and no additional sum be insured by means of such alteration. The extension of the time for the ship's sailing is within the provision of this latter enactment.

The name of the party insuring, or the usual designation of the firm, must be contained in the policy, under the 58 Geo. III. c. 56; and it should contain a true description of the subject of insurance, and disclose whether it is effected on ship, freight, bottomry, respondentia goods, profit, or other interest, together with the name of the ship; and where goods are insured, the insured cannot trans-ship them to another ship, except in case of urgent necessity, as where the first has been lost or damaged by the perils of the sea or other similar accident. But a mere error in the name does not vitiate the policy, provided the identity can be proved.

The commencement and duration of the voyage or period for which the insurers become responsible must be fully stated, the line of the voyage, the several ports at which the ship is entitled to touch, and the circumstances attending sailing with convoys, and the particular perils insured against must be set forth particularly. A clause should also be inserted, that "in case of any loss or misfortune, it shall be lawful to the insured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the ship" (or goods &c.) "or any part thereof, without prejudice to this insurance, to the charges whereof we the assurers will contribute each one according to the rate and quantity of his sum herein assured." This clause is said to have been inserted in consequence of doubts formerly entertained whether the insured could exert himself in the recovery and preservation of the property, without prejudicing his right to abandon.

The premium paid, the sum insured, the date or time of subscription, and the name of the insurer, must also be inserted in the policy. There is also usually a common memorandum at the foot of the policy, whereby the underwriters are protected from liability for certain partial losses on certain articles.

The construction of the policy is governed by the terms in which it is expressed, by the usage of trade, and the intention of the contracting parties. The only difference between policies and other instruments in this respect is, that the greater part of the printed language of them, being invariable and uniform, has acquired, from use and practice, a known and definite meaning. The policy is to be liberally construed for the benefit of the insured, and with a due regard to its design and object as a contract of indemnity. Parol evidence is sometimes admitted to explain doubtful phrases, or to ascertain the usual customs and practices of trade.

It is a general rule, that the insured cannot give the ship a different destination from that specified in the policy, although a change of the place specified may have become a matter of expediency, or even of necessity. But the mere intention to vary the port of destination will not vitiate the policy, especially if it be not fixed and absolute, and the loss occur before carrying such intention into execution. A deviation cannot in general be made in the voyage specified in the policy without endangering the policy; but where a departure therefrom is caused by necessity, or by an imperative or urgent obligation, as the absolute safety of the vessel, or the lives of those on board, it is not regarded as a deviation, but is excused in law. The ordinary occasions which will justify such departure are, to join convoy, stress of weather, want of repairs, the approach of an enemy, succouring another vessel in distress, a mutiny, desertion, arrest or sickness of the crew, or any other similar inevitable accident.

In all cases of insurance there is an implied warranty on the part of the insured, that the ship shall be seaworthy in regard to repairs and condition, manning, stores, and equipment; and if it prove not to have been so at the time of the commencement of the risk, the insurers are discharged. So also the ship must be provided with all the requisite documents and papers, or, as it is termed, properly *documented*; and if a loss ensue from the want of them, the insurers will not be liable; and if there is an express stipulation in the policy requiring them, and a loss happen from another cause, the want of them is a sufficient discharge to the insurers.

II. INSURANCES ON LIVES.

An insurance on life is a contract by which the insurer, in consideration of a premium proportioned to the age, health, and other circumstances of the person on whose life the insurance is affected, agrees to pay a certain sum on the event of his death, either within a certain fixed time, or generally at any indefinite period. The advantages resulting from this mode of investment are very great, and ought to be resorted to by every young man the first moment he is able to lay by any portion of his annual income, especially where he has no certain fixed property, sufficient for the support of a wife or children after death, and his income depending on his own exertions must fail in case of his illness or death.

To enable a party to insure the life of another person, it is necessary, as in the case of marine insurances, that he should have an interest therein; for the 14 Geo. III. c. 48 declares, that no insurance

shall be made on the life of any person, or any other event, wherein the person for whose benefit the policy is made shall have no interest; and if any such insurance is made, the same is void.¹ The name of the party to be benefited must be inserted in the policy; and no more than the amount or value of such interest (as in the case of an insurance by a creditor on the life of his debtor) can be recovered. A creditor has an insurable interest; but it seems that if he has any other security for his debt, he is only entitled to recover from the insurance office the deficiency that the other security leaves unsatisfied. His debt must also be a valid one; therefore a mere gambling debt is not sufficient. But a plea that the debtor was an infant when he contracted the debt, is not available. A trustee has also an insurable interest, although not clothed with any beneficial interest. So also has a *cestui que trust*.

Where an insurance has been effected by a bankrupt on his own life at an annual premium, the right to the policy passes to his assignees. So it is in general liable to the claims of creditors, as the sum received is part of the assets of the deceased party.

A warranty is usually inserted, that the person whose life is insured is in good health. This means that he is in *reasonable* good health; and though he be at the time labouring under a particular disorder, yet if it be proved that his death ensued from other causes, still the insurers will be liable. Nor is it to be concluded that a particular disorder under which he is labouring is a disorder to shorten life, from the circumstance of his afterwards dying of it, if it be not a disorder necessarily having that tendency. The warranty in the policy forms a condition on which the validity of the contract depends, and any fraud or misrepresentation of *material* facts will tend to invalidate it.

Payment of premium must always be made at the time required by the rules of the insurance office; for a court of equity will not, upon the doctrine of *cy pres* (that is, performance as near as may be), direct a payment after the appointed time, so as to revive the policy.

Life policies usually contain a provision, that if the party whose life is insured depart the limits of Europe, or even go out of this country, or enter into the military or naval service, without the consent of the insurance company, or die by suicide, duelling, or the hand of justice, the insurance shall be void. In a case where such a clause was not inserted, death by the hand of justice was held not to invalidate the insurance.² And where an insurance is made by another person, death by suicide, duelling, or the hand of justice, is not excepted.

It is to be observed, that the assignment of a policy of insurance does not take it out of the order and disposition of the assignor, unless notice is given of the assignment to the insurers,³ but a letter by the assignee to the secretary of an insurance office, in which the writer says, "I am holder of the under-mentioned policies," and inquires what the office would give for them, was held a sufficient notice of the assignment.⁴

¹ But see *Godsall v. Boldero*, 9 East, 27; and *Barber v. Morris*, 2 Moo. & Rob. 6. The law will not compel such payment; but the practice is otherwise. See also *Halford v. Kymer*, 10 Barn. & Cres. 724.

² *Bolland v. Dimes*; 3 Russ. 351.

³ *Williams v. Thorpe*, 7 Sim. Rep. 257; and other cases, Chit. Eq. Ind. 545, 6.

⁴ *Ex parte Stright*, 2 Dea. & Ch. 314; Mont. 502.

III. FIRE INSURANCES.

This species of insurance is a contract by which the insurer, in consequence of a certain premium received by him, either in a gross sum or by annual payments, undertakes to indemnify the insured against all loss or damage which he may sustain in his houses or other buildings, stock, goods, or merchandise, by fire, during the time for which the policy is effected. In this kind of insurance, as in the others, the insured must have an interest in the property; and notice of any assignment of it must be given to the insurers, and their assent obtained.

A misrepresentation or concealment of material circumstances will invalidate the insurance; as where a party living next to a boat-builder, where immediately before the insurance a fire had happened, this fact being concealed, although not fraudulently, was held to release the office's liability. If premises are insured at the low premium, whereby the insured agrees not to have fires or hazardous goods therein, he cannot habitually use a fire, or keep such goods there; but the mere occasional introduction of either does not invalidate the policy, though a fire be the consequence; and even if the gross negligence of a servant causes a fire, the insurers are still liable.

The terms and conditions of insuring vary in the different offices. These must always be strictly adhered to and observed by the insured. A policy on linen, wearing apparel, &c., the insured not being a linen-draper, will not extend to a quantity of linen goods introduced for speculation and sale.

The policy is always for a stated period, as a number of years, one year, or half a year. On policies under a year, the policy must be renewed before the office closes on the day specified, forming the end of the half year for instance. But in policies for a year and upwards, the principal offices allow fifteen days after the expiration of the policy for renewal, and if a fire happen within those fifteen days, they hold themselves responsible for the loss; therefore it is sufficient if the renewal be before the end of such fifteen days, though the office may give a notice which will countervail this privilege. The insurers have always the option of paying the money insured for, or of replacing the property in kind.

The 3 & 4 Wm. IV. c. 69 has taken off the stamp duties on insurances of farming stock.

By the London Building act, 14 Geo. III. c. 78, which relates to the bills of mortality only, in case of a fire, the turncock is entitled to 10s. reward from the parish; and the keepers of the first large engine that arrives, completely ready to act, to a sum not exceeding 30s; of the second, not exceeding 20s.; and of the third, not exceeding 10s. If it is merely a chimney on fire, the rewards are to be paid by the occupier of the room to which the chimney belongs, if a lodger, or otherwise by the tenant of the house. The rewards are to be settled and recovered before the lord mayor in London, or a justice out of London.

We have already seen, that servants negligently setting fire to any building shall forfeit 100*l.*, or be sent to the house of correction for eighteen months. But no person is liable to an action for damages arising from accidental fire.

CHAPTER XXII.

Of Landlord and Tenant.

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- II. BY WHOM TERMS OR LEASES MAY BE GRANTED.
- III. TO WHOM LEASES MAY BE MADE.
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I. THE NATURE OF LEASES IN GENERAL.

A lease is a grant of the possession of lands or other things to a person for life, for years, or at will.

If *for life*, it is a freehold interest; and to create this estate, unless effected by way of use, it was, till the passing of the recent Transfer of Property Acts, required that *livery* should be given, that is, a formal delivery of possession by the landlord.¹

But a lease *for years* may be completed by the mere entry of the lessee, and even before that he has an *interesse termini*. Before entry, however, he cannot bring an action of trespass; nor, if he take by common law, can he take a release of the reversion. But if the estate be created by way of use, actual entry is unnecessary; it is complete immediately the conveyance is executed.

¹ But all lands now lie in *grant*, as well as in *livery*, as regards the immediate freehold.—8 & 9 Vic. c. 106, § 2. See *post*.

A *parol* lease, if it do not exceed three years, is good under the Statute of Frauds. If for more than three years, and the lessee enter and pay rent, it becomes a tenancy from year to year, determinable only by a regular notice to quit.

A lease is usually in consideration of a yearly rent. The best way is to reserve it *generally*, as it then follows the reversion. A covenant for payment of rent should be inserted; otherwise, if once assigned, it may be re-assigned to a succession of beggars. And a provision for re-entry on non-payment of rent should always be inserted, in order to guard against there being no sufficient distress.

Unless there be a covenant against assignment, a lease may be *as signed*, that is, the whole interest of the lessee may be conveyed to another; or it may be *underlet*. If therefore it is intended that it should not, it is proper to insert an express covenant to restrain the lessee from assigning or underletting.

On *conditions* in leases to prevent alienation, or for any other purpose, it is to be observed, that where the condition gives a *right of re-entry*, the term (after breach of the condition) subsists till re-entry; and acceptance of or distraining for rent due after the breach dispenses with the forfeiture. Where the estate was forfeited on the breach of any condition, it formerly absolutely ceased, and the forfeiture could not be waived or dispensed with. The courts, however, are now inclined to hold leases not absolutely void in these cases, but only voidable, so that the forfeiture may be waived by any subsequent acceptance of rent or other act indicative of the intent of waiver.

A condition not to assign to a *particular* person is in any case good. But a condition restraining *assignment* will not prevent an *underlease*. Such conditions bind personal representatives when they are named. They do not, however, bind creditors or assignees in bankruptcy, who may, if they choose to adopt a lease, always sell or assign it to any person for the benefit of the bankrupt's estate. Nor does assignment by the sheriff under execution, or by any act of law, create any forfeiture. But the condition may be made so as to give a *right of re-entry* on the bankruptcy or insolvency, and then the assignment of the provisional assignee will not prevent the re-entry of the lessor.

These covenants, however, are entirely got rid of when consent has been once given to an assignment without restriction.²

II. BY WHOM LEASES MAY BE GRANTED.

All persons not under legal disability are capable of leasing for terms not inconsistent with the nature and quality of their estates, provided they have the actual or constructive possession of the premises to be let, and not a mere right of entry.

Tenants in tail may make leases to bind their issue, but not those in reversion or remainder, provided a fair and proper rent is reserved, and the other terms of the 32 Hen. VIII. c. 28 are observed and followed. So may a husband seised in right of his wife, provided she join in the lease, and provided the lease is by indenture, and not by deed.

¹ Dumpor's case (4 Co. Rep. 119) is the leading case upon this covenant, and is now the settled law.

² See Dumpor's case, and Bramwell v. Macpherson, 14 Ves. jun. 173.

As to covenants generally on the parts of

lessor and lessee, see 4 Western's Convey. 28 at seq.; Thorne v. Woolcombe, 3 Barn. & Ald. 591, per Lord Tenterden; 2 Sugden's Vendor and Purchaser, 269.

For the recent statute, "to facilitate the granting of certain leases," see APPENDIX.

poll, or by parol. Such leases must begin from the date of the deed. If there be an old lease, that must be first absolutely surrendered, or within a year of expiring. They must be either for twenty-one years or three lives, or less. They must be of corporeal hereditaments, and of lands &c. commonly letten for the last twenty years past. The usual rent for the last twenty years must be reserved; and these leases cannot be made without impeachment of waste.

Ecclesiastical persons may in general lease for twenty-one years or three lives from the date of making the lease, at the accustomed or a greater rent. Houses in corporations or market towns, being corporate property, may be let for forty years, provided they be not the mansion houses of the lessors, nor have above ten acres of ground belonging to them, and provided the tenant keep them in repair. A concurrent lease must expire within three years. The tenant must be liable for waste. In college leases one third of the rent must be reserved.

Tenants for years, or from year to year, may assign or underlet; but tenants at will cannot. Neither can churchwardens make a lease of parish lands. The crown may generally lease for thirty-one years or three lives; and, under certain circumstances, the time may be extended to fifty years. The master of the rolls may also make leases for forty-one years.

Guardians of minors, and committees of lunatics, may grant leases under the direction of the Court of Chancery; but no such lease of the capital mansion-house, or park and grounds held therewith, is to extend beyond the minority of the infant. 1 Wm. IV. c. 65.

Leases by tenants in curtesy, dower, or jointure, are void absolutely on their death; and the acceptance of rent by the heir does not make the lease good, but the lessee continues mere tenant by sufferance.

The assignees of a bankrupt have, under the 6 Geo. IV. c. 16, § 77, general powers, and may make leases of the estate, if beneficial to the creditors; and the same powers are given to assignees of insolvents.

Executors and administrators may either assign a term come to their hands, or they may underlet, in the same manner as their testator or intestate might have done. But they ought to exercise great caution to see whether they have that power by the will. And it is questionable where the executor is an infant, and there is an administration *durante minore etate*, how far such administrator can grant leases. If a wife is executrix, the husband and wife have the power of leasing, as in the ordinary case of husband and wife.

Mortgagees and mortgagors cannot make leases so as to bind each other's interests; neither have tenants under process of execution, as by *elegit*, statute merchant, &c., power to bind by lease beyond the period of the duration of their estates. Provided they are beneficial to the *cestuique* trusts, trustees for charities may make leases; but if otherwise, they may be set aside at the cost of the trustees by the Court of Chancery. Trustees should always therefore act with great caution, and under the advice of surveyors as to value &c., before doing such acts. Receivers, on the other hand, can never grant leases, except under the direct sanction and authority of a court of equity.

Leases of lands in copyhold capable of being leased may be granted

by the lord of the manor or his steward; But copyholders cannot grant leases for more than one year without licence from the lord, or by special custom, without incurring a forfeiture of their estate.¹ A lease, however, for a year, and so on during the will of the lessor, is good. If licence is once granted, the lessee may underlet; and a lease which is void as against the lord of the manor is binding on the copyhold lessor himself.

Powers of leasing must be strictly followed.² Leases executed by agents in the name of the principal, they having sufficient power for that purpose, are good to all intents and purposes as though executed by the principal himself. So are leases by bailiffs of manors, if they have express authority; but not otherwise.

A disseisor (that is, one holding under a wrongful and adverse title) has full power to make a lease binding on all persons except him who has the right of possession and is disseised. But a lease by a disseisee is not good, because he is out of possession; though if delivered to a third person as an *escrow*, it will be good when he comes to the possession again.

Leases, like all other deeds, may be impeached on the ground of fraud, as if entered into by either party at a time when he is in duress, or when drunk, if made so by the contrivance of the other party.

III. TO WHOM LEASES MAY BE MADE.

Leases to an infant are *voidable* by him when he comes of age, or sooner. But in this case, where the lease was at a fair value, the infant not having declined it before the rent day next after his coming of age, he was held bound to it; and at all events he may be liable for use and occupation under the doctrine of necessities. And he cannot recover back any premium paid for it. If an infant is jointly interested in a lease as co-lessee with A, and A gets a renewal of the lease, if it turn out beneficial, the infant may claim to share in the benefit; but if not beneficial, he cannot be made to participate in the loss.

Married women cannot (except by special custom, as in London) take leases. If husband and wife accept a lease, she may, after his death, accept or reject it, in the same manner as an infant may, and is not bound by the covenants though she continues tenant.

Persons outlawed or attainted cannot accept leases, except for the benefit of the crown: but in civil cases the outlawry is only a bar as between the crown and the subject. The same rules apply as to the granting leases by such persons. In treason they are void against the crown; and in felony they are for the benefit of the crown during the felon's life.

Corporations may take by lease; but a corporation sole cannot take a lease in such a manner as that it shall go to his successor, but it will go to his executor.

Parish officers are enabled, by 9 Geo. I. c. 7, § 4, to take, either by purchase or lease, houses for the lodging of the poor.

Assignees cannot take leases of the bankrupt's estate for their own private benefit; neither can solicitors from their clients.

¹ A liability to forfeiture of the estate, much less a stranger — *Doc dem. Robinson v. Dousfield*, 6 Q. B. 492 which may be waived by the lord, but of which the reversioner cannot avail himself, ² *Doc v. Burrough*, 6 Q. B. 229. *Id.* 203.

IV. WHAT MAY BE THE SUBJECTS OF LEASES.

All corporeal hereditaments may be leased. Advowsons cannot, because they are a public trust. Tithes and tolls may; and so may commons and estovers under certain conditions, and rights of way.

Offices, provided no public detriment may happen therefrom (and therefore not those relating to the administration of justice) may be leased by deed, but not by parol; and to this extent only is the sale of offices allowable. Franchises (as fairs and markets), corodies, and annuities, may also be leased.

V. TENANCY FROM YEAR TO YEAR.

A tenancy from year to year may be said to exist where a man lets to another, without limiting any certain estate. Formerly such an interest was merely a tenancy at will. Now, however, the tenant having once entered on the premises as tenant, is entitled to receive, and bound to give, half a year's notice before quitting the possession; and the tenancy must end at that period of the year at which it commenced. Where a party enters under an agreement for a lease, a tenancy from year to year is in general implied.¹ So also where a tenant holds over at the end of his lease. A tenant from year to year is in general entitled to estovers, and to other benefits and privileges, the same as a tenant for a term.²

VI. LODGINGS AND LODGERS.

Lodgings consist of rooms occupied in a house which has but one common outer door, and differ from what we term *chambers*, where each set of apartments has a separate outer door leading to one common staircase, as in inns of court. These latter are separately rateable to the poor, and give separate estates of freehold according to the holding; while the former are all rateable as one house, and the holding confers no right on the lodger as a freeholder or householder, in respect of voting at elections or otherwise, for many reasons, although in some respects it does as a householder. If the owner of the house do not sleep therein, then indeed, in respect of burglary, each apartment is the house of its respective lodger; though at the same time a bailiff, having obtained peaceable admission into the outer door, may break open any of the private doors of lodgers, if necessary.

Lodgers are in all cases in the same situation with regard to distress for rent &c. as other tenants; except that, as regards notice to quit, it seems they are generally considered as less than tenants from year to year; and if they take them by the month or week, a month's or week's notice respectively would be sufficient. If they take them for a time certain, there is no need of notice to quit at the expiration of the time.

In such tenancies there ought always (though not absolutely necessary) to be a written agreement as to the amount of rent, the notice to

¹ The great and vexatious question, as to whether a paper purporting to be an agreement for a tenancy was an agreement merely, or should be construed as a lease, and in either case whether the landlord could or could not enforce the payment of his rent

by distress, or was left to his action for use and occupation, is now settled by the recent statute 8 & 9 Vic. c. 106, § 3, which enacts, that all leases required by law to be in writing shall be void at law unless made by deed

² See *Doe v. Sumner*, 14 Mee & W. 39

quit, the time of entry, and any other particulars agreed upon between the parties. And care should always be taken by the lodger (especially in unfurnished apartments) to see that his immediate landlord has paid all taxes and rent; for the goods of the lodger are liable to distress for arrears of these at any time while on the premises. A list of the furniture engaged with the apartments should also be had.

It seems, that if lodgings are let to a woman for the purpose of carrying on an improper intercourse with men, the landlord can recover nothing for the rent.

VII. ESTATES AT WILL.

An estate at will is the lowest estate that can arise *by agreement* between the parties. It depends on the will of both; this it does by implication of law, even when expressed to be at the will of one only. It cannot (when created) be the subject of a conveyance. It determines by the death of the lessee, and confers no title on his representatives, except, as we shall hereafter show, as to emblements; and any conveyance by the lessor determines the estate.

The law does not favour estates at will; therefore in most cases, as if the rent be reserved yearly or half-yearly, it is generally construed into a tenancy from year to year, unless such construction would create a forfeiture; and therefore the determination of the estate by the lessor, or by the act of God, as the death of lessor or lessee, does not generally deprive the lessee or his representatives of emblements; though it is otherwise if the lessee determines or forfeits the estate. In a strict tenancy at will, if the lessor determine the estate before rent is due, he loses the rent; but if the lessee determines the tenancy, he must pay rent up to the next day when it would become due. Probably the lessor or his representatives would be held entitled to the rent, whenever the lessee or his representatives take or claim a right to emblements, except where the lessor determines the estate. A lessee at will can, however, receive a deed of release, *after entry*, for then there is privity between the lessor and lessee.

There are now few instances where a tenancy at will exists. It may arise, however, 1. Where there is an express letting at will; 2. Where the raising a tenancy from year to year would work a forfeiture of the lessor's estate; 3. Where there is an entry with the consent of the owner, but no conveyance, or *express* agreement for payment of rent, to raise a constructive yearly tenancy. This species of entry includes an entry under feoffment before livery; entries under other defective securities; entries under contracts for leases where rent has not been paid; where a mortgagor is allowed to continue in possession; and where a *cestuique* trust is let into possession.

This tenancy may be determined by the express declaration of either party, or by the death of either party, or by acts of ownership by the landlord, or his alienation of the reversion, or by the tenant's waste or deserting or assigning over the premises. Where, in this species of tenancy, rent is payable quarterly, the lessee, after a quarter of a year is commenced, may determine it, but he must pay that quarter's rent; but if the landlord determine it, he loses the rent.

VIII. TENANTS AT SUFFERANCE.

Tenant at sufferance is where a person has hold by a lawful title, and continues in possession after his right has determined, *without either the agreement or disagreement* of the person then entitled. It may arise, amongst other cases, 1. Where tenant at will keeps possession after the death of lessor; 2. Where a lessee holds over after the expiration of his term; and 3. Where a tenant *pur autre vie* continues to hold possession after the death of the *cestuique vie*. This tenancy can only arise by construction of law. There is no privity between a tenant at sufferance and the person entitled to the possession; consequently a release to a tenant at sufferance will not operate to enlarge his estate. It cannot be the subject of conveyance or transmission. While it exists, it is not adverse to the person entitled to enter, though such person may, if he chooses, consider it so. The descent or conveyance of the reversion does not appear to affect this kind of tenancy.

Where a tenant for life attempts to aliene in fee by a conveyance which does not operate as a forfeiture, as by lease and release or bargain and sale (which conveyance will only in fact pass his life estate), the person in possession under the release or sale, after the death of tenant for life, will become tenant at sufferance to the reversioner, and adverse possession will only take place from the commission of some wrongful act. In the case of the crown, there is no tenancy at sufferance; if the tenant holds over, he is an intruder.

IX. ESTATE OF MORTGAGOR IN POSSESSION.

Mortgagor in possession is considered, either as a tenant at will, a tenant at sufferance, or a receiver, according to the form of the conveyance.

Where the mortgagor is the occupant, with an *express* agreement for his continuing in possession till default, he may be considered as tenant for years; or if the agreement cannot be considered as a grant for that time, the mortgagor *may be* tenant at will. Where there is an agreement for possession of mortgagor till default, and the money is *not* paid, but he continues in possession, he appears, *till payment of interest*, to be tenant at sufferance. And where there is no express agreement on the subject, but the mortgagor being in possession continues so, with the tacit consent of mortgagee, here he seems to be strictly tenant at will. If then the mortgagee were to assign without the mortgagor joining, the mortgagor would be tenant at sufferance to the assignee *till payment of interest*. When a mortgagor is tenant at will, the death of either mortgagor or mortgagee determines the estate. When the latter dies, the mortgagor is tenant at sufferance to his representatives till payment of interest. If the former die, and his heir or devisee enter, and hold without recognizing the mortgagee's interest, by paying interest &c., an adverse possession takes place. Therefore, where a tenancy at sufferance exists, payment of interest makes it a tenancy at will.

Where the estate is in possession of tenants, and the mortgagor takes the rents, no actual tenancy exists between the mortgagor and the mortgagee; the mortgagor is considered as a receiver, with liability to account. When mortgagor is tenant at will, he is *not* entitled to

emblems, and may be at any time ejected by mortgagee. And the Court of Chancery will restrain the mortgagor in possession from committing waste, by injunction.

X. ESTATE OF CESTUIQUE TRUST IN POSSESSION.

In equity, the *cestuique* trust is considered the real owner, and the possession of the trustee is considered as his possession. But at law the trustee alone is looked upon as the tenant; so much so, that where the estate is fee simple, it would escheat on failure of heirs of the trustee. At law, therefore, the *cestuique* trust in possession is tenant at will to the trustee. Consequently, the death of either determines the tenancy at will. If the trustee die, the *cestuique* trust is tenant at sufferance to the representative of the trustee, real or personal, according to the nature of the trust property; and if the *cestuique* trust die, his heir is a new tenant at will.

XI. RENTS.—1. *Rents in General.*

Rent is properly a sum of money, or other thing, to be rendered periodically, in consequence of a reservation in a grant or demise of lands or other tenements, the reversion of which is in the grantor or person demising.

It must be a *profit*, money or money's worth, by payment, render, or corporeal service. It must not be a part of the thing itself; though it may be part of its future produce. It must be *certain*, or capable of being reduced to a certainty by either party. It is due and payable on the lands demised, if no other place is mentioned. The tenements out of which it issues must be of a corporeal nature, so as to give a remedy by distress.¹ It must be reserved to one of the grantors, and not to strangers; though it may be afterwards granted over.

Rents may be created by bargain and sale, lease and release, covenant to stand seised, or grant; and they may be limited in tail, with remainders over. When once granted, they may be *released* to the person seised of the lands, or conveyed to a stranger by grant, and that even to commence *in futuro*, under the Statute of Uses; and as a person may be seised of a rent to a use, such use is immediately vested by the statute. If a rent be created by deed, it cannot be released without deed, either at law or in equity.

2. *The different Kinds of Rent.*

A *rent service* is any particular service that was in olden times to be performed by the tenant, instead of the present usual mode of remuneration for the use of the land in the shape of money; as, for instance, a covenant to plough the landlord's lands, or the like; and these answer to the present money rent. *Rent charges* are, for instance, where a tenant in fee conveys away his land, reserving to himself the payment of a sum of money out of it, recoverable by a distress. *Rent seck* is the same as rent-charge, only without the power of distress. *Quit rent* is a rent undisturbably payable by copyholders in lieu of all other services. *Rack rent* is a rent of the full value of the tenement. Now, however by 4 Geo. II. c. 28, all rents are alike recoverable by distress.

¹ See *contra*, 2 Christ. Dia. Com. 41.

3. *The Time when Rent is due, and how payable.*

Rent is not due till midnight of the day on which payment of it is reserved; but, to perfect a forfeiture for nonpayment, if it be demanded a sufficient time before sun-set of that day to allow the tenant to see to count the money, as it is said, and the person demanding it remain till the sun's actual setting, it is sufficient. If no day is mentioned for payment, and so much *per annum* is payable, it is not due till the end of the year; and if so much per month, at the end of every month, &c. The rent should be demanded on the land or premises, for the tenant need not seek out his landlord in order to exculpate himself. However, rent due to the crown is to be paid by the tenant into the exchequer, since it would be below the dignity of the crown to be obliged to seek out its tenants.

4. *The Payment of Rent, and Excuses for Nonpayment.*

Rent, as between the parties themselves, is of a higher nature than even specialty debts; but, as respects the tenant's executors, it is regarded as equal to specialty debts, and is to be paid equally with them. If rent, by desire of the landlord, is remitted by post, and it is put into the office, not given merely to a bellman, and it is lost, the landlord must bear the loss of it. If paid by a bill of exchange or promissory note, which is dishonoured, the landlord has still his other remedies by distress &c., for it is *in this case* no payment; though if a bond is taken, and judgment is recovered, the usual remedies by distress are gone. A proper receipt stamp should always be taken for the rent. Ground rent, land tax, and other taxes to which the landlord is liable, may be deducted out of the rent; and where a landlord distrained for the whole rent reserved, without deducting the land-tax, although the broker deducted it, it was held that the tenant might properly bring his action on the case for excessive distress. So if the tenant is liable to be ousted or distrained upon if a payment is not made by him to which the landlord is liable, he may deduct the amount from his rent; and if the landlord, when bound, neglects to repair, or the tenant is obliged by sudden emergency, the costs of it may be deducted. And there are many cases in which payments to a landlord by a bankrupt after bankruptcy are allowed to stand good.

5. *In case of Damage by Fire.—Covenants to Insure.*

Where a lessee covenants generally to pay rent, he is bound to pay it though the house be burnt down. And a lessee who covenants to pay rent and to repair, with express exceptions of casualties by fire or tempest, is liable upon the covenant for rent, though the premises are burnt down, and not rebuilt by the lessor after notice; for whatever be the default of the lessor in not repairing, and though it is a hard case, yet the lessee must at all events perform his covenant, by which he is expressly bound, to pay rent during the term. Where the premises were destroyed by fire during a tenancy from year to year, and were no longer habitable, the landlord was held to be still entitled to recover the rent in an action for use and occupation; and the tenant in such case, to get rid of his liability, should give a regular notice to quit. Though formerly otherwise, the doctrine at present entertained by the Court of

Chancery is, that the tenant under such circumstances has no equity, and cannot restrain the landlord from bringing an action at law upon the covenant; and it has been held, that the tenant, with a covenant by him to rebuild, has no equity to compel his landlord to expend money received from an insurance office on the demised premises being burnt down, nor to restrain the landlord from suing for the rent until the premises should be rebuilt. Therefore it is always advisable to have a covenant or provision inserted in the lease or agreement, that rent shall cease in case of such accident till the premises are rebuilt and become inhabitable.

A tenant of a house from year to year, who is not under any agreement to repair, may quit without any previous notice to his landlord, upon the premises becoming unsafe and useless for want of repair; and he will not be liable for any rent after the occupation has ceased to be beneficial. If the landlord enter the premises of a yearly tenant to do repairs, and so much noise and inconvenience be created, that the tenant cannot prevail upon his lodgers to stop, or he is himself disabled from carrying on his business, he may leave the premises without giving any notice, and without being liable for the rent, even if a fresh quarter be commenced, as no beneficial occupation can be implied.

By an adverse entry of the lessor, or any one claiming through him, into any part of the premises demised, the rent is suspended; but if the lessor enter by virtue of a power reserved on the one hand, or as a mere trespasser on the other, and the lessee be not evicted, it will not operate as an excuse for nonpayment of the rent.

6. *Remedies to recover Rent.*

1. *By DISTRESS.*—A distress is the usual mode by which a landlord may recover his rent, and is by a learned writer on the subject said to be one of the most equitable and efficient remedies known to the English law.

We have already seen, that by the 4 Geo. II. c. 28, a distress may be made for any rent in arrear. We have also seen how far the remedy by distress is affected by taking a security of any other kind.

If, when the landlord comes to distrain, the rent is tendered, the distress cannot be made.

To authorize a distress, there must be an actual existing demise at a fixed rent, although if the tenant is in possession under an agreement for a lease, very slight circumstances are laid hold of to justify a distress. But if the landlord has treated a tenant as a trespasser, he cannot distrain; for he cannot blow hot and cold, regarding him as a trespasser one moment and a tenant the next.

The distress may be deposited, or, as it is termed, *impounded*, on any part of the premises as is most convenient. But if the goods are removed, notice must be given of the place to which they have been taken, and such notice must contain an inventory of the things distrained.

The Sale.—Unless the owner replevy the distress within five days after notice of the distress, the distrainer may have them appraised by the sheriff, &c., and proceed to sell by auction. The proceeds, after paying the arrears and expenses, must be retained by the sheriff for the owner of the goods. Therefore, on the sixth day he may proceed

to sell and remove the goods; and if he remain on the premises after that time without the consent of the owner, he may be treated as a trespasser.

A second distress may be made if the value of the first is not sufficient to pay the arrears of rent; so also if the replevy be nugatory.

Expences of the Distress.—These are always paid by the party distrained on. Where the distress is for less than 20*l.*, the expences are as follows:—For the levy, 3*s.*; man in possession,¹ per day, 2*s.* 6*d.*; appraisement 6*d.* in the pound; the stamp according to the value; all expences of advertising &c., if any, 10*s.*; catalogues, sale, and commission, 1*s.* in the pound on the net produce of the sale. Any act of extortion subjects the offender to heavy penalties, under the 57 Geo. III. c. 93, § 2.

When the distress exceeds 20*l.*, the practice is to charge 1*s.* in the pound for the levy, and 3*s.* 6*d.* per day for the man. A copy of charges is in all cases to be given by the officer.

Wrongful Distresses.—If the distress is altogether illegal, the party has his remedy either by action of replevin, of trespass, or on the case for damages, according to the circumstances. If a mere irregularity takes place, an action for special damages gives the tenant his remedy. If the distress be excessive, the remedy is by special action. If there were nothing else to distrain, then, however great the value, it cannot be deemed excessive.

By 11 Geo. II. c. 19, goods *fraudulently* or *clandestinely* conveyed off the premises to prevent a distress, may be seized any where *within thirty days* after the removal, unless *bonâ fide* sold to a person not privy to the fraud. And every person *assisting* in such removal or concealment forfeits double the value of the goods, to be recovered by action of debt; or if the value of the goods be under 50*l.*, two justices, on application from the landlord, and having proof of the fraudulent removal, may order the parties to pay double the value of the goods, or, on default, to be committed to hard labour for six months. And by § 7, landlords, with the assistance of a constable, may break open a dwelling-house, oath being first made before a justice of reasonable grounds to suspect that the goods are concealed there.

It is material to observe, that the remedies under this statute for goods clandestinely or fraudulently removed away to avoid a distress, extend only to the tenant's *own* goods, and not to those of a stranger, as of a lodger. It is even considered that a creditor, with the consent of the tenant, may take possession of the goods of the latter for a *bonâ fide* debt, and remove them from the premises, if apprehensive of a distress, without being liable to the penalties of the act. It is also important to remark, that the statute applies only when the rent is actually due; for the tenant may remove his goods any time previously to the rent day, and they cannot be followed under the provisions of this act; the rent, when due, would be a debt on simple contract only, to be recovered like similar debts by action in a court of law. Farther it is essential to observe, that the presence of a constable is necessary whenever *force* is resorted to by a landlord following goods fraudulently removed.

¹ The man in possession is bound to provide for himself, in respect of food, cooking, and lodging, as a bed, &c.; and if he go

out of the premises, he may be kept out, or any other process may acquire precedence over the distress.

As regards the liability of persons for assisting to remove goods to prevent the landlord from distraining, strict proof is required of being privy to the fraudulent intent. Proof of the mere act of assistance is not sufficient.¹

2. *Remedies to recover Rent otherwise than by Distress.*—It is to be observed, that where goods are already taken in execution by another person, the landlord can only get one year's arrear of rent, which must be paid by the person who has sued out the execution before he can proceed to sell under it. But if the rent became due after the execution, then the sheriff may proceed without any payment to the landlord; and to render the sheriff in any case liable, he is entitled to notice from the landlord before the goods are removed; nor is he ever liable beyond the value of the goods removed.

In case of the bankruptcy of the tenant, by 6 Geo. IV. c. 16, § 74, no distress for rent shall be available for more than one year's rent; but this the landlord is entitled to, even although the goods are in possession of the messenger under the commission. He has, however, no lien on the goods after they are removed. For the remainder of his rent he may prove as any other creditor. The same provisions are made in case of insolvency.

Outlawry in a civil suit is also a bar to the landlord's right to distress above the value of one year's rent.

On an extent at the suit of the crown, the landlord is left to his remedy by action, and has no lien whatever on the tenant's goods.

An action at law is always open to afford the landlord relief, and he may sometimes have relief in equity where his remedy at law is in any way prejudiced.

XII. TAXES, RATES, AND ASSESSMENTS.

The tenant is primarily liable to pay all taxes &c., as between him, the landlord, and the public; but, in the absence of express or implied contract to the contrary, the landlord is ultimately liable to pay to the tenant, or allow him out of the rent, the land tax, ground rent, and sewers' rate.² The assessed taxes and parish rates are payable by the tenant. A covenant by the tenant to pay "all taxes and rates" will, however, include the landlord's taxes, as land-tax &c., and therefore the tenant must pay them; but it will not extend to those subsequently imposed, and to which the landlord is made liable by the act imposing them. But if the contract is to pay rent "clear of all taxes &c.," it seems the tenant must pay those newly imposed also.

We have before seen, that taxes paid by the tenant, to which the landlord is liable, may be deducted out of the rent, and in some cases may be recovered by an action on the covenant, or for money paid.

XIII. REPAIRS AND CULTIVATION.

The burthen of repairs is in general thrown on the tenant, on the principle that "*qui sentit commodum, sentire debet et onus*," but this is mostly the subject of agreement between the parties.

Repairs are either *substantial* or ordinary; the former being those

¹ Brooks v. Noakes, 8 B & C. 537.

² See Palmer v. Earith, 14 M. & W. 499.

of main walls and other essential parts of the edifice, and the replacing of beams, girders, roofs, and other main constructive timbers; the latter, of windows, doors, shutters, and the like.

A tenant for life, although without being impeachable for waste, is obliged to keep the houses in repair; and a mortgagee in possession is bound for ordinary repairs. A tenant from year to year is only bound for ordinary repairs, and such as happen through voluntary negligence. But a strict tenant at will is not bound for any repairs. In the absence of contract, the tenant is in no case liable to make good damages by fire; neither, as we have already seen, is the landlord bound to rebuild, but in such case the tenant's only remedy seems to be the abandonment of his lease. Where a tenant holds over after the termination of his lease, which contained a clause that he should repair, he will be considered as still liable.

What repairs are to be performed under a contract generally depends on the construction which the contract will bear. If it be "substantially to repair, uphold, and maintain," he is bound to keep up inside painting. Breaking a door-way through a wall into an adjoining house, is a breach of a general covenant to repair; but ordinary and natural decay is not.

Under a general covenant to repair, all new erections made after the commencement of the tenancy must in like manner be kept up, and must in general be left for the landlord's benefit. But on this point there are many exceptions for the benefit of trade; of which we shall say more hereafter, when we come to speak of *fixtures*.

Where a tenant covenants to repair, "the landlord putting the premises in repair," the landlord is bound to repair in the first instance, although the particular part of the premises was in proper repair at the commencement of the tenancy.

Though formerly it was held that a tenant could not be sued on his covenant to repair before the end of his tenancy, yet it is now determined that he is liable, if the premises are out of repair, at any time during the term; and a covenant to repair at a stated time must be strictly obeyed. The good sense of this is manifest, since the freehold might otherwise be injured in the mean time, as for instance by not painting external or even internal wood-work.

The remedies in case of breach of such covenants are by an action of covenant if under seal, or by *assumpsit* if otherwise. No suit in equity can be maintained for specific performance, as the court does not entertain jurisdiction in such cases.

In husbandry leases there is a difference from others, which is this, that an *implied* covenant to repair (*i. e.* where none is expressly entered into) does not operate to oblige the tenant in all cases to repair other than the dwelling-house occupied by him; the burthen of the repairs of outbuildings and other erections on the farm falling on the landlord or the tenant according to the custom of the country. But courts are in general desirous of extending the liability even in this respect to the tenant. *Express* covenants in husbandry leases are in all respects construed as in other leases.

With regard to *cultivation*, the relation of landlord and tenant creates an implied obligation on the part of the tenant to manage the farm fairly and in a husbandlike manner, according to the custom of

the country; but this does not extend to particular modes of cultivation, out of the ordinary course of agriculture. The usual customs of the different counties are very succinctly detailed in Mr. Harrison's edition of Woodfall's Landlord and Tenant.

Where in a farming lease any covenants as to the mode of farming are stated, it is desirable to state the modes proposed particularly and specially; for though it is usual to say, that the business shall be conducted "according to the usage of the country," or "according to the course of good husbandry," such general modes of expression are open to objection on the ground of their uncertainty.

Where there is an express covenant against the removal of farming produce off the premises, the 56 Geo. III. c. 5 has provided, that the sheriff shall not be allowed to sell such produce so as to cause a breach of the covenant, and the tenant is bound to give the sheriff notice of the covenant; whereupon the landlord must be informed of the state of the circumstances, and when needful the sheriff must postpone the sale. The produce may be sold, but it must be dealt with by the purchaser in the same manner as the tenant would have been required by his covenant.

It is the duty of tenants to keep up the fences and preserve the boundaries of the land demised to them. They cannot in general dig up hedge-rows without making some proper hedge or fence, according to the custom of good husbandry.

Of trees, timber, and underwood, we shall have occasion to treat fully in a subsequent part of this work; suffice it here to observe, that in general the tenant has only a right to cut underwood, and not trees; and it would be waste for him to do so.

XIV. FIXTURES.

The general rule of law respecting fixtures, so far as relates to landlord and tenant, is, that whatever is fixed to the freehold becomes a part of it, and is subject to the same rights of property as the soil itself.

If chattels be not let into the soil, or into the walls of a house, they are not fixtures at all, and may be removed at will. The *general* rule as to annexations to the freehold is, that whenever the tenant has affixed any thing to the demised premises during the term, he cannot again sever it without the consent of the landlord. The tenant may, however, so erect buildings even as to be entitled to remove them, as by placing them upon blocks, pillars, or plates; but it seems he cannot remove the blocks &c. if they are let into the soil.

There are, however, certain exceptions to this general rule. Thus, where erections have been made *for the purposes of trade*, they may in general be removed. It is difficult to say with precision how far this rule may or may not be extended. When, however, articles can be removed without causing any serious detriment to the freehold, or when they are capable of being removed without themselves being entirely demolished, or without losing their value, the removal is lawful. A building entirely of brick could therefore hardly be removed. But where it has merely a brick foundation, and the erection is mainly of wood, it may be removed. A steam engine may be removed. So cider mills, salt pans, furnaces, coppers, brewing-vessels, fixed vats, machinery in brewhouses, collieries, or mills, and green-houses, stoves, and trees in

only insisting that the debtor is also a creditor in some other manner, in respect of which the opposite debt is counterbalanced either in part or in the whole.

By the common law, where an action was brought for one debt, a debt due from the party commencing the action could not be pleaded as a set-off, and the only relief was in equity; but the 2 Geo. II. c. 22, § 13, and 8 Geo. II. c. 24, § 4, have given a remedy for this evil, providing that evidence of such set-off may be given under the general issue, or it may be pleaded specially in bar to the action; and upon these statutes it has been determined, that a set-off is allowable in actions of debt, covenant, or assumpsit. But set-off is not allowable in actions on the case, trespass, or replevin, nor in the case of uncertain damages, nor in debt on bond conditioned for performance of covenants, nor against an avowry for rent (though in this case the defendant may plead the payment of ground rent to the ground landlord), nor against a distress, nor in the case of general damages in covenant and assumpsit; but where a bond is conditioned for payment of an annuity, or of liquidated damages, set-off is allowable.

What Debts may be set off.—In order to constitute a set-off at law, the debt to be set off must be such as might be the foundation for an action of debt, covenant, or assumpsit. If a creditor purchases goods to be paid for in ready money, the creditor may nevertheless set off his demand against the action for the price of the goods. So a verdict obtained by the defendant against the plaintiff in a prior action may be set-off against a subsequent one brought by the plaintiff. So also of a judgment, even pending a writ of error for its reversal. But unliquidated damages cannot be set off, except in bankruptcy, on which subject we shall treat fully in a subsequent part of this work.

In order to constitute a good set-off at law, the debt must be *legally* due; and in equity it must be *equitably* due. Therefore, if a debt be barred by the Statute of Limitations, it is of no avail even as a set-off. Debts, too, to be used as a set-off, must be due in the same right as those against which they are sought to be pleaded. Thus, a joint debt due from the plaintiff and another cannot be set off against a several demand by the plaintiff; though, if it were a joint and several debt it might, for then the plaintiff alone may be sued for it. And a debt owing by the wife before marriage cannot be set off against a demand by the husband alone. A, being indebted to B in 1000*l.*, executed a bond to him for securing that amount and interest; B subsequently died, having by will appointed C and D his executors and residuary legatees. The bond fell to C as part of his share of the residue. C died intestate, and L, his widow, took out administration to him, and also administration *de bonis non* to B. As such administratrix to B, she filed a bill as specialty creditor against the representatives of A; and it was held that they could not set off a demand in respect of sums which they alleged to have been omitted and improperly charged in the account of C, but that they must file a cross bill, because there could be no set-off at law or in equity where either debt is due *in autre droit*.¹

¹ *Gale v. Luttrell*, 1 Y. & J. 180. See *Bush*, Amb. 107; *Medlicott v. Bowes*, 1 also *Lec v. Carter*, 2 Atk. 84; *Whittaker v. Ves* 207.

With respect to setting off a joint or several demand, it has been held, that a joint simple contract creditor may proceed against a *clear residue of assets* of a deceased partner, the survivor being insolvent, and that he might set off against a debt due to the deceased from the survivor and himself as his *surety*, a debt to the survivor from the deceased, which was agreed to be applied in liquidation of the debt secured.¹

Where an action at law is commenced, and the defendant has a demand against the plaintiff of such a nature that it cannot be made available as a set-off at law, but is a good equitable set-off, he may file a bill in equity to restrain the action, and may have the benefit of the set-off in equity. Thus, where an attorney sues at law for his bill of costs, an allegation by the client, that the costs were occasioned by the solicitor's negligence, is a clear case of equitable set-off.² Or where there is a loan, and a promise to repay not provable at law.³ So an equitable set-off has been allowed upon mutual credit, though there were no mutual debts upon which a set-off could be sustained at law.⁴

But where a cross demand is acquired after a verdict, it is not a ground for an injunction in equity to stay the proceedings on the verdict.⁵ And the Court of Chancery refused, but without costs, a motion for special directions to the master, requiring him to deduct, in his taxation of costs of the parties, the costs which he should allow to the defendant, from those which he should allow to the plaintiff, who had become insolvent after the decree had been passed and acted upon.⁶ So if the defendant at law neglect to plead a set-off at law, a court of equity will not assist him.⁷ And if the set-off be of such a nature that it could be pleaded at law, it is clear that a court of equity will not entertain any jurisdiction.⁸

As regards the setting off against and in favour of costs, in a suit for the administration of assets, a debtor to the estate, who is entitled to have his costs of suit out of the fund, will not be allowed to receive the costs without setting off the debt due from him.⁹

In equity the court will not direct the costs of a suit and of an action between the same parties to be set off the one against the other;¹⁰ especially if the solicitor in equity claims a lien on them.¹¹

Where costs are due to a man and he becomes bankrupt, it becomes a debt due to the assignees, and the party liable must pay them in full, and cannot set-off a debt against them by proving it under the commission.¹²

As to setting off costs at law, though A has a separate demand against C, A may set off the debt and costs in a joint action by him against B and C against those recovered against A in an action by B.

¹ Cheetham v. Crook, 1 M'Clel. and Y. 307.

² Piggott v. Williams, 6 Mad. 95.

³ Taylor v. Okey, 13 Ves. 180.

⁴ Whyte v. O'Brien, 1 Sim. & S. 551.

⁵ James v. Kyunier, 5 Ves. 108.

⁶ Rumney v. Beale, 10 Pri. 113.

⁷ Exp. Ross, Buck. 125.

⁸ See Cooper v. Hutton, 12 Pri. 502; Harvey v. Wood, 5 Mad. 459; Towson v. Benson, 3 Mad. 203; Hurst v. Peime, 4 Pri. 339; Dinwiddie v. Bailey, 6 Ves. 136.

⁹ Harmer v. Harris, 1 Russ. 155.

¹⁰ Wright v. Mudie, 1 S. & S. 266; *contra*, Shino v. Gough, 2 Ball & B. 33.

¹¹ Smith v. Brocksby, 1 Anst. 61.

¹² Exp. Rhodes, 15 Ves. 539.

and C.¹ And the court will even permit the costs of one action to be set off against those of another, where the one is several and the other a joint action under the general jurisdiction of the court; the party applying undertaking to satisfy the attorney's lien for his bill in the cause to the costs of which he is chargeable, and to enter a general remittitur in that in which he is entitled to costs. And the costs of one judgment may be set off against the debt and costs in another. But a defendant cannot set off the debt and costs against the judgment recovered by the plaintiff, if the plaintiff have still another demand against him. And one judgment cannot be set off against another where the interest of third persons have intervened between the recovery of the two judgments, except, perhaps, in the case of bankruptcy; yet a defendant may set off a judgment recovered from the plaintiff against the demand for which he is suing, and the costs incurred, though the plaintiff is in execution on the judgment.²

We will only farther observe on this subject, that the principle of set-off being rather in the nature of a defence, than a compensation for the debt against which it is applied, the debt is not extinguished by the set-off. Thus, in *Pitts v. Carpenter* ³ it was held, that the plaintiff, to whom a larger debt than 40s. was originally due, but whose demand was reduced by the set-off to less than that sum, might nevertheless bring his action in a superior court, and was not within the provisions of a local court act confining debts for less than 40s. to an inferior jurisdiction.⁴

OF FRAUDULENT CONVEYANCES AND SETTLEMENTS BY DEBTORS.

By several statutes the claims of creditors are especially regarded and protected; and equity has always been so far disposed to afford its protection to creditors, that they have frequently been styled the favourites of courts of equity. Thus, with regard to *fraudulent conveyances*, by statute 13 Eliz. c. 5, § 2, and 29 Eliz. c. 5, every alienation and conveyance of lands, goods, and chattels, or any lease &c. of the same, made with intent to delay or defraud creditors, is void as against them, though good as against the debtor himself. It is questionable whether copyholds are within these acts. The compromise of a doubtful right may under circumstances constitute a fair and valuable consideration. Though a conveyance for the payment of debts taken abstractedly is within the statute, and standing alone may be void, yet if creditors join, or have notice, they cannot in general impeach the deed.⁵

Voluntary settlements are in general void as against pre-existing creditors. But the rule is the other way where the debts arise subsequently to the making of the settlement;⁶ and even though the grantor be indebted in a large sum at the time of making the settlement complained of, yet if that debt be secured (as for instance, by mortgage), it is not *prima facie* considered void or fraudulent upon creditors.⁷ Most cases are now, however, determined by the criterion, whether

¹ *Glaister v. Hewer*, 8 T. R. 89.

² See *Ellis, Debt. & Cred.* 213—15.

³ 1 Wils. 19.

⁴ See *Ellis, Debt. & Cred.* 210—219

⁵ *Exp. Cawkwell*, 19 Ves. 233.

⁶ *Batterabee v. Farrington*, 1 Swan, 106; S. C., 1 Wils. 88.

⁷ See *Exp. Pye*, 18 Ves. 149; *Bill v. Curitor*; 2 Mylne & K. 503; *Garard v. Lord Landerdale*, 3 Sim. 1; & 3 *Western's Coveyancing*, 145.

or not there is any intention to defeat or delay the creditors; and it is not necessary to prove that the party making the deed was *at the time* in insolvent circumstances.¹

If a party make an absolute conveyance, and yet continue in possession of the property, that is strong evidence of the absence of *bona fides*, and the conveyance will be set aside.²

The sale of an estate, attended with circumstances showing an intent to defraud creditors on the part of the vendor, may also be set aside.³ And if a gift by a father in insolvent circumstances to his children be so large as to convey a presumption of fraudulent intent, that too will be set aside; which is regarded as a very strong position.⁴

The secrecy of a transfer is regarded as a badge of fraud.⁵ So a voluntary settlement with a power of revocation, or any thing that amounts to such a power, is evidence of fraud.⁶

So, though a man be not then indebted, yet if he make a settlement to meet the event of his becoming so, it is equally void.⁷

Upon marriage, or for other good or valuable consideration, a conveyance to a man till such time as he shall become bankrupt, and then over, may be perfectly good and valid as against his creditors.⁸ But it is very doubtful whether a man could convey his own property to trustees on trust for himself till his bankruptcy, and then for some other party.

Although the consideration of marriage may take a settlement out of the reach of creditors, yet if the limitations of the settlement are carried beyond the parties contemplating the marriage and their issue, as for instance to any collateral branches of the family, the settlement may so far be void against creditors. Sometimes it has been held to go too far if it extend any benefit to brothers or sisters or uncles. But the law upon this point is at present in a very unsettled state.

A settlement after marriage is in general void, unless it be in consideration of some accession to or increase of property through the wife. But where the husband is not indebted at the time, it has been held that such a settlement is good;⁹ and where a husband had been living in adultery with another woman, and he and his wife separated, and he then in consideration thereof made a settlement on her, the consideration was held to be sufficient.¹⁰ And if a settlement after marriage is made in pursuance of articles agreed upon before marriage, it is then as perfectly good against creditors as though it were made before marriage.

If a trader unduly conveys away his property, he commits an act of bankruptcy; and even the conveyance of all a trader's effects on trust for the benefit of *all* his creditors is an act of bankruptcy, though a fiat must be founded thereon in six months to be of any avail.¹¹ In reference to such an act of bankruptcy it is to be observed, that if the

¹ Richardson v. Smallwood, 1 Jac. 552.

² Stone v. Grubham, 2 Bulstr. 248;

³ 1 Fonb. Eq. 276. Russell & Hammond, 1 Atk. 1.

⁴ Herne v. Moeres, 1 Vern. 465.

⁵ Partridge v. Gopp, 1 Eden. 169; Ambl. 596.

⁶ Row v. Dawson, 1 Ves. 51.

⁷ Tarback v. Marbury, 2 Vern. 510.

⁸ Stileman v. Ashdown, 2 Atk. 481;

⁹ Higginbotham v. Holme, 19 Ves. 88.

¹⁰ 12 Ves. 136; 5 Ves. 384; 2 Bro. C.C. 90.

¹¹ Hobs. v. Hull, 1 Cox. 445. See Stephens v. Olive, 2 Bro. C.C. 90.

¹² 6 Geo. IV. c. 16, ss. 4, 73. See post, 768.

deed be drawn contrary to the trader's intention, it will not be sufficient to support the fiat.

Again, creditors are favoured by a statutory protection against the *fraudulent devises* of debtors. The 3 W. & M. c. 14, § 2, declares such wills and testaments of lands &c., and of rents out of the same, to be void as against creditors; sect. 4 excepting devises to pay debts and children's portions according to marriage settlements.

If a man owing money to others release by his will a debt due to himself, though it is good against his executors, it is void as respects his creditors.¹

And although an heir is considered as entitled to special favour in a court of equity, yet it will never favour him so as to be instrumental in depriving a just creditor of any advantage he may gain.

So the defective execution of powers, and the loss of deeds and securities, are oftentimes supplied, when for the benefit of creditors. The doctrine of reputed ownership in case of bankruptcy, and the provisions against the fraudulent assignment of personal property on the eve of bankruptcy &c., are all for the benefit of creditors. So again, by the 47 Geo. III. c. 74, the real estates of traders within the meaning of the bankrupt laws are, upon their death, rendered subject to the payment of simple contract debts as well as of those by specialty. Thus, also, where several persons agree to become partners, the act of one binds the rest, and the estates of all are liable to the partnership debts.

These are the leading instances in which the law guards the interests of creditors; but there are a great number of cases upon the subject, too numerous to be mentioned in detail.²

OF ARRANGEMENTS BETWEEN DEBTORS AND CREDITORS.

On this branch of the subject we shall have to treat of—

1. COMPOSITIONS
2. DEEDS OF TRUST.
3. LETTERS OF LICENCE.

These are modes of arrangement between debtors and creditors, which are in general so advantageous to both parties, not only saving the expences of litigation, but expediting the receipt of a part (if not the whole) of their debts by the creditors, that it is to be regretted they are not much more frequently resorted to. Indeed, to facilitate these arrangements, the legislature has recently passed an act, 7 & 8 Vic. c. 70, which, by providing means for carrying them into effect under the sanction of a court of bankruptcy, has removed some of the objections against them, and will no doubt lead to their more frequent adoption. As we shall give the act at length hereafter, when we come to treat of the relief afforded to insolvents by petition to a court of bankruptcy, we must refer the reader thither, merely observing in this place that it applies only to those debtors who are not traders liable to the bankrupt laws.

¹ *Sibthorp v. Moxom*, 3 Atk. 581; *Drakeford v. Wilkes*, id. 540.

² See the cases collected, 1 Chit. Eq. Index, 285 *et seq.*; and Ellis, Debtor and Creditor, 154—197.

1. *Composition* is an arrangement whereby creditors agree to receive a proportionate part of their respective debts in lieu of the whole. It is generally resorted to where the debtor is out of the jurisdiction of the courts of this country, or where (being a trader) his estate is too small to bear the expence of a fiat of bankruptcy. Compositions, if fairly entered into on both sides, are much favoured in equity; though at law, unless they are under seal, they are not considered as absolutely binding, even when followed up by acceptance, unless confirmed by the guaranty of some third person to pay the composition, or the debtor's effects are assigned upon trust for that purpose, or there is some other such like consideration.

The debtor must be careful to comply with and follow the agreement most scrupulously, or else the creditor may become emancipated from it, and treat the debtor as though no such arrangement had been entered into. For instance, if a particular time, place, or manner of payment be agreed on, the letter, or at least the spirit, of the agreement must be performed; and if the agreement is to pay a sum less than the real debt by instalments, and the debtor's bankruptcy intervenes, the creditor may prove his whole debt, as though no composition had taken place, deducting the amount of any instalments he has received. So if the debtor agrees to assign the whole of his effects, and he subtracts a part, the agreement is at an end.

Creditors, by doing any act in conformity with the composition, may become as much bound by it in equity as though they had actually signed the deed; and it is to be observed, that if a creditor compound with one party to a bill or promissory note, the other parties liable to its payment are thereby released.

As already shown, if on this arrangement a creditor stipulates secretly for any advantages superior to the generality of the creditors, whereby they are injured, the private agreement is void as being fraudulent, and perhaps the whole arrangement might be set aside. But where a party is discharged under the insolvent acts, or by certificate on bankruptcy, he may afterwards, if he pleases, give any one creditor a bond or other security to pay up the deficiency of the debt, provided it has no connection with any prior promise that would be void.

2. *Deeds of Trust* form another mode whereby an arrangement of debts may be effected. In this case the debtor assigns his estate and effects, or a certain part thereof, to trustees for the payment of his creditors' demands. It is, however, to be remembered that by the 6 Geo. IV. c. 16, § 4, the very act of executing such a deed by a trader constitutes, of itself, an act of bankruptcy, if a fiat be sued out within six months from its execution and insertion in the Gazette. An assignment of this nature by joint traders must have the consent of the separate as well as the joint creditors.

The deed is generally signed by a body of creditors who agree to it in the first instance, and contains a proviso for the benefit of those who shall come in and claim the benefit under it within a certain time. Creditors, however, coming in after the specified time are not excluded; though, after such time, according to the case of *Dunce v. Kent*,¹ a bill

in equity may be filed to compel creditors to come in or renounce all benefit. Such a right seems, however, to be very questionable.

The construction of trust deeds is always in favour of an equal distribution among creditors; and law as well as equity favours this view. So that when a debtor is sued by one creditor, and he assigns all his property for the benefit of all his creditors, although unknown to them, and perfectly voluntarily, the law considers it a righteous act.

3. *A Letter of Licence* is sometimes resorted to in order to afford the debtor time to turn himself round and arrange his affairs, so as to enable him to acquire the means of paying his debts. It does sometimes happen (though for the honour of humanity, not very often) that a creditor is so obdurate that, though he knows his debtor to be wholly without the present means of paying his debts, he prefers, either from revenge, or upon the chance hope of some of his friends coming forward and discharging the debt, to consign his unfortunate debtor to a prison. If he do so from the latter motive, it is an unjust infliction on those who never injured him; and if the former be his motive, it reminds us of the moral in the fable of the boy and the goose which laid him golden eggs. Here his motive is as foolish as it is morally improper. Creditors do wisely who (presuming their debtor to have some sparks of honesty in his character), by forbearing to sue him, afford him an opportunity of redeeming himself by honest industry. This they may do by signing what is called a letter of licence, permitting him without molestation to carry on his business, or to compound with his creditors; and, generally speaking, they agree by this instrument, one with the other, that whoever does molest the debtor shall forfeit his debt.¹

OF LIENS.

Lien is the right of a creditor having possession of property belonging to his debtor, under certain circumstances, to hold it until his demand is satisfied; and it arises by operation of law or equity, in which respect lies the material distinction between it and a *pledge*, which latter arises by contract merely. Lien is held to be a personal right, and cannot therefore be assigned.

Legal liens are of two kinds, *general* and *special*; and then, again, a lien may be *equitable*.

A *general* lien consists of a right to retain possession of a chattel till payment of the debt incurred in and about that particular chattel, and *also* till payment of a general balance incurred in the course of the creditor's trade, though not in general for other debts.

A *specific* or *particular* lien is the right to retain for the debt incurred in and about the particular chattel retained, and for that only.

Equitable lien is a species peculiar only to courts of equity, and arises where actual possession cannot be had, and yet it is reasonable a lien should exist. In other respects courts of equity and of law hold the same doctrines upon the subject of lien.

One of the first requisites of a *legal* lien is actual possession, by one's self or by one's agent. Such possession must be continuous; for if once it is parted with, the lien is in general gone. It must also

¹ See Ellis, Debtor and Creditor, 198—209.

be righteous: thus, if a person pays the freight of goods that he may obtain wrongful possession of the goods, he has no lien for the amount of the freight; but if, having a lien on the goods, and in order to obtain possession it is necessary that he should pay the freight, then he has a lien for the freight so paid.¹

Where a debtor deposits deeds with his own wife to hold for a creditor, this is not a sufficient possession by the creditor to create a lien; and if a firm abroad send goods to a correspondent with directions to him to apply part of the proceeds to another firm in England, of which one of the partners abroad is a partner, the firm in London has no lien on such proceeds while they are in the possession of the correspondent. So if a debtor deliver to a creditor an order to receive money in the hands of a carrier on the road, the creditor has no lien before delivery of the order to the carrier. If a bankrupt misapplies securities of his customer, and, to secure the latter, the former incloses in a cover bonds, stating that they are deposited as a collateral security to the customer whose property they are, and they are then deposited in an iron chest with other securities belonging to other customers, the particular customer acquires no lien.

Neither does a general assignment of a trader's effects constitute a good lien; for it amounts to an act of bankruptcy, if taken advantage of as such.²

In regard to *general liens*: Some traders have this right by the special custom of their trade; as factors, packers, policy brokers, bankers, calico printers, fullers (at Exeter), wharfingers, and brokers. So an attorney³ has a general lien for costs on all papers that come to his hands in the way of his business, though they are not papers in the cause in which he makes his demand. But this general lien is confined to debts incurred in the particular trade or business of the creditor, and does not extend to other debts.

As to *special liens*: A miller, a dyer, a printer, a carrier, an innkeeper, and all other traders not before specified, have only this more limited right. They may, however, acquire a kind of general lien by contract. Thus, if a miller by agreement is to grind a certain quantity of corn, and he re-deliver a part of it, he may detain the rest for the demand for grinding the whole. So, if a printer is to print a certain number of parts or numbers of a work, he has a lien on the last, if he pleases, for the price of the whole.

As to *equitable liens*: In bankruptcy, at all events, the holder of a bill of exchange has a lien on property which had been deposited or agreed to be pledged by the drawer with the acceptor to cover the liabilities of the parties thereto, even although the holder were not aware of the existence of any such deposit.⁴

An equitable lien may be created by the mere deposit of title deeds or the muniments of property. Thus, the holder of dock warrants is held to be the owner of goods in the docks.⁵

¹ *Lempriere v. Pasley*, 2 T. R. 487.

² *Exp. Smith*, 1 Ves. & B. 518.

³ See *ut. ATTORNEY AND CLIENT*, p. 288—291.

⁴ *Exp. Waring*, 2 Rose, 182, 19 Ves. 345;

2 G. & J. 461. *Exp. Parr*, 18 Ves. 65.

Exp. Perfect, Mont. 25. *Exp. Copeland*

re Thompson, 3 Dea. & Ch. *Exp. Powis re Thompson*, *id.*

⁵ *Exp. Davenport*, 1 Dea. & Ch. 497.

If the vendor of an estate delivers possession to the vendee before payment, he has a lien on the land. So if the vendee pays part of his purchase money and a good title cannot be made, he has also a lien on the land.

But these liens, as will be seen hereafter,¹ may be lost by taking any distinct security, as a pledge of stock, or mortgage on other property.

On the subject of equitable *mortgages*, which are in other words mere liens, like indeed legal mortgages, we shall take occasion to treat at large in the second part of this work, under the subject of Property, and the titles thereto.

Where persons acting as factors for the purchase of goods have paid the whole money, and drawn a bill of exchange, which is protested, equity will follow (or, as it is termed, *earmark*) the specific effects; as in the case of a sale by a factor (there being no partnership) who laid out his money in the purchase of goods, sent them to his correspondent in England, and drew a bill of exchange, which, the correspondent having failed, was sent back protested, the goods having arrived at that time, it was held that there was a lien on those goods against other creditors till the price of them was repaid.²

How Lien is Lost.—Where a specific lien only exists, and possession is parted with, though the property afterwards come back to his possession, the creditor has no lien for the previous demand. Thus, where a coachmaker repairs a carriage, and gives up the possession to the owner, who afterwards puts up the carriage in the coachmaker's yard, there is no lien for the repairs. So if the master of a ship parts with his possession of goods, he loses his lien for the freight; or if the owner of a vessel delivers it up to the charterer.

The sending goods to wharf with an order not to part with them until the charges &c. are paid, is not such a parting with the possession as to constitute a waiver of the lien. But where a party entitled to lien is party to an agreement to sell the goods by private contract, and delivers part of them, he is said to have parted with his lien of the whole. Wherever possession is acquired by the mere receipt of the symbol of the whole, so the lien may be parted with, as well as the possession, by delivery of such symbol to another party, as the key of a warehouse, or the dock warrants before mentioned.

If the creditor part with possession by force of law, as a captain of a ship under the obligation to remove a cargo to the king's warehouse, he does not thereby lose his lien. But a very little is in general sufficient to destroy lien; as if the vendor of goods points out the goods, and they are marked with the vendee's mark; or if the vendor takes another security, or even agrees so to do, as a bill of exchange.³

OF STOPPAGE IN TRANSITU.

Stoppage in transitu is a species of lien, but differs from that already alluded to in this, that, whilst possession is necessary to give a lien,

¹ See *post*, tit. VENDOR AND PURCH.

² See Ellis, Debtor and Creditor, 220—

³ Exp. Dumas, 2 Ves. 582; 1 Atk. 234; 241; and Chit. Eq. Index, tit. *Lien*.

Godfrey v. Furzo, 4 P. W. 186; Mase v. Cadell, Cowper, 233.

it is incident to stoppage *in transitu* that the possession has been parted with. It is where a party consigns goods to another, and, whilst they are in the hands of a third person, as a carrier or bailee, the consignor claims the restoration of them to him without their being delivered to the consignee. A lien once parted with by a cessation of possession cannot be recovered by a stoppage *in transitu*.

The vendor has a right of stoppage of all such part of the goods as is not paid for; though if a third party has paid part of the price, and the goods get into his hands, the vendor's right is gone. But, in general, the vendor's right over-rides that of the carrier's lien, or any creditor of the consignee, or even his assignees in bankruptcy, if the vendor can stop them before they reach the bankrupt's hands; though equity will not interfere to stay the sailing of a ship to prevent it.

A vendor has this right generally speaking; and a purchaser on his own credit by order of another person, to whom he consigns, is a vendor of this description; but a surety for the purchaser has no such right.

Stoppage *in transitu* is not a determination of the contract; and therefore a vendor having exercised this right may nevertheless maintain an action against the vendee, calling on him to complete his contract, or rather to pay damages for the non-completion. Money remitted by a debtor to a creditor cannot be stopped by this means upon the bankruptcy of the creditor.

How long the *transitus* continues depends on each particular case, and there are many nice distinctions upon this subject. Thus, where A, upon an order from B abroad, delivered a quantity of goods to C, to be delivered to B, and C sent them to his correspondent abroad, with directions to send them to B's order, and the correspondents on the receipt of them wrote an acknowledgment of them to B, and stated that they awaited his directions; A was held still to have the right to stop them.¹ In another case Lord Ellenborough considered the *transitus* to be at an end when the goods had arrived at a third place to be at the direction of the vendee, and had been afterwards sent out by order of the vendee in a new course of conveyance by the vendee's direction.²

If goods are delivered by the vendor to a third party to have work done on them by the direction and at the expence of the vendee, the right of stoppage still exists.

Though formerly held otherwise, corporeal touch is not now considered to be necessary to determine the transit; but the delivery may be either actual or constructive. Thus, where, upon the vendee's bankruptcy, the provisional assignee went to the inn where the goods had arrived in London, and put his mark on them, although he did not take actual possession of them by reason that a creditor of the vendee had previously attached them, it was held that he had constructive possession,³ though it might have been questionable, if it had been the duty of the carrier to have carried them further, as for instance, to the vendee's warehouse, in pursuance of the vendor's original direction.⁴

If the vendee has parted with the property, or has assigned the bill of

¹ Stokes v. La Riviere, cited 3 T.R. 466; ² Duff v. Budd, cited in Ellis's Debtor and Creditor, 251.
³ East, 397; 2 Selw. N. P. 1110. ⁴ Id. ib.
⁵ Dixon v. Baldwin, 5 East, 184.

lading to a third party fairly and *bonâ fide* for valuable consideration, the vendor's right of stoppage is at an end; and this is so, even although the third party knows that the vendor has not been paid, provided there is no fraud. Nor does it signify whether the bill of lading be indorsed in blank, or to a particular person.¹

Stoppage in transitu avoids a policy of insurance effected before the stoppage. *Clay v. Harrison*, 10 B. & C. 99.

OF INTEREST ON DEBTS.

Interest may be defined to be the recompence for forbearing to require immediate payment of money. The legal rate of interest varies in different countries; but in England, by the 12 Ann. stat. 2, c. 16, the highest rate of interest that may be taken, without subjecting the receiver to the penalties of usury, is *5l. per centum per annum*.

But by the 3 & 4 Wm. IV. c. 98, § 7, no bill of exchange or promissory note made payable at or within three months after date, or not having more than three months to run (extended by 1 Vict. c. 80, to bills not having more than twelve months to run), shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring the same, be void, nor shall the liability of any party thereto be affected, by reason of any statute or law in force for the prevention of usury; nor shall any person drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture.

If any usury, or design to evade the statute, appear on the face of a contract, not only is *no* interest recoverable, but the debt also from which the interest would arise is forfeited at law, nor can it be proved in bankruptcy. But if it does not appear on the face of the contract, and it is necessary to come into equity to obtain a discovery of the fact, inasmuch as you cannot call upon a party to discover that which will subject him to penalties or forfeiture unless you waive the forfeiture, you must state such waiver on the bill, and offer to pay that which shall be found really to be due, otherwise the bill will be demurrable.²

If, however, usurious interest is not contracted for, the security is not invalidated by taking usurious interest subsequently;³ though there are penalties which attach independently of the above-mentioned forfeiture.

The above statute of Anne does not extend to Ireland, the East Indies, or any of the British colonies.

Where additional interest is taken by reason of a greater hazard, or in the shape of commission by bankers or bill brokers, it is not usury, provided the contingency be not merely colourable. Upon this principle bottomry bonds are not in general usurious, because a real risk is run, though they are capable of being so constructed as to amount to usury.⁴

The charge of 10s. per cent is usually allowed to bankers and bill brokers; and although the party lending the money be not a banker,

¹ *Ellis, Debtor & Creditor*, 242—255.

² *Whitmore v. Francis*, 8 Pri. 616.

³ *Exp. Jennings*, 1 Mad. 331.

⁴ *Chesterfield v. Janssen*. 1 Atk. 340; 2 Ves. 143.

nor engaged in trade, and although the money is his own, such a charge is not usurious, if it is fairly referable to trouble and expence incurred by the lender *bonâ fide*.¹ Where a bill broker, in order to get a bill discounted at 4*l.* per cent, took upon him the responsibility of indorser, and charged his principal 5*l.* per cent discount, which was the lowest rate at which he could have done the business except for his indorsement, it was held that he might charge 10*s.* for his trouble and commission in addition thereto without its amounting to usury.²

As we may take occasion to speak of usury more fully hereafter, we shall not digress further at present, but confine our attention to *when* and *what* interest is payable on debts.

In equity, when interest is payable on a decree, it is computed up to the day on which the master's report is confirmed. But interest is not allowed on book and simple contract debts prior to the confirmation of the master's report, even although founded on a claim under a will devising real estates to the payment of debts.

The mere direction in a deed to pay debts does not infer either contract or trust to pay interest upon debts by simple contract.³ And a provision by will to pay interest on debts has been held not to extend to simple contract debts.⁴

Formerly, at law, nothing could be levied in respect of interest subsequent to the judgment. But now, by the 1 & 2 Vict. c. 110, judgment debts carry interest at the rate of 4*l.* per cent per annum from the time of entering up the judgment, and such interest may be levied under the writ of execution.

Where interest has been given in equity, after a decree on further directions, on demands not carrying interest, it has been under circumstances of misconduct in delaying the execution of it; but the court is generally adverse to it.

On mortgages the interest is prescribed by the deed. In a case where interest was reserved at 5*l.* per cent, with a condition to take 4*l.* per cent if regularly paid, equity held that the 4*l.* per cent only could be taken, considering the 5*l.* per cent as a penalty, which equity scarcely ever enforces.

The court sometimes allows compound interest on mortgages, by making annual rests in the mortgage account; but this is purely discretionary in the court. Unless under the sanction of the court, it can never be demanded on the foundation of a previous agreement. And although a mortgagee may, when interest becomes in arrear, take a further mortgage to secure it, provided intermediate incumbrances are not thereby prejudiced, yet he cannot stipulate that if the interest be not paid at the appointed time it shall be converted into principal.

If there is no agreement for interest on a bond, the law nevertheless presumes a condition for payment of it; but it is a rule,⁵ that interest shall never be given so that the amount with the principal shall exceed

¹ Exp. Gwyn, 2 Dea. & Ch. 12.

² Exp. Goss, 2 Dea. & Ch. 240.

³ Hamilton v. Haughton, 2 Bli. 186.
See Stewart v. Noble, Vern. and Scriv.
528; Shirlev v. Ferrers, 1 Bro. C. C. 41;
Lloyd v. Williams, 2 Atk. 108.

⁴ Tait v. Northwick, 4 Ves. 816.

⁵ Clark v. Seton, 6 Ves. 411. See also

Grant v. Grant, 3 Russ. 598; Duval v. Terry, Show, P. C. 15; S. P. 2 Ch. Ca. 182, 186; Hale v. Thomas, 1 Vern. 350, and note there, as to cases where the creditor has been delayed in his recovery at law by the act of a Court of Equity. See also other cases, Chit. Eq. Index, tit. *Interest*,

111.

the penalty of the bond, although there may be special circumstances in which it may be given.

The general rule is, that the law, in cases of simple contract debts, does not imply a contract on the part of the debtor to pay interest on the sum he owes, although the payment of the principal or debt may have been frequently demanded. Thus, interest is *prima facie* not due or claimable on a demand for goods sold, although the price was to have been paid on a certain day, or on a balance struck on an account for goods sold, or on a debt for money lent to or paid for the defendant, or which had been received by him (though fraudulently) for the plaintiff's use; nor is it allowed on a sum insured, or in an action on a foreign judgment, or on an attorney's bill, or for work and labour, or upon a replevin bond, or recognizances of bail in the Queen's Bench. And an auctioneer is not, it seems, in general liable to pay interest on a sum deposited in his hands on a sale by auction.

But in some instances the law impliedly gives interest. Thus, the acceptor of a bill of exchange, and the maker of a promissory note, are respectively liable to pay interest thereon, in the nature of damages, from the time the interest became due, without proof of any demand of payment; and the drawer or indorser of a bill, or the indorser of a note, is liable to pay interest from the time he receives notice of the dishonour.

So if there be a contract to pay a debt by a bill of exchange or promissory note, and the debtor refuse to give it, he is liable to pay interest from the time when the instrument, if given, would have become due. But if the delay of payment of a bill or note has been occasioned by the default of the holder, the jury may refuse to allow interest. And if at the time a bill fall due there be no person legally authorized to receive it, as if the holder be dead intestate, and administration be not then taken out, even the acceptor shall be charged with interest only from the time the administrator demands payment of the principal.

Money awarded to be paid on a particular day carries interest from that day, if duly demanded thereon. And it has been allowed on the affirmance of a judgment on a promise to execute a mortgage. And a bond conditioned for the payment of money implied carries interest from the time of the obligor's default.

In all cases interest is allowed if there be an express contract for the payment thereof; and an agreement between the parties that it should be paid may be inferred from the course of dealing between them, as if it had been frequently charged without objection in former and similar accounts.

The invariable custom or usage of any particular trade or business to charge interest may also evidence and establish a contract to that effect; and even compound interest is allowed, if consistent with the course of dealing between the parties. But it seems that a debtor is not bound or affected by the custom of his bankers to charge interest upon interest by making rests in their accounts, unless it be proved that he was aware of such their practice.¹

By the 3 & 4 Wm. IV. c. 42, § 28, it is provided, that upon all debts or sums certain, payable at a certain time or otherwise, the

¹ Chit. Jun. on Contracts, 195—197, 1st ed.; Ellis, Debtor and Creditor, 335—355.

Jury, on the trial of any issue, or on any inquisition of damages, may, if they think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment. Provided, that interest shall be payable in all cases in which it is now payable by law.

And by s. 20, the jury on the trial of any issue, or on any inquisition of damages, may, if they think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance made after the passing of this act.

And by s. 30, if any person shall sue out any writ of error upon any judgment whatsoever given in any court in any action personal, and the court of error shall give judgment for the defendant therein, then interest shall be allowed by the court of error for such time as execution has been delayed by such writ of error for the delaying thereof.

OF THE PRIORITY OF DEBTS.

The following observations, as to the order of priority in which debts of different natures stand towards each other, apply to the payment of debts and the distribution of assets by executors and administrators, or where such distribution takes place under a decree in equity in a creditor's suit. Bankruptcy, it must be observed, has a very different effect, since administration under its auspices breaks down all the distinctions, and places every species of debt upon the same footing. In bankruptcy a judgment debt has no advantage or precedence in payment over one due by parol only; and it is only debts due to the crown, and certain others, such as those due to landlords for rent, or to clerks and servants, to a limited extent, that are not thus levelled and brought into an equality.

Independently, then, of bankruptcy, the order to be observed in the payment of debts stands thus:—

1st, Debts due to the crown, by record or specialty.

2dly, Sums due to the post-office for letters; and sums due from deceased or insolvent overseer of the poor to the parish by 17 Geo. II. c. 38, § 3.

3dly, Debts due by a judgment obtained in a court of record,¹ or by a decree of a court of equity.

4thly, Debts by recognizance and statute, if forfeited; if not, neither of these are preferred to—

5thly, Debts by specialty. These are such as are due on mortgages, bonds, covenants, and other instruments under seal. Of the

¹ A judgment obtained in the Lord Mayor's Court gives no priority, *Holt v. Murray*, 1 Sim. 485.

claims of mortgagees and landlords it is to be observed, that the former, by having possession of the land, has virtually a priority over other creditors; and so has a landlord, from his summary power to distrain.

6thly and lastly, Simple contract debts, or such as are due on instruments not under seal, written agreements unsealed and unstamped, bills of exchange and promissory notes, and ordinary debts, unsecured by any of the foregoing means. It is said that debts of this nature, due to the crown, or to servants for wages, have a priority to other simple contract debts.

If a person takes from a crown debtor by simple contract an equitable mortgage by the mere deposit of the deeds, the crown has no priority over such equitable mortgagee; and where the crown seized the property thus mortgaged, the court ordered the equitable mortgagee to be paid out of its produce in the first instance.¹

Of debts due by specialty, judgment, &c., and of equal degree in their nature, those that are prior in point of date, and are earliest completed, take the precedence; though in the case of administration by executors and administrators, they may prefer which they please of the same particular class, provided no action or suit is commenced to recover the one not preferred; or if the executor or administrator be himself a creditor, he may retain his own debt before all others of the same rank.

As, by the commencement of an action, the executor is bound to give priority to the debt for which it is brought over others of the same degree, it is desirable that no time should be lost by creditors in this state of circumstances. Where the general body of creditors are likely to be injured by this sort of procedure, it is recommendable that some creditor, or even the executor himself, should file a bill in equity for the administration of assets. Upon this the action at law is stopped, and all creditors of similar rank come in on an equal footing.

The order of payment, however, of certain debts is subject to be varied by circumstances other than their dates. Thus, of two judgment creditors, he who first sues out a *sci. fa.* has the priority.

As far as relates to purchasers *bonâ fide* for a valuable consideration, a judgment affects the lands, tenements, and hereditaments of the party only from the time it is signed. To ascertain which, the master, in signing the judgment, must mention on the record the time of signing it, and the same must be stated in the margin of the judgment roll when the judgment is entered.² But as to all other persons besides purchasers, the judgment (when not signed by leave of the judge under the statute 1 Wm. IV. c. 7), as it affects lands, relates, it should seem, to the first day of the term of which it is signed; and it affects as well lands held in trust for the defendant as those of which he is actually seised.³ And although the defendant died before judgment was signed, yet it was held to relate to the first day of the term, and that execution tested the first day of the term might be taken out on his goods.

If a judgment be kept on foot merely to defraud other creditors, or

¹ Gasberd v. Ward, 6 Price, 511.

² 29 Car. II. c. 3, § 13—15, extended to

the counties palatine by 8 Geo. I. c. 25, § 6

³ Id. § 10.

if there be any defeasance of it in force, such judgment shall not prevail to preclude them of their debts. A later judgment has, however, priority over a prior statute or recognizance; neither does it depend on the nature of the original cause of action. A judgment obtained after a conveyance of an estate to pay debts gains no priority; and if a writ of error is brought against a judgment, as the judgment is suspended, the executor may pay a debt due by statute or recognizance in priority to it. So if a judgment be not docketed, it gains no priority over simple contract debts.

Although a first mortgagee may *tack*, as it is called, that is, add to his present security a judgment obtained subsequently to a second mortgage, and so gain priority for the first mortgage and judgment over the second mortgage, yet a prior judgment creditor cannot tack a subsequent mortgage with like effect.¹

Of mortgages the date creates the priority in general. But if a mortgage is made for money advanced and to be advanced, a second mortgage made with notice of the first, and before any subsequent advance is made, is nevertheless subject to the further advance, the subsequent loans being considered as belonging to and forming part of the original transaction.

As before shown, a subsequent mortgagee can buy up a judgment prior to the date of the first mortgage, and so gain priority over the first mortgagee. We shall have occasion to say more of mortgages hereafter.

Although a bond be not yet due, the obligation is a present duty, and therefore must be paid in priority to a simple contract debt. But, as regards payment by an executor, if one bond is due and the other is not, the former has priority; though if the obligee forbear to demand payment till the latter becomes due, the executor may prefer either. If the bond be on a contingency not yet happened, simple contract debts may be paid first; though not otherwise. So voluntary bonds, and such as are voidable only but not absolutely void, must not be preferred to simple contract debts.²

CHAPTER XXV.

Of Principal and Surety.

THE contract of suretyship takes place when one person, to obtain some trust, confidence, or credit for another, engages to be answerable for him. As defined by Mr. Fell, in his work "On Guaranties," a *guaranty* is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is in the first instance liable to such payment or performance.³

¹ Baker v. Harris, 16 Ves. 307; Exp. Knot, 11 Ves. 617.

² See Ellis, Debt. and Cred. 383—405.

³ Lopes v. Middleton, 1 Turn. & Russ. 224, is a leading case upon this subject.

The first requisite, then, to the existence of a surety is, that there be a principal debtor, and one whose obligation or debt is a valid one in point of law. The surety does not become a principal debtor, so as to discharge the principal; but he must engage to do the same act as, and no more than, the principal; otherwise the character does not subsist. To create this character, it is required by the Statute of Frauds, 29 Car. II. c. 3, § 4, and 9 Geo. IV. c. 14, § 6, that the engagement be *in writing* and *signed* by the party to be charged therewith, or his lawful agent; so that a verbal promise is not binding.

It is also necessary that there should be a *consideration* for the agreement. What is a good and sufficient consideration we shall see when we enter upon the investigation of the law of Contracts; for all considerations which are good in relation to contracts in general, will be so for the purpose of suretyship. Forbearance from suing the principal debtor is generally the consideration of guaranties; but in all cases the consideration must be *definite* and *certain*; wherefore a consideration not to sue for "a time," "some time," or "a little time," is bad, because it is indefinite; though if it were "for a reasonable time," it would be good, as a jury would determine what is a reasonable time. The consideration must also be something executory, *i. e.* to be done. It is not, however, necessary that the surety should derive any benefit to himself from the performance of the consideration.

The consideration, as well as the contract, must, since the case of *Wain v. Walters*,¹ be *in writing*. It need not be in any formal set of words; but "I guarantee the payment of any goods which J. S. delivers to A. B," and such like forms, are sufficient, because the consideration is contained in the latter part, *viz.* the delivery of the goods. But the following, by reason of the absence of a statement of the consideration, was held void, *viz.* "We hereby promise that your draft on W. C., due at Messrs. M., at six months, on the 27th November next, shall be then paid, out of money to be received from St. S. Church; say, amount 174*l.*" The cases on this subject affording instances of these requisites are very numerous, and are sufficiently collected by Mr. Theobald.²

If, however, on an action being brought, the surety pay the money into court, the written proof of the contract and consideration is not needful or required.

The undertaking must, however, be express, explicit, and certain; and therefore the merely writing, "Indeed, I have no objection to guarantee you against any loss from giving A. B. credit," without notice that the plaintiff meant to accept, or some proof that the defendants had subsequently consented to its being conclusive as a guaranty, was held not to be binding. It is here to be observed, that the term, "I have no objection to become guaranty," is not inchoate, but is a mere offer to become surety, and not in itself the becoming a surety.

With regard to the power of *agents* to create suretyship, we need only refer to the chapter on Principal and Agent.³ So with respect to guaranties by and to partners, we shall find the particulars of the subject in the chapter on Partnership.

¹ 5 East, 10.

² Principal and Surety, p. 13, &c.

³ *Ante*, p. 282, &c.; see also 29 Car. II. c. 3, § 4.

With regard to the *extent of the surety's liability*, if a person is surety for the fidelity of another in an office of limited duration, or the appointment to which is only for a limited period, he is not obliged beyond that period. If the engagement is for a particular individual, it will not extend to the acts of his partner; and it will in general cease on a subsequent partnership of the principal debtor. So if for more persons than one *collectively and jointly*, it will not continue, on the death of one of them, in respect of the subsequent transactions of the survivors.¹

How the Suretyship may be extinguished.

A suretyship may be put an end to by payment, or performance of the contingency; by release; by accord and satisfaction; by bankruptcy and certificate of the surety, or by discharge under insolvency; by the Statute of Limitations; or by lapse of time, and consequent presumption of release.

As to its extinguishment by the *bankruptcy* of the surety, the certificate in general discharges the bankrupt from all debts proved, or which might have been proved under the commission. And by the 6 Geo. IV. c. 16, § 51, where credit has been given to the bankrupt, and the debt shall not have become payable at the bankruptcy, the creditor may prove and receive dividends nevertheless, rebating five per cent interest for the time it has still to run.

In *Exp. Adney*,² which was decided on the 7 Geo. I. c. 31, Adney guaranteed the payment of a promissory note and became bankrupt, and the Court of King's Bench held that the debt was not provable, as it had not at the time of the bankruptcy matured into a debt, but was only an engagement to stand indebted at a future time and on a certain event; and therefore bankruptcy was no discharge. So in *Allsop v. Price*.³ So in *Exp. Thompson*,⁴ A covenanted to pay an annuity on default of B; A became bankrupt before any default; and it was held that the annuitant could not prove against A's estate, he not having contracted a debt until default made.

If, therefore, at the date of the bankruptcy, the debt is not due and payable from the principal, or rather if the liability of the surety is still contingent, his bankruptcy is not a discharge. But if the contingency has happened, and the surety has become absolutely liable to pay, either then or at a future day, it is otherwise.

The case of a drawer or indorser of a bill or note is, however, different; for whether he is in reality a surety or not, yet the law regards him as a principal, and liable as soon as he puts his name to it, and proof can be made against his estate under the 51st section; so that his bankruptcy is a discharge.

In order that the suretyship should be extinguished by bankruptcy, the liability must be not only such a one as is provable, but it must be such as is properly called a *debt*; therefore a mere demand for compensation in the nature of stipulated damages is not provable, and consequently not discharged by the surety's bankruptcy.

¹ Theobald, Prin. and Surety, 1—92.

² Cowper, 460.

³ Dougl., 160.

⁴ 2 Dea. & Chit. 126, S. C.; Mont. & B. 219. But see *Johnson v. Compton*, 4 Sim. 47.

As to sureties for *annuities*, the 6 Geo. IV. c. 16, § 55 provides, that it shall not be lawful for any person entitled to an annuity granted by any bankrupt to sue any person who may be collateral surety for the payment, until such annuitant shall have proved under the commission for the value of such annuity, and for the payment thereof. And if such surety, after such proof, pay the amount proved, he shall be thereby discharged from all claims in respect of such annuity. And if such surety shall not (before any payment of the said annuity subsequent to the bankruptcy shall have become due) pay the sum so proved, he may be sued for the accruing payments, until such annuitant shall have been paid or satisfied the amount so proved, with interest thereon at the rate of four per cent per annum from the time of notice of such proof and of the amount thereof being given to such surety. And after such payment, such surety shall stand in the place of such annuitant in respect of such proof, to the amount so paid. And the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant or of such surety. Provided, that such surety shall be entitled to credit in account with such annuitant, for any dividends received by such annuitant under the commission, before such surety shall have fully paid or satisfied the amount so proved as aforesaid.

If the principal is discharged by his bankruptcy, and the creditor omits to prove under it, so is the surety; as, for instance, where default has been made before bankruptcy; for then the creditor can prove his debt under the bankruptcy, by the 46th and 47th sections, in the ordinary mode, and might recover the deficiency from the surety.

The surety's liability may also be discharged by the *statute of limitations*; and this commences its operation from the time when the surety's liability originated, that is, from the time when the principal made default. An acknowledgment of the liability, or promise to pay, in writing by the surety, if it accord with the 9 Geo. IV. c. 14, will continue his liability; and so will a payment on account. But how far a part payment by the principal would have that effect is not exactly determined, though it seems to be clear that it would not.

So also the surety may be discharged, in cases where the Statutes of Limitation do not apply, by a lapse of time, whence the presumption of payment arises. "This," in the words of Lord Mansfield,¹ "differs from that length of time which operates as a bar to a claim. A jury is concluded by a length of time that operates as a bar, where the Statute of Limitation is pleaded; and, though the jury may be satisfied that the debt is due and unpaid, it is still a bar. But length of time used merely by way of evidence may be left to the consideration of the jury, to be credited or not, and to draw their inference one way or the other, according to circumstances. For instance, there is no Statute of Limitation that bars an action upon a bond,² but there is a time when a jury may presume the debt to be discharged; as where no interest appears to have been paid for sixteen years. But if a witness is produced to prove the contrary, as by showing the party not to have been in circumstances to pay, or a recent acknowledgment of the debt, the jury must say the contrary."²

¹ Cowp. 102.

² Although there was not at that time, there is now a Statute of Limitation for debts

due on specialty: the 8 & 4 Wm. IV. c. 41 has fixed the period of twenty years as a bar to claims of this nature.

The surety's liability ceases in *general* when the principal becomes discharged by any means; but where such discharge is occasioned by act of law, then the surety is not discharged; as in the event of bankruptcy, or the like.

If the creditor agrees to accept a composition from the principal debtor, the surety is discharged. So if the principal is released, or the creditor agrees to release him, or if the principal debtor and creditor make any new arrangement inconsistent with or altering the terms of the original agreement of suretyship, or in the mode of performing them, or if time be given to the principal without the surety's consent. But merely taking a new security from the principal, without agreeing to give him time, will not discharge the surety. Neither is the surety discharged by time being given, if the agreement were authorized or subsequently ratified by the surety.

Forbearance or mere passiveness for any length of time on the part of the creditor towards the principal does not discharge the surety; for, unless called on by the surety, the creditor is not bound to sue the principal. If, however, after such request on the part of the surety, the creditor remain inactive, the surety becomes discharged.

Neither is the surety discharged by the creditor making advances beyond those to which the liability of the surety is limited; or by new credit being given to him upon an account different from that to which the surety is a party.

If, indeed, the liability of the surety is made by the terms of the contract to depend upon any act of the creditor, as upon his making a demand upon the surety, and no time is mentioned, such act must take place, or such demand must be made in a reasonable time, according to the nature of the case, otherwise the liability never attaches. Thus, in the case of *Payne v. Ives*,¹ the defendant guaranteed thus—"I undertake to indorse any bill or bills Mr. J. S. may give to Messrs. Payne and Co. in part payment of an order for lace which is now being executed for him; Messrs. Payne & Co. to allow 5*l.* per cent on the amount of the said bills for the guarantee." The order referred to was intended for India, and immediately after it was executed J. S. paid the plaintiffs 500*l.* in money and wine, and in June they drew on him for 337*l.* at eighteen months date, the usual credit in the India trade. For seventeen months and ten days the plaintiff retained the bill without making any application to the defendant to indorse it, and at the expiration of that time J. S. became insolvent. The plaintiffs brought an action on Ives's refusal to indorse or accept the commission tendered, which was resisted on the ground that the length of time that the plaintiff had kept the bill without tendering the commission or demanding the indorsement was a waiver of the contract of guaranty, and the Court of King's Bench held the defence to be good.

Again, if the creditor parts with, or through neglect loses, securities which he holds for payment of the debt, or any fund which he would be entitled to apply in discharge of his debt, the surety becomes exonerated, at least to the extent of the value of such securities; because the surety is entitled to the benefit of all the securities which the creditor holds.

¹ See *Dell v. Banks*, and another
3 D. & R. 664.

² *Mann & Gr.* 258; *Clarke v. Wilson*
3 Mee. & W. 208.

The concealment from the surety of any of the terms of the principal contract prevents any obligation arising from the engagement of the surety, and renders the engagement a nullity. Thus, in a mercantile contract, if the surety is not informed of the price of the goods, the market price is to be understood; and therefore any private bargain between the creditor and the principal debtor for a different price annuls the liability of the surety.

If the surety by any event becomes the principal debtor, then the suretyship is extinguished as such; for a man cannot be surety for himself.

If two persons agree to guarantee, in moieties, a debt composed of a sum already advanced and of another to be advanced; if the latter be not done, there is no suretyship. Or if the agreement of suretyship stipulate for a credit for eighteen months, but the credit mentioned in the invoice is only twelve months, it was held that, unless it were a mistake, the surety was not liable; the reason being, that the creditor must perform the conditions on the part of the surety according to the strict letter of the contract, claims against sureties being *strictissimi juris*. Neither is a substantial performance merely of such conditions sufficient, if a strict and literal performance is possible.

A surety cannot, however, relieve himself from his obligation as such by giving notice to the creditor that he will not be any longer answerable. Thus A, on taking B as his clerk, took a bond from him and a surety to secure his duly accounting for his receipts. No time was fixed for the continuance of the service, but it was to be determinable at the option of either party. The surety died. His executrix gave A notice that she should no longer consider herself liable on the bond. A read the notice to B, and required him to execute a new bond with another surety, which was done. B died, and deficiencies were found in his accounts subsequent to the notice; and it was held that the executrix was still liable on the first bond.¹

Neither does a surety become discharged by the creditor signing the principal's certificate in the event of bankruptcy.²

Of the Surety's Rights against his Principal, and also against the Creditor.

As soon as the surety's obligation to pay is become absolute, he is entitled, before payment, or even demand by the creditor, to call on his debtor to exonerate him, and may file a bill in equity against the principal to compel him to provide for his exoneration. Until, however, the debt is absolute, equity will not grant this relief, either by ordering the principal to pay the money into court by way of a deposit, or by any other mode.

In cases where the surety has paid the debt of his principal, he can demand reimbursement, either in law or in equity; if at law, it would in most cases be by action of *indebitatus assumpsit*, the count being for money paid at the request and for the use of the principal; but

¹ Gordon v. Calvert, 2 Sim. 252; and Brown v. Carr, 2 Russ. 600; and see other cases affirmed by L. C., 4 Russ. 581.

² Theobald's Prin. and Surety. 92—169; *pal and Surety*, IV.

when the surety has taken security from his principal, he will generally have to resort to that security. And if security given by a principal is made to fall due before the payment of the debt, the surety may enforce the security without waiting till the debt be paid. But no surety has a right to reimbursement where the payments made by him were under an unlawful engagement, the unlawfulness of which was known to him at the time of payment; nor can such be recovered from the principal, either as money lent for his use, or upon a counter security.

Where the debtor has become a bankrupt, if the surety pay the debt before the issuing of the fiat, the debt then becomes a debt to the surety, and he may prove as any common creditor; but if the surety have not paid the debt when the fiat issued, but pay it afterwards, his rights are secured to him under the commission by the 52d section of the Bankrupt Act, 6 Geo. IV. c. 16. Thus it will be found, that the surety must have paid the whole of the debt, or a part in discharge of the whole, so as to do away with the claim of the creditor; for if he fail in this, he is not aided by this section. To pay, therefore, only a part of the debt, not being in discharge of the whole, but merely to discharge himself, leaving the creditor still a claim upon the estate of the debtor, gives him no title to prove the part which he did pay, as a debt by virtue of the section above cited. But if the surety pay the whole of the original debt, or a part in discharge of the whole, he will have the benefit of this section, whether the creditor have proved under the commission or not: if he have proved, then the surety is entitled to stand in the shoes of the creditor as to dividends and other rights under the commission; and if he have not proved, then the surety himself may prove. In either case the certificate absolves the bankrupt from liability to his surety in respect of such payments. Also, by the 52d section, the *bail* of a bankrupt is expressly entitled to similar benefits; he may prove under the commission, and therefore cannot recover in an action against the bankrupt. There is another class of persons who are aided by this section, namely, those whom it designates as "liable for any debt of the bankrupt." Thus, where one partner assumes the obligation of paying the debts of the firm, here, as between such partner and his copartners, equity regards the debts as having fallen upon him; but, as the co-partners are still liable as between them and the creditors, it is viewed as a liability for the debts of another, and retiring partners so circumstanced are called *sureties*, although they do but slightly partake of the character. They are enabled by the above-cited section to prove against the estate of their co-partner, as persons liable for the debt of a bankrupt partner.¹

In cases where the surety, bail, or person liable for the debt of one who has become bankrupt, does not pay the debt till after the bankrupt has obtained his certificate, the surety, bail, or person liable are not barred from obtaining a reimbursement of the sum paid, notwithstanding the certificate.²

An acceptor of a bill for the accommodation of another who becomes bankrupt, is looked upon as one liable for the debt of another, and is entitled to prove under the 52d section.³ He is put to this

¹ 2 M. & S. 195.² 3 D. & R. 269.³ 13 East, R. 427.

method of recovering from the party whom he has accommodated, and cannot bring an action.

It is necessary, however, that the debt should be really existing at the time of the fiat issuing, in order to entitle the surety to prove under it; and, therefore, where one was surety for the payment of rent, and the tenant became bankrupt before any rent was due, the surety brought his action and recovered, the court being of opinion that this did not come within the meaning of the act 49 Geo. III. c. 121, § 8.¹


And under the 55th section of the Bankrupt Act, an annuity surety is not liable for the arrears of the annuity until the annuitant shall have proved under the commission against the grantor for the value, and the certificate discharges the grantor from all claims both of the grantee and the surety.

But where a debtor has been discharged under the act for the relief of insolvent debtors, the creditor may still recover his debt against the surety; and the surety, in his turn, may recover against the insolvent,² even although the liability was absolute before the insolvency. So, also, in the case of annuities granted by insolvents, the above-mentioned act provides for the valuation of such annuities, and discharges the insolvent from the annuity as towards the grantee; but it leaves the surety still liable to the grantee, and the insolvent to the surety, for whatever payments the surety may have made on account of the annuity after the insolvency.³

As between the surety and the creditor, the principle is, that the surety having paid the creditor his demand shall stand in his place, and have all the securities held by the creditor, and derive the same benefit from them as the creditor might.⁴ And if the surety is under any peculiar personal disability, which prevents his obtaining the benefit of funds or securities set apart for the creditor, equity will step in and restrain the creditor till the surety shall have had the means of resorting to those funds or securities.⁵ But the mere existence of funds out of which the creditor might have obtained payment for his debt, is no ground at law on which to rest a defence to the creditor's suit against the surety, the law being satisfied with nothing short of actual payment of the money; but it is a ground for application to a court of equity, that a creditor is making an unjust use of one security in preference to another.

The royal prerogative, however, is superior to this equity, and the crown is not compelled to proceed first against the real debtor in cases where it is concerned, nor need it state that the principal has been applied to for the payment, or that he is insolvent. But a surety to the crown, who has paid the debt, is entitled, on the principle above stated, to stand in the place of the crown in respect of securities belonging to the debtor; and it is usual to allow him the aid of crown process against the debtor.

In some instances the surety is discharged from his liability when the creditor agrees to take a composition for his debt; and where he is not thus discharged, the surety is entitled to a rateable proportion of

 J. B. Moore, 644.
Bing, 23.
M. & P.

* 14 Ves. 162.

* 2 Anstruther, 544.

the composition. So, where on a debt of 1000*l.* the creditor accepts a composition of 10*s.* in the pound, the surety being liable for no more than 500*l.*, the surety is liable for a deduction of 10*s.* in the pound from the 500*l.* on which he is surety, the creditor not being allowed to place the aggregate of the composition paid by the debtor as a gross payment, excluding the surety from all benefit of it.¹

It is also a principle of law, that a creditor shall not enforce any agreement or security by which an advantage would be had over the surety beyond what he contemplated and consented to.² Therefore any compromise between the creditor and his debtor, in consideration of which the security is enhanced or any advantage is taken of the surety,³ is looked on as a fraud on the surety, and the contract cannot be enforced against the debtor.

Contributions between Co-Sureties.

The principle of contribution arises where two or more having been responsible for another's debt, one has paid it; and the rule is, that he who has not paid shall be made to come in and contribute his part.⁴ The claim for contribution was first acknowledged in equity, but it is now well established at law also, with a modification. In equity, all the sureties being solvent, the debt which one has paid will be equally divided amongst the whole, or, if any have become insolvent, among the solvent.⁵ At law, however, the solvency of co-sureties is not considered; so that if any become so, the surety who has paid can recover no more than an aliquot part from each, the number of sureties being the matter considered: thus, where there are three sureties, and one has paid the debt and another has become insolvent, the one who has paid will have to bear his own and the insolvent's share, for it will not, as in equity, be divided between the two who are solvent.⁶

If a surety has been reimbursed a part of the payment that he has made, either by the debtor, by a counter security, or in any other way, he must deduct the sum reimbursed, and can only claim contribution on the balance.⁷ A surety may, either expressly or by implication, waive his right to contribution. Where three were co-sureties, and they had agreed that, if the debtor did not pay, each would pay his part, and one of the three became insolvent; here the surety who paid the debt claimed a moiety of the solvent co-surety, but the court thought that the intention of the parties had been that each surety should contribute no more than his share, which would be a third, and so it decreed. Also, if one become surety at the instance of his co-surety, he is not in general to be held liable to such co-surety for contribution,⁸ on the contrary, it is a question whether such surety, if the creditor oblige him to pay, might not demand a complete indemnification from his co-surety.

A surety has a right to demand contribution, not only on the debt that he has paid, but also for such necessary and reasonable expences as he may have paid in consequence of the default of the debtor; for in-

¹ 7 Bing. 489.

² 4 East, 372.

³ 1 Anstruther, 202

⁴ Pitt v. Pussord, 8 M. & W.; Calton v. Simpson, 8 Adol. & Ellis. 136.

⁵ 1 Chan. Rep. 19.

⁶ 2 Bos. & Pul. 268.

⁷ 3 Car. & Payne, 467.

⁸ 2 Esp. N. P. C. 478.

stance, the expences of the writ issued against him by the creditor to compel payment is regarded as a necessary legal demand, until which the surety need not pay. But the surety would not be justified in defending the action of the creditor, and therefore could not claim contribution on the expence of such wrongful defence.

A surety has a right to demand contribution from all his co-sureties of the same degree, without respect to their being engaged jointly or severally; and if they are engaged severally, it matters nothing whether they are engaged all in one instrument or in several instruments, nor whether they know of one another's engagements.¹ The payment by one of these sureties is a benefit to the whole of them, and therefore they ought to contribute. But where one engages to pay the debt if the debtor and his surety do not, this is surety for the debtor and his surety; in such case, if the creditor make the first surety pay the debt, that surety cannot come upon the subsequent surety for contribution, for he was himself a principal as towards the subsequent surety, who expressly engaged to pay if the others failed to do so.² The terms of the engagement of the last surety take the case out of the general principle of contribution.

An agreement by the creditor to give time to one of the sureties does not take from the co-surety his liability to contribute.³ In case of the bankruptcy of one of the sureties, if the debt was paid by the co-surety before the commission issued, he might then prove under the commission; but if not, it does not seem that he could, and therefore the co-surety might here sue for contribution.

The Liabilities and Discharge of Bail.

Bail, in its original signification, means a guardian or keeper; and a man *bailed* is where any one, being arrested or in prison, is delivered, by the person suing him, into the hands of others, whose engagement as his bail is, to have him ready to appear at a time specified, or to answer for him by paying what may be recovered against him.

The bail, then, having taken this responsibility, stand in the shoes of the person who has commenced the suit; and they have all the powers over the person of the defendant that the plaintiff had. If he be at large, they may re-seize him and have him committed;² and, in most particulars, the relative obligations of the three parties (the plaintiff, the defendant, and the bail) resemble those of creditor, debtor, and surety.

Since the abolition of arrest for debt, bail is not required except where it can be proved that the defendant is about to leave the country.

There are two kinds of bail; bail to the sheriff, and bail to the court, commonly called *bail above*.

The leading principle as to liability and discharge of bail is, that where the plaintiff either had not from the beginning, or has lost, the right of arresting and detaining the defendant, the right of the bail to do so is also lost, for they derive their right from the plaintiff, out of whose hands they took the defendant. There are many ways in which

¹ 2 Bos. & Pul. 270.

² 14 Ves. 160.

³ 1 J. B. Moore, 2.

⁴ Com. Dig. tit. *Bail*, A.

the right of detaining may be lost, some by act of law, and some by act of the plaintiff.

If a defendant becomes bankrupt and obtains his certificate before the time when the bail has become fixed, they are discharged, because the certificate releases the defendant from his liability to the plaintiff,¹ and his bail cannot render him. But where the certificate of the bankrupt is signed by the creditors, but not allowed by the chancellor till the bail has become fixed, the bail are not discharged.² The rule is, that bail fixed by a regular judgment shall not be relieved, unless the bankrupt was, at the time when they were fixed, in such a situation that he could not be sued.³

If the defendant succeeds to the peerage, becomes a member of the house of commons, or receives sentence of transportation for felony, or is sent out of the country as an alien, or dies, before the bail are fixed, the bail are discharged, because in either of these cases the power of the plaintiff over the person of the defendant is taken away, and the bail cannot render him.

If the plaintiff proves under a commission of bankruptcy against the defendant before the bail are fixed, they are discharged; for here the plaintiff makes his election to resort to the defendant's estate, instead of proceeding against him personally.⁴ Also, if the plaintiff agrees to give the defendant time, whether before or after judgment, and whether the bail are fixed or not, the bail are discharged. In the case of *Willison v. Whitaker*,⁵ the plaintiff after judgment agreed to take bills from the defendant payable at a future day and accepted by a third person. The defendant, thus, had freedom from arrest until the time for paying the bills, and consequently it was held that the bail were discharged. But this case is distinguished from one in which it is stipulated that the security shall not preclude proceedings during the time when the bills are running.⁶

A mere remission of legal diligence on the part of the plaintiff will not discharge the bail; and therefore where a plaintiff, after obtaining judgment, offered to take a composition, saying he would not arrest the defendant for three weeks, the court held that this did not exonerate the bail.⁷ But where a defendant offered to surrender himself on a certain day, and the plaintiff gave him time on condition that his bail should continue liable, and the bail, ignorant of the fact, signed an agreement to continue liable; proceedings being taken afterwards against the bail, the court held the bail to be discharged when the defendant's surrender was dispensed with, and not renewed by the agreement signed by them in ignorance.⁸

If a plaintiff accepts from the defendant a cognovit for payment of his debt by instalments, the bail are discharged, unless they are parties to the transaction.⁹ The reason given by the court was, that here the plaintiff had agreed to take the money in a different way from that which he was before pursuing, and if the defendant had been surrendered by the bail after the cognovit the court would have discharged

¹ 14 East. 598; 1 Burr. 245.

² 7 Taunt. 589.

³ 2 Wm. Bl. 811.

⁴ 2 Taunt. 246.

⁵ 7 Taunt. 53.

⁶ 7 Taunt. 126.

⁷ 5 Taunt. 614.

⁸ 7 J. B. Moore, 568.

⁹ 4 Taunt. 456.

him. Yet there is some conflict of cases here; for it was ruled by Lord Tenterden, that if the cognovit did not enlarge the time for payment beyond what the defendant would have by law, the bail were not discharged though they were ignorant of the cognovit.¹ So, again, bail are not discharged by the plaintiff taking a cognovit upon which he may sign judgment *instantly*, because upon the entering up of judgment, the bail might still have rendered the defendant.²

If before bail above is put in, the plaintiff accepts a cognovit from the defendant, the bail to the sheriff are discharged; for the acceptance of the cognovit is an admission on the part of the plaintiff that the defendant has appeared in court, and when he has done this the sheriff has done his duty.³

It is a general rule, laid down concisely by Mr. Justice Bayley in *Thomas v. Young*,⁴ "that the plaintiff could not give a partial indulgence to the principal without the consent of the bail; and that if he did, he discharged them, for the bail could not after this have rendered the principal."

And in the cases of *Charlton v. Morris* (6 Bing. 427), and *Clift v. Gye* (9 B. & C. 422), the court manifested great jealousy of proceedings taken against bail where due notice of the transactions between the plaintiff and defendant had not been given to them.

Bail above are discharged by their own bankruptcy and certificate, if they are fixed before they obtain their certificate.

CHAPTER XXVI.

Of Trustees and Cestuique Trusts.

THE term *trust* (from which that of *trustee* is derived), in its common acceptation, comprehends all personal obligations for paying, delivering, or performing any thing, where the person trusting has no real *legal* right in the security, but thereby confides altogether to the faithfulness of the trustees, or those entrusted. In its less comprehensive signification, and that sense in which we are about to view the subject, it means "an obligation upon a person, arising out of a confidence reposed in him, to apply property faithfully and according to such confidence." The party upon whom this obligation lies is called the *trustee*; the party for whose benefit he is to perform such obligation, and apply the property, is called the *cestuique trust*; and the party creating the trust may be termed the *settlor*, *devisor*, *grantor*, or *testator*, according to the subject of the trust, or the nature of the deed which prescribes it.

It would be an object of very little utility in this place to enter into any disquisition on the origin of trusts; it will be sufficient to state one of the most generally ascribed inducements for their introduction

¹ *Roche v. Stevenson*.

² 1 Taunt. 161.

³ 4 B. & Ald. 91.

⁴ 15 East's R. 616.

into this country. A trustee is the party in *law* who is supposed to have the entire property and ownership in the thing confided to him, so that his right can only be controlled in a court of equity. During the reign of Edward III. (which is the supposed date of the introduction of trusts into England), when forfeitures for treason or supposed treason became very common, the creation of trusts was resorted to in order to save the lands of the parties guilty, or likely to be pronounced guilty, of that crime. They therefore granted away their lands to a stranger, upon trust that he should hold and dispose of them in such and such ways. If the grantor in such case became guilty of treason, the land was safe in the hands of the trustee as *legal* owner, who was bound to apply it according to the exigencies of the deed conveying it to him; and if the trustee himself became guilty of treason, the land continued subject to the same trust; so that in either case forfeiture was prevented, or rather evaded. But there were many other motives for the introduction of trusts; as the anxiety of the clergy of former days to increase their possessions in evasion of the Mortmain acts, whereby they contrived that lay persons should hold lands upon trust for them (which they were forbidden to acquire in certain modes *directly*); the desire of men to dispose of property by their wills; and other similar reasons.¹

Who may be Trustees, and the Nature of different Trusts.

Although there were formerly much doubt and controversy upon this subject, it is now clearly established, that the king or queen regent, bodies politic or corporate, tenants in tail, for life, or for years, or even an occupant, a husband for his wife (in respect of property given to her separate use), infants, and generally all persons capable of confidence and of possessing real or personal estate, may hold as trustees.

No person, however, can be considered a trustee unless some interest be actually vested in him or her; and a married woman cannot be a trustee for her husband.

The cestuique trust must be a person capable of enjoying the thing entrusted. An alien cannot, therefore, be a cestuique trust of lands, because he cannot, by the laws of the country, enjoy the same, but must, if at all, hold them for the benefit of the crown. If the characters of cestuique trust and trustee unite by any accident in the same person, the trust is determined.

Trusts may be *public* or *private*; and, whether of the one sort or the other, trustees may become such, either expressly (by appointment, or by devolution from descent or representation) or by implication merely.

No person can be made liable as a trustee without his consent, either actual or implied; and an acceptance, or such a degree of interference with the trust property as may be construed into an acceptance of the trust, is necessary to constitute a trustee.

The trust also must be lawful, or else neither law nor equity will enforce it. By the 29 Car. II. c. 3, (the Statute of Frauds), §§ 7, 8, 9, it is provided, "that all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested or proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be

¹ See Willis on Trustees, 1--29.

utterly void and of none effect. Provided, that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by implication or construction of law, or be transferred or extinguished by any act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made. And all *grants* and *assignments* of any trust or confidence shall also be in writing, signed by the party granting or assigning the same by such last will or devise, or else shall likewise be utterly void and of none effect."

There is not, however, any form prescribed for the creation of trusts; and it need not necessarily take place by deed, as a mere letter, note, or memorandum in writing, or any written confession thereof, is sufficient. And, however informal or untechnical the words are, so that sense and certainty can be collected from them, a court of equity will interpret the intention of the parties.

Trusts thus *expressly* created, when of real estate, devolve by the death of the trustee on his heir at law, or, if an effectual will be made, on the devisee; when of personalty, on his administrator or executor. If there be co-trustees, the trust survives to the survivor, and so to his heir or devisee, executor, or administrator.

Implied, resulting, or constructive trusts arise in all those cases where it would be contrary to the rules and principles of equity that he in whom the property becomes vested should hold it otherwise than as a trustee. Thus, where money was given to a trustee to purchase promotion in the army for one who, after the death of the donor, was compelled by bad health to retire from the service, yet as the intention was evidently to provide for him, and he had as far as he was able co-operated with the views of the donor, the money was declared to be held in trust for him, although the specified object of the trust had failed.¹

There are, of course, many other instances in which this species of trust arises.² Generally speaking, where a man purchases an estate or other property in the name of another person, the latter is regarded as a mere trustee; but if a father purchase in the name of his son unprovided for, or a husband in the name of his wife (as she cannot be his trustee), the purchase is *prima facie* intended to be a provision for them and for their own benefit. If a trustee purchase an estate in his own name, and in the deed recites, or by any other manner admits it to have been purchased with the trust money, a trust results for the benefit of the person who was entitled to the money, or the benefits it was intended to produce; and if it were purchased partly with trust money and partly with his own, there is a resulting trust for the cestuique trust to the extent in value that was purchased with the trust fund. A purchaser, if he has notice (actual or constructive) that what he buys is trust property, is himself constructively a trustee. But if a purchaser who had no notice intervene between him and the original trustee, the second purchaser, though he had notice, may protect himself.

If the trustee of a lease renew it in his own name, he shall hold the renewed lease on the original trust; and if he be co-cestuique trust with an infant, and the renewed lease prove beneficial, the infant may par-

¹ Turn. & Rus. 207.

² See Chit. Eq. Ind. 1292, 3.

ticipate in it, though, if it be not beneficial, he cannot be compelled to bear the burthen of it.

So at law, a surviving partner is entitled absolutely to the partnership estate and effects, unless expressly provided against; but in equity he is constructively a trustee for his deceased partner's personal representatives to the extent of the share of such latter partner.

It has been before observed, that a man cannot be a trustee for himself; but there is one instance in which this strange anomaly does take place, and that is in the case of a mortgagee in fee, who together with his heirs holds in trust for himself and his executors, which may be thus further explained. If the mortgage remains unredeemed, his heir shall continue to enjoy the estate; but when redeemed, his executors take the price of redemption; therefore he and his heirs hold the land in trust, when the mortgage money shall be repaid, to pay it over to the mortgagee and his executors or personal representatives.

A bankrupt or insolvent gaining any property which ought to be distributed under the bankruptcy or insolvency, is a trustee for the assignees. So a stakeholder of any kind is but a trustee for both parties.¹

Of the Estate of Trustees.

The estate of the trustee conveys to him the legal burthens, and invests him with the legal privileges. He is actually seised of the freehold, and is liable to all onerous services. However, though formerly otherwise, trustees, and mortgagees out of possession (which latter, strictly speaking, are mere trustees), cannot now vote for any office, such as coroners, sheriffs, members of parliament, &c., in respect of their estates as trustees.² The trustee of a copyhold must be admitted, and is regarded as the legal owner to all intents, except the most beneficial one, *viz.* the enjoyment of the fruits of it.

The trustee, as the legal owner, is entitled to the possession of the property; but he will not be permitted, in equity, to keep possession of *real* estate against the cestuique trust, nor to disturb the possession of the latter when he has entered, if he be competent to sustain the estate, and the trust be not affected, the estate of the trustee being merely regarded as for the benefit of the cestuique trust.

By recent statutes, the estate of the trustee is not forfeited for treason or felony, as the crown may and usually does direct the execution of the trust to which it is liable. Neither does the trustee's bankruptcy or insolvency affect such estate as far as the interest of the cestuique trust is concerned. If the trust property be money, and it can be specially identified (or, as it is termed, *earmarked*), as by being in a certain coin or in certain numbered bank notes, or being kept in a certain box, or if it be any other species of specific chattel that can be identified, it does not pass to the assignees; though in the converse case, if it could not be traced or identified as the identical trust property, or the actual produce thereof, it would, and the only relief would be as in the case of other and ordinary creditors.

If a *feme sole* being a trustee marry, the husband takes no estate by curtesy; but the general opinion seems to be, that she cannot pass the legal estate even to the cestuique trust without her husband's join-

¹ Willis on Trustees, 30—71.

² See *ante*, pp 25, 195.

ing. The execution of the trust devolves entirely on the husband, except where the wife's personal acts are required; though if he survive her, the trust devolves on her heir or next of kin.¹

With respect to trustees or mortgagees who have been found lunatic, idiot, or of unsound mind by inquisition, the 1 Wm. IV. c. 60 enables the committee, under the direction of the lord chancellor, to convey property as effectually as the lunatic himself might; and where any stock is standing in the name of such lunatic &c. as trustee or executor, the committee may in like manner receive the dividends, and transfer or dispose of them. If no commission of lunacy has issued, by sec. 5, the lord chancellor may direct any person he may think proper to appoint for that purpose to convey property, transfer stock, &c.; though, where any sum of money is payable to such lunatic, no such order can be made if it exceed 700*l.*; but if it be under that amount, the lord chancellor may direct to whom and in what manner it shall be paid. By sect. 6, where an infant is seised of property in trust or as mortgagee, the infant is empowered to convey, by the direction of the Court of Chancery, as effectually as if he were of full age. If trustees are out of the jurisdiction of the court; or if it be uncertain, where there were several trustees, which of them was the survivor, or whether they or he be living or dead; or where the heir or executor of a known trustee deceased cannot be found or is unknown; or if a trustee, or heir, or executor, refuse or neglect to convey, assign, transfer, &c., within twenty-eight days (or thirty days in the case of an executor) after a proper deed of conveyance is tendered for his execution; then by §§ 8, 9, 10, the Court of Chancery may in like manner direct some proper person to convey, &c. All these orders may be applied for by petition; though, by sec. 12, the court may direct a bill to be filed, in case of any disputed rights, to establish and settle them. Section 13 provides, that the foregoing persons who are enabled to convey &c. may be compelled to do so if they refuse. If the mortgagee be an infant, and the mortgage is to be paid off, the money may be paid into the Bank of England in the name of the accountant-general of the Court of Chancery in trust for any cause depending (if any), or (if none) to the credit of the infant, subject to any special directions of the court.²

The act extends to trustees having an interest as well as to those having none (who are termed *bare* trustees), and the representatives of vendors and persons in whose names purchases take place are deemed to be trustees within the act; and it extends to all constructive or resulting trusts in like manner. And where the trustee, mortgagee, &c. is a married woman, her husband is deemed the trustee; and the act also extends to petitions in the cases of charities or friendly societies. By this act the lord chancellor is also empowered to appoint new trustees *upon petition* without a bill being filed, if the interests of the trust require it. So that now all impediments to the interests of trust property are capable of being removed.

Of the Estate and Interest of the Cestuique Trust.

The interest of the cestuique trust is in no way regarded in law;

¹ Willis on Trustees, 72—95.

² See 3 Western's Conveyancing, 207 *et seq.*

but, as observed by Lord Mansfield,¹ the trust is the legal estate in a court of equity by imitation. In the eye of this court, Lord Hardwicke said, an equity of redemption had always been considered as an estate in land. It will descend, may be granted, devised, and entailed, and that equitable entail barred by common recovery. This proves that it is considered as such an estate whereof in consideration of law there may be seisin, for without such seisin a devise could not be good of a trust. He who has the equity of redemption is considered as the owner of the land. It is said to be a settled right in equity which a man cannot come at but by subpcena, and that husband and wife being in the perception of rents and profits during the coverture are seised of a freehold by imitation of the law. The allowing tenancy by the curtesy of a trust is founded on the maxim, that equity follows the law, which is a safe and well fixed principle, for it makes the substantial rules of property certain and uniform, be the mode of following what it will; so that by the great authority of this determination, on clear law and reason, the cestuique trust is actually and absolutely seised of the freehold in consideration of equity, and therefore the legal consequences of an actual seisin of the freehold follow.

The cestuique trust is the proper party to exercise the rights of voting, of serving offices, and doing all other acts, as though there were no trust and the estate were solely in him. Though, however, he may sue alone in equity, it must always be borne in mind that at law he can do nothing of the kind, as courts of law wholly disregard him, and all rights *there* must be arrived at through the name of the trustee.

In equity the trust estate may be entailed or limited, aliened, or devised by the cestuique trust, provided the extent of his interest would enable him to do these acts had there been no trust intervening.

Unless it be vested in trustees *for the sole and separate use of the wife*, a trust estate of the wife will entitle the husband to be tenant by the curtesy; but, except in the case of a trust term to attend the inheritance, the wife cannot have dower or free bench thereout.

The estate of the cestuique trust is, by the 33 Hen. VIII. c. 20, forfeited to the king on the high treason of the cestuique trust, though not for felony merely or outlawry. If a *term* merely be limited in trust, the trustee's treason, felony, or outlawry in a personal action forfeits it, and the trust estate of the cestuique trust is liable to an extent; and if the estate be freehold, it is liable to execution on a judgment at the suit of an individual; though leaseholds, terms of years, equities of redemption of terms of years, or equitable interests of any kind engrafted on the legal estate of leaseholds or terms of years, are not so liable. But in bankruptcy or insolvency such equitable estate, of whatever kind, passes to his assignees, provided they manifest their acceptance.

So trust estates in the hands of the heir are legal assets for payment of the ancestor's debts by specialty, and a trust term is equitable assets, unless it is merely a term to attend the inheritance. *Legal* assets are such as constitute the fund for payment of debts according to their legal priority. *Equitable* assets are such as can only be reached by aid of a court of equity, and are divisible *pari passu* among all the creditors, as where the debtor has made property subject to his debts generally,

¹ *Burgess v. Wheate*, 1 Eden. 223; 1 Sir W. Bla. 121.

which without his act would not be so subject, or where the interest is purely equitable, and not converted into legal assets by any statute.

As before observed, equity will give the possession of the trust estate to the cestuique trust, provided it is compatible with the ulterior trusts, and the cestuique trust is able to receive and support it, though he is merely considered as a receiver and a tenant at will to the trustee. Between the trustee and cestuique trust there can be no adverse possession, and therefore the Statute of Limitations or length of time will not operate against the cestuique trust's rights.¹

Of the Duties and Power of Trustees.

If a trustee refuse to accept a trust, equity will interpose, and either appoint a new trustee or take the execution of it upon itself. But if he does accept it, he takes it for the benefit of the cestuique trust, and cannot possibly do so for his own. Moreover, the cestuique trust will not be bound by any act of the trustee which is contrary to the trust.

The trustees are bound to take every step to defend the title to the property, and to prevent waste or decay. They should execute their office as nearly as they can in accordance with the intention of the party or parties appointing them; and in cases of doubt and difficulty they are always justified in filing a bill in equity, so as to have the opinion and direction of the court as to the course they ought to pursue, in which cases, if they commence such proceedings upon reasonable grounds and with fair intentions, they are invariably allowed their costs at all events out of the estate or from some other party. They are bound to manage the trust property with provident care and diligence for the benefit of the cestuique trusts, and not for their own, and they will only be liable personally for losses that occur from their wilful default. They must keep clear accounts, as they are at all times liable to be called on to render them. If they retain any of the trust money in their hands, they ought to keep it distinct from their own, so that it may at any time be recognized; and if they make use of it, they are liable to pay interest; though the court will not make rests in their accounts so as to charge them with compound interest, even although they are trustees for a charity,² unless there is fraud, or a direction in their appointment for accumulating the fund.³ If they mix the trust funds with their own or their partnership property, they are liable to produce their books, whether private or partnership. They are bound to invest their property in real or government securities, and are seldom justified in an investment on personal security.

Besides the powers expressly given to trustees by the deed which appoints them, they have impliedly the fullest powers for enabling them to do all things (though not expressed) which are necessary to carry the trusts into execution; as, for instance, if a sale is necessary, they may sell, though not expressly authorized by the deed or will; or, they may mortgage. As before observed, however, it is better for them, previous to their doing any thing for which they have no *express* authority, to take the opinion of the court upon it, by doing which they can run no risk. If for the benefit of the estate, they may in general

¹ Willis on Trustees, 96—120.

² Att. Gen. v. Solly, 2 Sim. 518

³ Stackpole v. Stackpole, 4 Dow. 209; Raphael v. Boehm, 11 Ves. 92.

⁴ See the 10 & 11 Vic. c. 96, for better securing trust funds, and for the relief of trustees.

make leases. So they may grant the office of steward and receiver. But, generally speaking, they cannot appoint stewards, game-keepers, and the like, unless to meet the exigencies of the estate.

The power, interest, and authority of trustees in the subject matter of the trust is equal and undivided; and they cannot, like executors, act separately, but must all join both in receipts and conveyances, though when one trustee renounces and gives a release to the others, he is considered as having disclaimed, and the others are held competent to act alone.

If any thing be due to the trust from the cestuique trust, the trustee may withhold the trust fund which would otherwise have been payable to the cestuique trust. Unless the instrument appointing them expressly so provide, trustees cannot take any thing from the trust fund in recompence for their trouble in the execution of their trust; and it has lately been decided in the Exchequer, in a case not yet reported, that if the trustee be an attorney, he cannot make his charges for business done, even though the assistance of an attorney would at all events have been required. This decision does not seem quite consonant with justice, and its correctness may be much doubted, although it is quite right that some limit should be provided for their charges.

Neither can trustees ever be allowed, except in very peculiar cases, to purchase the trust estate for their own benefit, nor indeed to make any private advantage of it to themselves.¹

Of the Responsibilities of Trustees.

When trustees fail in their duty, they (and, if it be not a mere personal duty only, their heirs) are chargeable in equity for breach of trust. They are, however, generally presumed to be doing their duty until the contrary be shown.

If trustees assign property to a third party who is ignorant of the trust, as regards the assignee and the cestuique trusts, the transaction is binding, though they have their remedy against the trustee. But if the third party have notice, no act of the trustee in breach of his duty is binding against them, and therefore an assignment under such circumstances would not be allowed to stand. And trustees must never assume the ostensible ownership of the trust property. But appearing only as trustees, they are bound to exercise all that care and discretion over the property that a provident owner would himself observe. And they are liable to all the duties and impositions which the law casts upon mere ordinary individuals in similar circumstances.

Whenever trustees violate their duty, whether public or private, either by fraudulent alienation, by refusing to give possession to the cestuique trust (where the latter is competent to take possession &c.), by endeavouring to evict him improperly, by neglecting to receive and pay over the rents and profits of land, or by refusing to convey, at the request of the party entitled to call on him to do so, or are in any other manner, in the management of the trust property, guilty of fraud, misrepresentation, concealment, or other wilful misconduct, or even negligence or want of due caution, or omit doing what is plainly beneficial for the estate, a court of equity will give relief to the cestuique trust.

¹ Willis on Trustees, 121—166.

It is also the duty of trustees to give the parties interested accurate information of the disposition of the trust property, to keep correct accounts ready to be rendered, and to invest monies which are not otherwise required. If this is neglected from an improper motive, the court will visit them with the costs of suit personally, and the payment of interest on money in their hands, generally at the rate of four per cent at least. If the fund invested be the produce of real estate, the court will also in general direct that annual rests shall be made in their accounts so as to charge them with compound interest. But this is seldom or never done where it arises from personal estate.¹

They are also bound to invest money in real or government, and not on personal securities, or else they will be liable for any loss that may occur.² But if the founder of the trust had left property on personal security, without any direction for a change of it, the trustees are justified in leaving it so invested. They are sometimes enabled to lend on personal security by the terms of the trust deed or will; but even then they run great risk, unless great discretion is used, as for instance, if they lend on bond, or mere bill of exchange, or the like. And as the court of chancery only adopts (in general) the three per cent consols as a mode of investment, trustees may be liable to make good any diminution of the interest of other funds, if they think proper to run the risk of such an investment. They should therefore resort to the three per cent consols, or to the reduced bank annuities only, whereby they will avoid all risk.

It has been said to be a breach of trust on the part of the trustee to sign the certificate of a debtor to the trust who has become bankrupt, unless he has the consent of the cestuique trust. At law, if trust money be laid out by the trustee in purchase of any chattel, the chattel or other produce of the money may be claimed by the cestuique trust; and in equity they may elect whether they will take the produce or hold the trustee personally responsible.

If a trustee part with the trust fund, even to one of the cestuique trusts, or with his consent, to the injury of the others, that cestuique trust who received the benefit is first to be resorted to, to make good the loss; but if such cestuique trust be a married woman, her consent will not affect her rights against the trustee.

Trustees are generally exonerated from the consequences of accidental loss, provided they have taken all due and reasonable care to avoid it. And where they have *properly* left money in bankers' hands, and a failure ensues, or where they entrust another from necessity or according to usual custom, they will not be held responsible. But if they place money in bankers' hands mixedly with their own private funds, they are liable in case of the bankers' failure, especially if they have received interest on it.³ And if a trustee confide entirely to a solicitor, he is liable for the solicitor's defaults.

They must sell property under the most advantageous circumstances, or courts of equity will stop or annul the sale, holding the trustee liable for the loss and costs, if any.

¹ See *Att. Gen. v. Solly*, 2 Sim. 518.

² A trustee should avoid mixing trust

³ See *Shepherd v. Moulds*, 4 Harc. 500; *monies with his own. Melland v. Gray-Watts v. Girdlestone*, 6 Beav. 188; *Challon* 2 Coll. 295.
v. Shipham, 4 Harc. 555.

Trustees are not chargeable for the acts or receipts of their co-trustees, except where they have expressly bound themselves to be so, or where their misconduct or inactivity has thrown such a responsibility upon them. In this respect they differ from executors. Every executor may act independently of his co-executors; and when they join in signing receipts, each of them is held answerable for the whole sum. But as one of several trustees cannot give a discharge, and as every person who pays money to the credit of a trust estate may require all the trustees to join in giving him a receipt, only those into whose hands the money actually came will be answerable for it. Nevertheless, trustees who have joined in signing a receipt are *prima facie* considered as having received the amount; and those who mean to exonerate themselves from that inference should show that the money acknowledged to have been received by all the trustees was in fact received only by some or one of them, and that they merely joined for the sake of conformity. And the rule, that trustees are not liable for losses occasioned by the misconduct of their co-trustees, does not extend to cases where it has been through their own default or negligence that their co-trustees have unnecessarily been invested with the power which has enabled them to occasion the loss.

As a trustee is answerable for any misapplication of the trust fund by his co-trustee when it has been occasioned by needless confidence which he has reposed in him, so will he also be liable for misconduct which has been connived at by him, although he has derived no advantage from it.

The responsibility of a trustee amounts only to a simple contract debt, unless he acknowledges it by specialty. If the trustee be a trader at the time of his death, or if his debts are charged on his real estate by will or otherwise, the cestuique trust will be entitled to the benefit of these circumstances.

Removal of Trustees.

Courts of equity will remove trustees in all cases of misconduct or of inability or refusal to act, or where the interests of the cestuique trust demand it; as where a trustee is guilty of breach of trust, or absconds on a charge of forgery, or being a female if she marry a foreigner, or if a trustee go abroad, or where co-trustees refuse to act with him, or where he becomes infirm and is desirous of being discharged.²

The 6 Geo. IV. c. 16, § 70 empowers the lord chancellor, where a trustee becomes bankrupt, to appoint a new one in his place; and the Court of Review has now the same power. In some cases the court requires that a reference should be made to the master or other officer of the court to ascertain the fitness of the person proposed; but where the trust fund is small, a reference is dispensed with.³ Failure of duty on the part of a trustee, from a misunderstanding of it, is not a ground for removal.⁴ If a party wishes to be discharged from the trust, a reference is sometimes directed, to inquire if he is accountable for any acts done by him in the character of trustee; and if not he will be discharged.⁵

² Willis on Trustees, 167, 198.

³ See the cases, Willis on Trustees, 199.

⁴ Exp. Inkersole, 2 G. & J. 230.

⁴ Att. Gen. v. Cooper's Co. 19 Ves. 192.

⁵ 6 Ves 455.

CHAPTER XXVII.

Of Executors and Administrators.

THERE is no character or situation, perhaps, which requires so much precaution as that of an executor or administrator.

An *executor* is he to whom the execution of a man's last will or testament is confided by direction of the testator himself expressed in such document; except in the case of an executor *de son tort*, who takes upon himself the office by intrusion, and thereby becomes liable to all the trouble and responsibility of the office without any of its advantages. The appointment of an executor is essential to the making of a will or testament of personal estate. As far as the will relates to real estate, the executor (if he have any thing to do with such estate) is, properly speaking, a *trustee* or *devisee in trust*, and it is in that character he carries the trusts into execution.

In general, all persons are competent to sustain the character of an executor. Thus the king may be executor, though he may appoint others to act for him; so may corporations. An infant may be so appointed even while *en ventre sa mere*; but by 38 Geo. III. c. 87, § 6, he cannot act till twenty-one, till which time an administrator *durante minori ætate* must be appointed. So a married woman with her husband's consent; an alien friend or enemy, here under safe conduct; a person outlawed or attainted; paupers, or insolvents. A disability, however, arises from the party being guilty of certain offences against religion, or from his being the subject of a foreign country resident there, or being here without licence, or from a party's going and residing abroad, or from intellectual incompetency. And persons excommunicated, Popish recusants, Roman Catholics refusing to take the oaths of allegiance and abjuration, persons denying the Trinity, are all disqualified.

An executor is either appointed by the testator's will (actually or constructively), or he becomes such by assuming the office by his own intrusion or interference; in which latter instance he is styled an *executor de son tort*.

Constructive appointment is where, without expressly naming or appointing a party executor, the testator *recommends* or commits the duties of executing the will to him, or by conferring on him those rights which properly belong to the office. The appointment may also be absolute or qualified: *absolute*, where he is so constituted certainly, immediately, and without restriction in regard to the testator's effect or limitation in point of time; *qualified*, as where he is appointed executor at or up to a given period, or in regard to certain parts only of the effects.

The appointment may be solely, or in conjunction with others in which latter case they are all regarded as one person in law.

Executor de son tort.—A party becomes *executor de son tort* (or in his own wrong) by taking possession of and converting assets to his own use; living in the house, and carrying on the testator's trade; paying mortgages, debts, or legacies; maintaining suits on behalf of the estate; and by a variety of other modes. But merely performing acts of humanity or necessity to the testator's family or estate (such as locking up goods, burying the deceased, or providing necessaries for his children or cattle) will not amount to such an intermeddling as would render the party liable to be sued as an *executor de son tort*.

We may here observe that an *executor de son tort* cannot retain for his own debt out of the assets, as we shall presently see that a rightful executor may. A wrongful and rightful executor only differ in respect that the first is to take no benefit by his own wrongful interference; but as regards other creditors, there is no difference. And an *executor de son tort*, as well as a rightful executor, may administer the assets in due course of law, and in doing so stands in precisely the same situation as a lawful executor.

An executor derives his title from the will; and therefore at the moment of the testator's decease his right is complete, and, before obtaining probate of the will, he may exercise every act which is incident to his office, such as arranging the funeral, taking possession of the estate wherever he can find it (though he should do so peaceably), paying and releasing debts, selling and disposing of the property, commencing actions or suits, and the like.

Before, however, he can bring an action to trial, or a suit to a hearing, he must have obtained probate, so as to maintain his title in court; and if obtained before hearing, the probate relates back to the time of issuing the writ. The *probate* is the legal proof of the will, of which we shall say more presently.

Administrators.—An administrator is one to whom the law entrusts the distribution of a deceased person's estates and effects, where the party dying (who in this instance is called the *intestate*) has either left no will or other special directions as to such distribution, or where the party whom the deceased appointed executor is incompetent, generally or temporarily, or refuses to take the office upon himself. In the first instance he is simply termed administrator. In the others he is either, 2dly, *administrator pendente lite*, being appointed by the spiritual courts during the pendency of a suit either to establish the rights to administration or to controvert the alleged existence of a will; or 3dly, he is *administrator durante minori etate*, that is, during the minority of a person appointed executor, or entitled to take out administration; or 4thly, he is *administrator cum testamento annexo*, that is, where the deceased left a will, and either appointed no executor, or where the executor appointed declines to act, or dies before he obtains probate of the will; or else, 5thly, he is *administrator de bonis non administravit*, that is, where an executor or administrator dies, without leaving any representatives on whom the trust devolves, and there is property of the original testator or intestate not yet disposed of; or 6thly, he is *administrator durante absentia*, that is, one appointed for the convenience of the estate during the temporary absence of the proper executor or administrator.

Administrators are the officers of the ordinary, whose jurisdiction it is to see to the due distribution of the estates of deceased persons. The appointment in all cases takes place by the ordinary granting letters of administration to the particular individual, of which more hereafter.

In the second, third, and sixth instances of administration, as the appointment is simply for the benefit and protection of the estate, it is purely discretionary in the ordinary whom he will invest with the office; but in the first, fourth, and fifth instances, it is a matter of right in some parties to have themselves so appointed. Such parties are the next of kin of the deceased. Who are such next of kin will more clearly appear when we come to treat of the mode of distribution which the law has directed of the intestate's effects. It may be observed, however, that though the ordinary is compellable to grant administration of the goods and chattels of the wife to the husband or his representatives, yet of the husband's effects he may grant administration either to the widow or the next of kin, or to both at his discretion; and though, among the kindred, those are to be preferred that are the nearest in degree to the intestate, yet of persons in equal degree the ordinary may take which he pleases. Therefore, in the first place the children, or, on failure of children, the parents of the deceased, are entitled to the administration; then follow brothers, grandfathers, uncles or nephews, including the females of each class respectively; and lastly, cousins. The half blood is admitted to the administration as well as the whole; the brother of the half blood shall, therefore, exclude the uncle of the whole blood; and the ordinary may grant administration to the sister of the half, or to the brother of the whole blood, at his discretion.

Distribution of an Intestate's Effects.—By the 22 & 23 Car. II. c. 10 (commonly called the Statute of Distributions) it is enacted, that the remainder of the personal estate of a person dying intestate, after payment of debts and funeral expences, shall, at the expiration of one full year from the death of the intestate (which time is allowed for the purpose of paying a due regard, as the statute expresses it, to the creditors), be distributed in the following manner; *viz.* One third part thereof shall go to the widow of the intestate, and the residue be divided in equal proportions among his children; and, if any of them are dead, the share of such shall go to their legal representatives, that is, their lineal descendants. If there are no children, or legal representatives of them existing, then one half the estate shall in all cases go to the widow, and the other half be distributed equally among all the next of kindred to the intestate in equal degree, or the representatives of such of them as may happen to be dead, if such next of kin are brothers and sisters, but not else; the representatives of no other relations being admitted, except of children, brothers, or sisters. If there is no widow, the whole estate shall be divided among the children. If there is neither widow nor children, the whole of the estate shall be distributed among all the next of kin in equal degree, or their representatives, if, as before observed, such next of kin be brothers or sisters.

Out of the above rule of distribution all such children are excepted (except the heir at law) as may have had any estate settled on them by the intestate in his life-time, or may have been advanced by him, by mar-

riage portions or other gifts, equal to the share which would be due to them under such distribution. But if the estate or portion so given them by the intestate in his life-time is not equal to their distributive share, they or their representatives are then entitled to so much only of their father's estate under this statute as will make the shares of the children as equal as possible. The eldest son and heir at law, however, or any other son who may be heir by particular custom, as the youngest son under the custom of Borough English, though he may have land by descent of ever so large a value, and though he may have had land given him by his father (the intestate) in his life-time, is nevertheless entitled to his proportion of the personal estate equally with the other children. But if the heir at law has had any advancement from his father *in money*, he must, like the other children, allow for that, to make his share of the personal estate equal with their's.

In all cases where children have been advanced in their father's life-time by gifts of a marriage portion or otherwise, and the father afterwards dies intestate, if this marriage portion is not equal to the share due under the Statute of Distributions, the rule is, for such children to allow what they have so received to be part of the personal estate of the deceased, and then to take their distributive share out of the whole. Thus, if a man dies worth 2000*l.*, leaving three daughters, one of whom in his life-time has received 500*l.* from him, in order to make an equal distribution under the statute, the advanced daughter must bring this 500*l.* into hotchpot, that is, mix it with the other personal estate of the father, making that by this means the sum of 2500*l.*, to one-third part of which each daughter is entitled, or 833*l.* 6*s.* 8*d.* and which the two unadvanced daughters will accordingly receive out of the 2000*l.*, the estate of the father at his decease, thereby leaving the sum of 333*l.* 6*s.* 8*d.* for the advanced daughter, which, with her former portion, will make her share equal to that of the others. It is to be remembered, that where the intestate leaves a widow, her third part or share is in all cases to be in the first place deducted out of the whole personal estate, before any distribution is made among the children.

A man's *nearest of kin* (who take his personal estate, under the above statute, together with his widow, in the proportions before mentioned, or, in case there is no widow, the whole of such estate) are, in the first place, his children and their representatives, who are particularly provided for in the act. In case there are no children, but only grandchildren, then the personal estate belongs to such grandchildren. If he leaves no wife, children, or grandchildren, or issue of them, and his father is living, such father takes the whole of his personal estate. If his father is dead, then, by the 1 James II. c. 17, his mother (if he has no brothers and sisters) takes the whole; but if he leaves brothers and sisters, the mother and they divide his effects in equal proportions; whether such brothers and sisters are of the half or the whole blood, this making no difference in the succession to personal estate. If he leaves a wife, and also a mother and brothers and sisters, the wife has one-half of his effects, and the remainder goes to his mother, brothers, and sisters equally. If his wife, father, and mother are all dead, then between all his brothers and sisters equally, and the children of such of them as may be dead; and if he has only one brother or sister, the

whole estate goes to such one. If he has neither children, father, mother, brothers, nor sisters, it goes to the grandfather, or if he is dead, the grandmother.¹ If none of these are living, then such of his uncles and aunts, and nephews and nieces, as may be living at his death, take his personal estate equally amongst them. Lastly, if there are none of the above relations, his first cousins take it equally, share and share alike. But no person is ever admitted to take as a representative of another, except the issue of the intestate's children, or the children of his brothers and sisters.

In order to elucidate and explain the above, a few observations may be necessary. And 1st, It is a rule, that in all cases where there is only one person who is next of kin to the intestate, there being no other relation *in equal degree*, that one person takes the whole, as if there be but one child, or if there be no children and only one grandchild, and as in the case above mentioned of the father of the intestate.

2dly, Where representation is allowed, all the children of such deceased person as may be entitled to a share take such their parent's share among them all. As if a man dies intestate, leaving two children, a grandchild by another of his children, and two grandchildren of another, each of his two children take one-fourth part, the grandchild of one of the deceased children another fourth part, and the two grandchildren of the other deceased child have the remaining fourth between them. The reason of this is, that the grandchildren do not take this share in their own right as next of kin, but as representatives of their deceased parent, they are here said to take *per stirpes*, or according to their roots, all the branches having the share which their root, whom they represent, would have had if living. But if a man leaves only grandchildren (as, for example, two grandchildren by one son, three by another son, and five by a daughter), here each of the grandchildren take one-tenth part, because in this case they claim their share in their own right as next of kin, and all are so in an equal degree: they are thus said to take *per capita*.

3dly, So if a person dies without children, grandchildren, father, or mother, and his estate is divided between his brothers and sisters, and their children, the same rule is adopted as in the above case of children and grandchildren; as if there are two brothers, one sister, and three nephews and nieces (children of a deceased brother or sister), here the two brothers and the sister living each take one-fourth part, and the three nephews or nieces the remaining fourth between them, as personal representatives of their deceased parent. But if there are only nephews and nieces living, then they take the whole in their own right *per capita*, dividing it equally among them, and not *per stirpes*, or according to their roots.

4thly, If there be neither children, grandchildren, father, mother, brothers, nor sisters, but a grandmother living, she takes the whole of the estate, and his uncles and aunts (if he has any) do not share with her, contrary to the case of his own mother and brothers and sisters.

5thly, In case of the intestate leaving only uncles and aunts and nephews and nieces (children of a deceased brother or sister), the

¹ In a case where the next of kin were a grandfather by the father's side, and a grandmother by the mother's side, it was determined they should each take half of the estate.

uncles and aunts take equally with the nephews and nieces, being all next of kin in equal degree.

6thly, If the intestate leaves his wife with child, such child, when born, shall have an equal share with the other children, or such other share as it would have been entitled unto if born and living at the time of his death.

The following table shows the manner in which the Statute of Distributions operates in almost every instance that can occur:—

A Table showing how the Personal Estate of an Intestate is to be distributed.

If the Intestate has left	His Estate is divided as follows:
Wife and child or children,	One-third to wife, rest to child or children and if children are dead, then to their representatives, that is, their lineal descendants; except to such child or children (not heirs at law) who had estate by settlement of intestate in his life-time equal to other shares.
Wife and no child,	Half to wife, rest to next of kin in equal degree to intestate, or their legal representatives.
No wife or child,	All to next of kin and their legal representatives.
Child, children, or representatives of them,	All to him, her, or them.
Children by two wives,	Equally to all.
If no child, children, or representatives of them,	All to next of kin in equal degree to intestate.
Child and grandchild,	Half to child, half to grandchild, who takes by representation.
Husband,	Whole to him.
Father, and brother or sister,	Whole to father.
Mother, and brother or sister,	Whole to them equally.
Wife, mother, brothers, sisters, and nieces,	Half to wife, residue to mother, brothers, sisters, and nieces.
Wife, mother, nephews, and nieces,	Two-fourths to wife, one-fourth to mother, and other fourth to nephews and nieces.
Wife, brothers or sisters, and mother,	Half to wife (under statute of Car. II.), half to brothers or sisters, and mother.
Mother only,	Whole, (it being then out of the statute of 2 Jac. II. c. 17.)
Wife and mother,	Half to wife, half to mother.
Brother or sister of whole blood, and brother or sister of half blood,	Equally to both.
Posthumous brother or sister, and mother,	Equally to both.
Posthumous brother or sister, and brother or sister born in life-time of father,	Equally to both.
Father's father and mother's mother,	Equally to both.
Uncle or aunt's children, and brother or sister's children,	Equally to all.
Grandmother, uncle, or aunt,	All to grandmother.
Two aunts, nephew and niece,	Equally to all.
Uncle, and deceased uncle's child,	All to uncle.
Uncle by mother's side, and deceased uncle or aunt's child,	All to uncle.
Nephew by brother, and nephew by half sister,	Equally <i>per capita</i> .
Brothers or sisters, and nephews or nieces,	Whole, the nephews and nieces taking <i>per stirpes</i> , and not <i>per capita</i> .
Nephew by deceased brother and nephews and nieces by deceased sister,	Each an equal share <i>per capita</i> , and not <i>per stirpes</i> .
Brother and grandfather,	Whole to brother.
Brother's grandson, and brother's or sister's daughter,	To daughter.
Brother and two aunts,	To brother.
Father and wife,	Half to father, half to wife.

It will be observed that this statute secures as just a distribution of the personal assets as under ordinary circumstances would probably be directed by the most deliberate will; and in general the word *relations* in a will is construed by reference to the Statute of Distributions.

Before quitting this subject it will be necessary to say a few words on the customs of the city of London, of the province of York, and of other places having peculiar customs of distributing intestates' effects. There were formerly in different parts of the kingdom, particularly in Wales, in the province of York, and in the city of London, several customs, the remains of the old common law, which prevented persons from disposing of more than one-third part of their goods and personal property; which restriction continued till very modern times, when, in order to favour the power of bequeathing, and to reduce the law throughout the whole kingdom to one uniform standard, three acts were passed (the 4 & 5 W. & M. c. 2, explained by 2 & 3 Anne, c. 5, for the province of York; 7 & 8 Wm. III. c. 38, for Wales; and 11 Geo. I. c. 18, § 17, for London), whereby all persons within those districts, as well as elsewhere, are now enabled to dispose of the whole of their estate *by will*, and the claims of widows, children, and other relations to the contrary are totally barred. But although in these places the restraint which persons were formerly laid under by these customs, with respect to devising, has thus been removed, yet the Statute of Distributions expressly excepts and reserves these customs, and they still remain in full force, so far as respects the distribution of the estates of such as die *without will*. The mode of distribution, therefore, according to these customs, we shall now proceed to notice.

In the city of London and province of York, the effects of the intestate, after payment of his debts, are divided in the following manner; *viz.* If the deceased leaves a widow and children, his personal estate (deducting the widow's apparel and furniture of her bed-chamber, which in London is called the *widow's chamber*) is divided into three parts, one of which belongs to the widow, another to the children, and the third to the administrator; if only a widow, or only children, they respectively in either case take one half, and the administrator the other half; if neither widow nor child, the administrator has the whole. This share thus given to the administrator, and called the *dead man's part*, the administrator used to apply to his own use, till the statute 1 Jac. II. c. 17 declared that the same should be subject to the Statutes of Distribution; now, therefore, this one third part is distributed in the same manner, where these customs prevail, as the whole of the estate is in other cases of intestacy. So that if a man dies worth 1800*l.*, leaving a widow and a child or children, the estate shall be divided into three parts; of these three parts the widow shall have one, or 600*l.*, by the custom, and the child or children another 600*l.* also under the custom, and the remaining third or 600*l.* (being the dead man's share) is to be divided as directed by the statute, that is, one third to the widow, and the remaining two thirds to the child or children; so that in the whole the widow has 800*l.*, and the child or children 1000*l.*; which 1000*l.* is to be divided among the children, if more than one, or, if there

is only one child, to belong to such one. If he leaves a widow and no child, the widow shall have three-fourths of the whole personal estate; that is, one half of the whole by the custom, and half of the remaining half under the statute; and the remaining one-fourth part shall under the statute be distributed to the next of kin. If, however, the wife be provided for by a jointure before marriage in bar of her customary part, she is not entitled to any thing by virtue of the custom; but she will nevertheless have her share, under the Statute of Distributions, of that one-third which the custom gives to the administrator, and which he is directed to distribute accordingly, unless she is barred of that by special agreement. And if any of the children are advanced by the father in his life-time with any sum of money (not amounting to their full proportionate part), they must allow for that to the rest of the brothers and sisters, in the same manner as has been mentioned with respect to distribution of the whole estate under the statute, but not to the widow, before they are entitled to any benefit under the custom; and if they are fully advanced, the custom entitles them to no further dividend.

Thus far, in the main, the customs of London and of York agree. But, besides certain other less material variations, which it would be here needless to mention, there are two principal points in which they considerably differ. One is, that in London the share of the children (or, as it is called, the *orphange* part) is not fully vested in them till the age of twenty-one, before which they cannot dispose of it by will; and if they die under that age (whether married or not), their share survives to the other children; but at the age of twenty-one it becomes their absolute property, and may be disposed of by will, or, in case of their dying without will, distributed under the statute, like their other personal estate. The other difference is, that in the province of York the heir at common law who inherits any lands, either in fee or in tail, is excluded from any *filial* portion, or *reasonable part*.

In all the above cases, by children must be understood *legitimate* children, *i. e.* such as are born in lawful wedlock; a bastard being in law accounted the son of no one, and therefore incapable of taking by descent or under the Statute of Distributions. And if a bastard, who can have no relations or next of kin (except his wife and children), dies intestate, without a wife or any issue (children or grandchildren), leaving a personal estate, in this case the crown is entitled to such personal estate, and administration thereof will be granted to any one whom the crown shall appoint by letters patent, and which is generally to such persons as appear to have the most equitable claim.

If a married woman dies without any will (as she generally must), administration of all her goods belongs of right to her husband, as her next of kin, or most lawful friend, within the Statute of Distributions. And this is confirmed by the 29 Car. II. c. 3, which enacts that the Statute of Distributions shall not extend to the estates of married women who shall die without will, but that their husbands may demand and have administration of their rights, credits, and other personal estate, and recover and enjoy the same as they might have done before the making of that act; and the husband is accordingly entitled to the whole personal estate, and becomes her personal

representative to all intents and purposes. And if the husband dies after the wife, before administration taken out by him, his executors or administrators, and not the wife's next of kin, are entitled.

But where the wife is executrix to another, then, as to the goods which she had in that capacity, administration must be granted to the next of kin to the person to whom she was executrix, his personal estate belonging to them.

General Rules for the Guidance of Executors and Administrators.

Immediately on the death of the deceased, and before it is known who is executor, any person may, without risk, adopt means to secure the property and the will, or perform any other work of humanity or necessity, without rendering himself liable as an executor *de son tort*. The safest course, however, for a stranger to pursue, where the property is considerable, is to obtain letters merely *ad colligendum bona defuncti*, which only authorizes the *securing* of the property. Courts of equity will not appoint a receiver until letters of administration are taken out, unless good cause is shown for the delay. The executor's duty is to preserve all specific articles bequeathed, and not to sell them, unless there is clearly insufficient to pay debts without, in which case he may sell them.

If the executors neglect to secure property, or suffer personalty to remain more than six days on the land of the deceased which devolves on some person other than the executor, they are liable to the consequences personally. They may, after proper application, enter the house of the heir or devisee &c. to take away personal property, but cannot break open chests &c. for the purpose, but must resort to law. They are not bound to give an inventory or receipt for property thus delivered up.

As to the *will*, by the 7 & 8 Geo. IV. c. 20, § 22, if any person shall, during the testator's life, or afterwards, steal, or for any fraudulent purpose destroy or conceal any will, codicil, &c., he is liable to seven years transportation, or fine and imprisonment, as for a misdemeanor. If criminally withheld, a magistrate may interfere for its being delivered up; if not criminally, the spiritual court is the proper jurisdiction. A solicitor has no lien on it for costs or otherwise.

A person who, from nearness of relationship or other circumstances, may reasonably suppose himself appointed executor, may *open the will* on the testator's decease; but the discreet course is to convene all the nearest connexions of the deceased, who should be present at the reading of the will.

The executor, or expected administrator, must, within a reasonable time, provide for the *funeral and burial* of the deceased, unless he has directed his body to be given for dissection. It is a vulgar error to suppose that a creditor can arrest the body of a deceased debtor; as also, that the passing of a funeral over a private right of way makes it a public one.

If a husband neglects to bury his wife, a stranger may do so, and obtain reimbursement from the husband, even though she lived apart from him, and had a separate maintenance; or if the executor be absent, a stranger may act in like manner, and charge such executor. The funeral should be conducted in a style adapted to the rank and

means of the testator; but if he were insolvent, 20*l.* is all that executors or administrators would be allowed to charge as against creditors. In Lord Holt's time, the only expences allowed in funerals of insolvent persons as against creditors were for the coffin, ringing the bell, and fees to the parson and clerk and the bearers; to which Dr. Burn adds, for the shroud and digging the grave. Nothing is allowed for the pall or ornament, or for feasts or entertainments, nor for family mourning.

Besides the acts that have already been alluded to as what an executor may do before probate, it is his duty to present for payment bills or notes (the property of the deceased) at the exact time when they fall due, and to give immediate notice of dishonour.

An executor may be sued, if he has acted, before probate. And service of notice to quit on a widow, before administration granted, is sufficient. It has been held, that an expected administrator may file a bill in chancery, although he cannot sue at law, before letters of administration are granted, and that, provided he obtain them at the hearing, it is sufficient.

An expected administrator may also in general, before obtaining letters of administration, do all such acts as have been expressed to be proper for an executor to do before probate; and such preliminary steps may often be obviously necessary, as letters of administration are seldom issued till after the expiration of fourteen days from the death.

An executor or administrator should, as soon as possible after the death, cause an inventory and valuation to be made of the personal estate of the deceased up to the time of his death, by two competent and disinterested persons, usually sworn appraisers, who should sign the same, in case they may be required afterwards to authenticate the valuation; and this should be done before any sale or disposition is made of the property; and the executor or administrator is required, by 55 Geo. III. c. 184, § 38, to swear that the value of the property is under a certain amount. Such inventory is now not exhibited in the spiritual court, unless upon citation for that purpose; and the right of such citation may be lost by length of time.

Executors and administrators should also, as soon as possible, ascertain (by advertisement or otherwise) what debts were owing by and to the deceased, and of the latter, whether they are good or bad. In the offer to pay debts due by the deceased, great care is requisite that the executor or administrator do not make a *personal* engagement, so as to render himself individually responsible.

Executors should, as soon as they have ascertained the probable amount of the personal estate; take out *probate* of the will. They are liable to 100*l.* penalty, and ten per cent on the property, if they do not do so within six months after the death; but in case of dispute as to the right to probate, two months after settlement of it is allowed.

If the property is sworn under its value, and there is no fraud, the additional duty may be paid; and so if it is sworn to above its value, part of the duty may be returned. It does not seem that desperate or doubtful debts need be included in the amount sworn to.

With respect to where application should be made for probate or letters of administration, this depends on the locality of the property.

If it be all in one place, then it must be obtained from the jurisdiction of that particular diocese; but if there are *bona notabilia* (i. e. property to the amount of 5*l.* value) in several dioceses, then it must be obtained in the Metropolitan Prerogative Office of Canterbury, if all the property is in that province; or of York, if there; or of both, if in both provinces.

Land devised to pay debts is not regarded as *bona notabilia* at all, being mere equitable assets. But simple contract debts, bills of exchange, notes, and other choses in action due to the deceased, are *bona notabilia* of that diocese where the debtor resides. There are some nice distinctions as to what diocese under certain circumstances the property belongs to.

On obtaining probate in the common form, the executor, with two of the witnesses of the will (if living), and usually with his proctor, presents the original will to the judge, and proves it; the executor makes affidavit duly to administer according thereto; and the judge thereupon annexes his probate and seal thereto. The will is deposited in the registry of the ordinary of the metropolitan, and a probate copy on parchment is delivered to the executor, with a certificate of its being proved, which are termed the *probate copy* and *probate*. The executor then swears as to the amount of the property; and this is *prima facie* evidence for and against the executor of such amount.

Probate to one executor is good for all co-executors, unless they formally renounce.

Administration is not, in general, obtained until fourteen days after the death, and is granted in pretty nearly the same manner. Proof is required of the right to take it out; and a bond is also taken, with two sureties, in about double the amount of assets sworn to, for faithful administration; and on it parties injured may in general sue, by means of its assignment to them. An administrator, after obtaining letters of administration, stands in most respects in exactly the same situation as an executor.

Executors and administrators should, as speedily as possible, collect in the deceased's estate and effects, and reduce them into money as speedily as possible, unless otherwise directed by the will. If they carry on the deceased's business, the profit belongs to the estate, while the loss falls on themselves, unless they do so under the direction of the Court of Chancery, or merely for the purpose of winding up the affairs. We have already seen as to their duty of investing property. It is their duty to prosecute, by suit or action, all claims which the deceased had against other parties, and to defend those against the deceased which are not ended by his death (as all personal actions are); but, in all cases of doubt or difficulty, they should take the voice of those interested in the property before doing so.

Executors are in general allowed their costs out of the estate, where they act righteously and with a tolerable degree of prudence, even though unsuccessful, especially in equity. They should not, however, refer a dispute to arbitration, at least without restricting the arbitrator from awarding against them personally. Nor, indeed, is a reference even with that qualification, but without the consent of creditors and legatees and of the next of kin, prudent; for if an executor refer

generally, and the arbitrator should award him to pay, he will be personally liable. So if an arbitrator should award that a debt claimed by an executor as due to the estate is not due, and the same be thereby lost, the executor will be personally liable to pay the amount. Also if an executor compromise or give time, or take a new security, and the debt be thereby lost, he must sustain it. But an executor, to get rid of a bad tenant, may release an arrear of rent, and even give him money out of the assets to obtain possession; and if it appear that he acted *bonâ fide* and did what he considered for the best, he will be allowed the same.

Executors and administrators should always be ready to account; but filing a bill in equity, after a proper demand and neglect or refusal, is the only means of forcing them to do so.

If there is any fair doubt of the solvency of an executor, a court of equity will call upon him to give security, or else will restrain him from managing the estate, and appoint a receiver for that purpose.

Of General Compromises with Creditors.—An executor (when there are not assets enough to pay all the creditors) ought, even without a bill filed, to convene a meeting of creditors, and propose an equal distribution; and if, upon the faith of an agreement to that effect, he execute an assignment of assets, one of the creditors who assented cannot afterwards refuse to come in, nor can he sue the executor.¹

Of Retaining.—As an executor or an administrator cannot sue himself, the law allows him, when he has been legally invested with his representative character, to retain, out of any assets that may come to his hands, to the extent of all funeral and testamentary expences and debts that have been legally paid by him out of his own pocket, and also any debt due to himself, before he pays any other creditor in equal degree. It has long been an acknowledged principle in courts of equity, that an executor paying to creditors as much as the value of his testator's personal assets, acquires an absolute right to them. Indeed, this principle equally extends to trustees of real estate; though, in general, a trustee is not allowed to purchase any part of the trust. And, for the same reason, he may retain his own debt, notwithstanding a decree has been made in a suit by other creditors for administration of assets equally, and notwithstanding assets out of which he seeks to retain his debt came to his hands after the decree; but he cannot retain, in respect of his own debt, any assets against a creditor of a higher degree. It would even seem that an executor may retain a debt due to himself and really unsatisfied, though barred by the Statute of Limitations. Where there are joint executors or joint administrators, they must *inter se* retain their debts rateably, and in proportion to the assets. It is optional to plead a retainer, or give it in evidence under a plea of *plene administravit*; but it is in general better to plead it specially, as the replication must then narrow the evidence. To prevent a struggle between creditors in order to pay themselves, it is settled that an executor *de son tort* is not entitled to retain, though he obtain letters of administration pending the suit against him. He may rejoin to the same *puis d'arrêre continuance*, so as to sustain a previous plea of retainer, to which the creditor had replied that the defendant was executor *de son tort*.²

¹ Chit. Gen. Prac. 532.

² Id. 534, 5.

An executor or administrator should, in case of a deficiency of assets, pay debts of a higher nature first, and so on down to those of the lowest; otherwise, in case of deficiency, he would be held to have committed a devastavit, and be personally liable to the extent misapplied. The order of payment may here be shortly recapitulated; *viz.*

1st, Funeral charges.

2dly, Expences of proving the will, or taking out letters of administration.

3dly, Crown debts by record or specialty.

4thly, Debts having priority under particular statutes.

5thly, Debts of record in general; as judgments, and the like.

6thly, Recognizances, and statutes merchant and staple.

7thly, Rent, and covenants and contracts as tenant.

8thly, Debts or unliquidated damages secured by bond or covenant under seal.

9thly, Simple contract debts.

10thly, The legacy duty. This, by the 55 Geo. III. c. 184, is to be paid before payment of legacies or a division of the residue; and if not so paid, it becomes the personal debt of the executor or administrator as well as of the legatee, and which (having paid the legacy without deduction) he may afterwards recover from the legatee at any time.¹ The duty is to be paid on the aggregate amount of the residue of the testator's property at the time of the executor delivering into the Stamp office the note of what he intends to retain as residuary legatee. A gift or *donatio mortis causæ* is subject to this duty; and if a will forgive a debt, that too, being in the nature of a legacy, is liable to duty.

11thly, Legacies. With respect to *specific* legacies (or, as they are termed, *bequests*), that is, when any specific chattel, as a horse, a library of books, or the like, is left *eo nomine* to any person, it is, as before observed, the duty of the executor or administrator to preserve it entire, and not to sell it, unless there are otherwise insufficient assets to pay debts. Specific legacies only abate for the payment of creditors. Neither are such legatees in general liable to pay the duty on their legacies, but the general estate must bear that burthen.

An executor or administrator should be extremely cautious in giving his assent, however slight, to a legacy, whether general or specific, or even using expressions of congratulation or approbation respecting it, until he is confident there is a sufficiency of assets to pay all the debts and legacies in full; for such assent frequently vests a thing bequeathed in the donee, and it may turn out that it will be required to pay debts, or that the legatees in general will have to abate. The last and a very important case on this subject, containing most of the law thereon, is that of *Doe dem. Sturges v. Tatchell*.²

In general, legacies ought not to be paid within a year after the testator's death; and even then an indemnity and undertaking to refund may be required. If the executor &c. act otherwise, he does so at his own risk.³

¹ If a legacy is directed by the will to be paid without deduction, the estate must bear the burthen, and the legatee must be paid in full.

² 3 Barn. & Adolph. 675. See also *Shadbolt v. Woodfall*, 2 Coll. 30.

³ If an executor indorse a bill or note, he renders himself personally liable. *King v. Thom*, 1 Term. Rep. 487. So if he draw a note, unless he expressly states that it is to be paid out of the assets. *Childs v. Morris*, 2 Br. & B. 460.

Among legatees there is no priority or preference, not even on behalf of the executor or administrator; but all must be paid in full, or all must abate in proportion. The expressions or construction of the will may, however, give a priority.

13thly, As to *remuneration to the executor or administrator for his trouble and loss of time*, none is in general allowable by the law of this country, unless expressly given; therefore a liberal testator should take care to provide a fair remuneration by the express terms of his will. In a late case in the Exchequer,¹ the court held that a trustee and executor, who was a solicitor, could not be allowed his professional charges, although, had he not acted as a solicitor, some other person would have been required to have done so, who would have been entitled to such charges. This case, however, has been much doubted by the bar. An executor in India is allowed five per cent on all assets collected there. An executor with annuity would be allowed the expences of collecting rents, and sometimes of an accountant or solicitor's assistance. So he is, in general, allowed interest on advances made by him from necessity.

14thly and lastly, The payment of the *residue*.

Who is entitled to the residue, depends on the construction of the will. Previous to the passing of the 1 Wm. IV. c. 40, if no express disposition were made of the residue of the personal estate by the will, the executors were by law entitled to the whole of it; and courts of equity so far followed the law, as to hold such executors to be entitled to retain such residue for their own use, unless it appeared to have been the testator's intention to exclude them from the beneficial interest therein, in which case they were held to be trustees for the persons who would have been entitled to it under the Statute of Distributions if the testator had died intestate. But that act enacts, that the executors shall be deemed by courts of equity to be trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions in respect of any residue not expressly disposed of, unless it appear by the will, or any codicil thereto, that the executors are intended to take such residue beneficially. But where there is no person so entitled under the Statute of Distributions, this act does not affect any right in respect of such residue to which the executors would have been entitled if the act had not been passed.

Before dividing the residue, the heir or next of kin should always be advertised for.

The residue is only recoverable in equity or in the ecclesiastical court. If it issues out of or is charged on land devised to be sold, or from equitable assets, then the former must be the court resorted to.

In intestacy no distribution need take place before the end of a year after the death, and then a bond to refund may be required. If, however, an executor or administrator retain the residue after the year without good reason, he is liable to pay interest.

To enable a party entitled to a residue to sue an administrator on the administration bond, it has recently been decided at law (contrary to the ecclesiastical and spiritual court) that there must have been a decree of the latter court. When, however, such bond has been forfeited,

¹ Exp. Southwell, Trim. T. 1833.

² See 1 Chit. Gen. Prac. 5-0-554.

a creditor, as well as the next of kin, is entitled to sue upon it, in the name of the archbishop or his ordinary; and they cannot refuse.

Before the passing of the recent Law Amendment act, 3 & 4 Wm. IV. c. 42, there was no remedy provided by law for injuries to the *real* estate of a deceased person which had been committed in his life-time, nor for certain wrongs done by a person deceased in his life-time to another in respect of his property, real or personal. To remedy this, the second section of that act enacts, that remedies for the first kind of injuries may be obtained by action of trespass, or trespass on the case, provided the cause of action arose within six months before the death, and the action be commenced within one year after the death; and it directs that the damages to be recovered shall form part of the personal estate of the deceased. In like manner similar actions may be maintained against the executors, if the cause of action arose within six months prior to the death, and they be commenced within six months after the death; and the damages shall be a debt to be paid *pari passu* with other simple contract debts of the deceased.

So by § 14, an action of debt on simple contract is maintainable in any court of common law against the executors or administrators.

And by § 31, executors and administrators, suing in right of their testator or intestate, are, in the event of nonsuit or verdict against them, liable to pay costs, as though they were suing in their own right.

And by § 37, the executors or administrators of a deceased landlord are enabled to distrain on the goods of the tenant for arrears of rent due to the deceased, in like manner as the deceased himself could have done.

CHAPTER XXVIII.

Of Partners.

PARTNERSHIP is a contract by which two or more persons join together their money, goods, or labour, for carrying on some business or undertaking in common, upon an agreement that the gain or loss shall be divided proportionably between them. Although the partners' shares need not be equal, yet they must be joint.

Public trading companies, established by royal charter of incorporation, letters patent, or by act of parliament, are for the most part exempt from the general law of partnership, by which each individual partner is personally liable for the whole of the debts of the partnership. But, unless such responsibility be so limited, public companies differ not in this respect from private copartnerships, and the members of each are jointly and individually liable for all the debts of the company.¹

¹ Under the 6 Geo. IV. c. 91, charters of incorporation were sometimes granted merely for the purpose of enabling public companies to sue and be sued in the name of their public officers, without limiting the responsibility of the shareholders to the public. By the 4 & 5 Wm. IV. c. 91, this

privilege might be granted to unincorporated companies and associations. And now the 7 Wm. IV. & 1 Vic. c. 73, after reciting that divers associations are and may be formed for trading or other purposes, some of which it would be inexpedient to incorporate by royal charter, although it

Private copartneries and joint-stock companies differ in other respects. In a private copartnery, no partner, without the consent of the company, can transfer his share to another person, or introduce a new member into the company: each member, however, may, upon proper warning, withdraw from the partnership, and demand payment of his share of the common stock. In a joint-stock company, on the contrary, no member can demand payment of his share from the company; but each member may, without their consent, transfer his share to another person, and thereby introduce a new member.¹

Contract of Copartnership.—To constitute an ordinary partnership (to which we are now about to confine our observations) no charter or licence is necessary, nor any thing more, as affects the world, than their bare consent for this purpose; and though there is usually some deed of copartnership entered into, yet the mere existence of a mutuality of interest in the profits of a business or a branch of it, or of the ostensible character of joint traders, is sufficient to render them liable to be treated and considered as partners.

All persons capable of contracting may become partners. But an infant, as between him and the world, will not be liable to the burthens of the partnership (for he may plead his infancy); and a *feme covert* can in no way be a partner, for the husband is entitled to all her share in the subject matter of the partnership.

The free and personal choice of the parties is essential to the existence of a partnership. So that the executors &c. of a deceased partner do not become partners with the old firm, though entitled to participate in the profits till the winding up of the concern. And, for the same reason, though one partner can charge his own share in the concern to its utmost value, yet he cannot give a stranger an interest in the partnership without the consent of the copartners.

Another ingredient of a partnership is, that the object of it should be within the policy of the law, and for a lawful purpose.

If a partnership be formed for one particular purpose, another cannot be pursued, against the consent of any one partner, though an indemnity from loss be offered to him.

Where there is an *implied* contract of partnership only, the copartners are each presumed to have an equal share in the property *inter se*, and as regards the world; and though towards the world each is liable

might be expedient to confer on them some of the privileges incident to corporations created by charter, empowers her majesty, by letters patent under the great seal, to grant to any such company, although not incorporated, any privileges which, according to the rules of the common law, it would be competent to grant by a charter of incorporation; such as, that the members shall be liable for the engagement of such companies only to such extent per share as shall be limited by such letters patent; and that the companies may sue and be sued by their public officer, providing, however, that any member may be joined with such officer as a defendant in equity for the purpose of discovery, or in cases of fraud.

¹ By the 7 & 8 Vic. c. 110, provisions are made for the registration, incorporation, and regulation of joint stock companies; and by 7 & 8 Vic. c. 131, for facilitating the winding up of their affairs when unable to meet their pecuniary engagements. The 8 & 9 Vic. c. 16, called "The Companies Clauses Consolidation Act," comprises in one general act a variety of provisions relating to the consolidation and management of such companies, which are applicable to every joint stock company thereafter incorporated by act of parliament for the purpose of carrying on any undertaking, except so far as they may be expressly varied by any such special act.

for the whole loss, yet *inter se* each is only liable to the extent of his own share and interest.

A partnership may sometimes subsist as regards individuals and the rest of the world, though not as between the individuals themselves. Thus, where it was agreed between A and B, that A should furnish the goods, and that A and B should share the profits, it was held that there was no partnership between A and B *inter se*, as it was merely a mode of remuneration of the trouble and credit of B by the division of profits, though, as regarded third persons, they were liable as partners. So if the amount of a clerk or servant's remuneration is dependent on and derived as such from the profits of a concern, though, as regards the world, he is liable as a partner, he is not a partner as regards his employers.

There are three classes of partners, whose contract and liability as regards the world and *inter se* we shall now shortly consider: 1st, An *actual ostensible* partner; 2dly, A *secret* or *dormant* partner; and 3dly, A *nominal* partner.

The *first* is one who not only participates in the profit and loss, but appears and exhibits himself to the world as a person connected with the partnership, and as forming a component part thereof. As partner, he is clearly answerable for the debts of the partnership, and entitled to a share in the profits; and therefore, in joint stock companies, a person paying his deposit on shares, and afterwards signing the deed of partnership, has been held to be a partner from the time of his deposit, and liable from that time.

The *second* description of partner is where a person is participant in the profits and losses, but, his name being suppressed and concealed from the world, his interest is consequently not apparent. It is laid down, that whoever has a right to share in the profits of a trade or particular adventure, or has a specific interest in the profits themselves as profits, becomes chargeable as a partner to third persons in respect of transactions arising out of the trade or particular adventure in the profits of which he is to participate. Executors of a deceased partner, whose names are not added to the trade, but who continue his share of the partnership property in the concern for the benefit of his infant child, and who on a division of the profits and loss carry the same to the account of the infant, though they take no part of the profits themselves, are liable as dormant partners. The responsibility of this class of partners cannot, any more than that of the other classes, be altered as regards the world by any private agreement; though, like the others, it may be *inter se*; and therefore a dormant partner may be called on to pay the whole debts of the partnership.

As to constituting a person a partner, a distinction prevails between his having an interest in the profits themselves as profits, and being entitled to a given sum of money in proportion to a given *quantum* of the profits, as the reward of or compensation for labour and services. Thus, a remuneration to a clerk or servant of a portion of the money of his principal does not constitute him a partner. Lord Eldon observed, that "if a man stipulates that, as a reward for his labour, he shall have, not a specific interest in the business, but a given sum of money in proportion to a given *quantum* of the profits, that will not

make him a partner; but if he agree for a part of the profits as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner." The distinction is certainly very fine drawn; but it is too well established to be questioned in the present day.

A retiring partner, who receives an annuity fairly proportioned to the interest he possessed in the profits and good-will at the time of his secession from the partnership, is absolved from continued responsibility to third persons, provided the fact of his retiring is sufficiently promulgated to the world. But if he continue to receive any share of the profits as such, he does not become exonerated; or if the amount of the annuity is indefinite, and depending on the accidents of trade.

Under the *third* class, or *nominal* partners, are those who have no actual interest in the trade or its profits, but who, by allowing their names to be used, hold themselves out to the world as apparently having an interest. As observed by Lord C. J. Eyre, "a case may be stated, in which it is the clear sense of the parties to the contract that they shall not be partners; that A is to contribute neither labour nor money, and, to go still further, not to receive any profits; but if he will lend his name as a partner, he becomes as against all the rest of the world a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent frauds, to which creditors would be liable if they were to suppose they lent their money upon the apparent credit of three or four persons, when in fact they only lent it to two of them, to whom without the others they would probably have lent nothing."

To create this liability, the allowed use of the name on bills of parcels used by the firm seems sufficient, and either a positive consent, or at least a knowledge and constructive permission of the assumption.

If a retiring party give ample notice of his seceding, the unauthorized use of his name will not render him liable; but if he permit his name to remain over the shop door, or, being a carrier, suffer it to remain on the cart, his liability will continue; as it will also where from circumstances it will be presumed he acquiesced in the use of his name.

Exceptions to the general rights of individuals to enter into copartnership have sometimes been provided in favour and for the protection of certain establishments. Thus, in favour of the Bank of England it was enacted, that it should not be lawful for any body politic, other than the Bank of England, or for any other persons whatsoever united in covenants or partnership *exceeding the number of six persons*, in England, to borrow, owe, or take up any sum of money on their bills or notes payable on demand or in a less time than six months from the borrowing thereof. But this restriction was removed by the 7 Geo. IV. c. 46, so far as relates to bodies politic or corporate or persons carrying on the business of bankers at a distance exceeding sixty-five miles from London; who are allowed to issue notes payable on demand at places exceeding sixty-five miles from London, but not to have any house of business or establishment, or to draw upon any partner or agent or other person resident within that distance. And by the 3 & 4 Wm. IV. c. 98 (the act for the renewal of the Bank Charter) the exclusive privileges of that corporation are, if not still further

abridged, somewhat more accurately defined. This act enacts, that no body politic or corporate, or society or company or persons in partnership *exceeding six persons*, shall make or issue, in London or within sixty-five miles thereof, any bill of exchange or promissory note, or engagement for the payment of money on demand, or upon which any person holding the same may obtain payment on demand. But joint-stock banks, or copartnerships of bankers exceeding six persons, established under the 7 Geo. IV. at a greater distance than sixty-five miles from London, and not having any house of business or establishment as bankers within that distance, are allowed by this act to make their notes payable at the places where issued not being within sixty-five miles, *and also in London*, and to have an *agent or agents in London*, or at any other place at which such notes are made payable, *for the purpose of payment only*; but no such bill or note is to be for any less sum than 5*l.*, or to be re-issued in London or within sixty-five miles thereof.¹

There were also formerly some exceptions to the general law of partnership in favour of the Royal Exchange Assurance and London Assurance Companies; all societies or partnerships, with the exception of these two chartered companies, having been prohibited from engaging in the business of insuring ships or goods at sea, and from lending money at bottomry. This prohibition, however, was removed in the year 1824 by the 5 Geo. IV. c. 114, and the business of marine insurances is now placed on the same footing as all others.

Interest of Partners in the Partnership Property.—Partners are at law joint tenants of their merchandise, except that there is no right of survivorship between them, but the share of a deceased partner goes over to his executors or administrators. This, however, is the only respect in which it differs from an ordinary joint tenancy, the nature of which we shall more fully discuss in a subsequent part of this work. All living partners have therefore a unity, or the same species, of interest in the stock in trade, whether each individual partner contributes exactly in the same proportion or not; but their several degrees of interest must be regulated according to the stipulated proportions and the conditions of the partnership. To whatever share a partner may be entitled, or in whatever sum a firm may be indebted to him, he has no exclusive right to any part of the joint effects, until a balance of accounts is struck between him and his copartners, and it is ascertained precisely what is the actual amount of his interest.

¹ Under the previous Bank Charter Acts, it had been generally understood, that, by the acts conferring exclusive privileges on the Bank of England, banking establishments of every description consisting of more than six persons in partnership were prohibited within the prescribed limits, including banks of *deposit* merely, as well as banks of *issue*; but this act (3 & 4 Vic. c. 98) declares, that any company or partnership, *although consisting of more than six persons*, may carry on the business of banking in London or within sixty-five miles thereof, *provided* they do not borrow, owe, or take up in England any

sum of money on their bills or notes payable on demand, or at any less time than six months from the borrowing thereof, during the continuance of the exclusive privileges of the Bank of England.

For further regulations as to joint stock banking companies, see the acts 1 & 2 Vic. c. 96, 2 & 3 Vic. c. 68, 3 & 4 Vic. c. 111, 5 & 6 Vic. c. 85 (by which the two first-mentioned acts are rendered perpetual), and especially the act 7 & 8 Vic. c. 113, which enacts that no company of more than six persons shall carry on the business of bankers according to the provisions of that act.

If partners buy real estate, either in land or houses, for the partnership purposes, they become to all intents and purposes tenants in common thereof; and if the property therein becomes vested in point of law in one or more as the survivors, courts of equity, going beyond the law in this instance, consider such survivors to be trustees for all the *quondam* partners or their representatives. So if a partnership lease be renewed by one partner in his own name only, he is a trustee for the others.

It does not appear to be distinctly decided, whether a deceased partner's share in such real estate is to be considered as real estate going to his heir, or as personal and belonging to his executors; but the prevailing opinion is, that it is personal estate.¹

How far the Acts of one Partner may bind the Firm.—It may be laid down as a general rule, that partners are bound universally by what is done by each other in the course of the partnership business, contrary to the general principle of law, that no one is liable upon any contract unless privy to it. For this purpose they are all considered but as one person, it being presumed that by entering into partnership each party reposes confidence in the other, and constitutes him his general agent as to all the partnership concerns; since it would be a great impediment to commerce, if, in the ordinary transactions of their trade, it were necessary that the actual consent of each partner should be proved, or that it should be ascertained that the transaction was really for the benefit of the firm. It is therefore a clear and undeniable position of law, that one partner may by his acts bind his copartners in any transaction relating to the partnership, even although it may be out of the regular course of their business, and contrary to an express arrangement between themselves. As, for instance, if two horse-dealers, being partners, agree between themselves never to warrant horses, yet if one does warrant a horse, the other is bound. But such authority to bind the firm is never implied, except in measures which are necessary to carry on the trade.

In partnership transactions one partner may indisputably bind the rest by drawing, accepting, or indorsing bills of exchange, promissory notes, or other negotiable securities; and it is also indisputable, that in every case in which a firm becomes, through the instrumentality of a single member, partners to a negotiable security, and the transaction which occasioned the giving the security was *bonâ fide* and fairly referable to the partnership concerns, the act of a single partner in pledging the joint credit will have a conclusive binding effect upon all collectively.

Although, also, the transaction be not referable to the business, it will be binding on the partnership, if the sanction (express or implied) of the copartners were given. Thus, if the salvation of the partnership depended on the solvency of one of the partners, the application of the partnership property to the amount of a demand against him in a certain state of circumstances would *primâ facie* be considered as under the sanction of the rest. But cases of this kind always depend, more or less, on evidence one way or the other; as, if the transaction were fairly entered in the partnership books, their cognizance and au-

¹ Gow on Partnership, 1—36.

² Bayley, 180; 11 Adolph. & Ellis, 339. But not so if engaged in any profession or business not requiring the acceptance of bills, as attorneys, farmers, &c. Levy v. Payne, 1 Carr. & M. 438.

quiescence will be presumed. So subsequent approbation is as effective for this purpose as a prior authority.

In the hands of a person aware of and collusively partaking in the fraud committed upon the partnership by the individual partner pledging the firm in a separate transaction, the joint security would not be available, and the creditor would take it at his peril. And, generally speaking, where there is any indication in the transaction that the goods supplied to an individual partner are to be appropriated to his own sole use and benefit, the courts will not consider the partnership bound by any security given by the individual partner.

Upon the same principle, where one partner clandestinely draws or accepts bills &c. in the name of the firm, partly for a demand which the payee has against the partnership and partly for such partner's own debt, the payee can only recover upon the former part of the consideration against the partnership. At the same time a *bonâ fide* holder of a negotiable security so taken, ignorant (at the time of obtaining it) of the fraud on the part of the partner, might enforce it against all the partners collectively, provided there were no want of due caution and circumspection on his part. And therefore negotiable securities apparently issued by the firm, though in fact sent into the world by one partner alone in fraud of the others, are good to all intents and purposes, except in the hands of a party cognizant and partaking of the fraud.

If, indeed, persons are partners in a single or particular transaction only, and not general partners, they are not liable even to a *bonâ fide* holder on a bill issued by one of them in relation to a different concern.

The authority of one partner to bind the rest by a bill or note is only presumed to exist *primâ facie*, and is liable to be rebutted by evidence; and where a holder knew, or had any notice, that by the terms of the partnership deed no such authority existed, he cannot recover, though in point of fact the value of the bill were advanced for and actually applied to partnership purposes; and such power always ceases immediately on a dissolution of the partnership.

The foregoing observations as to the right of one partner to bind the firm in bill transactions, apply in a great measure equally to a purchase or sale of partnership property; and with whatever view goods are bought or applied, a sale to one partner is in legal effect a sale to the partnership, if the case is free from all charge of collusion, and not affected with notice of any kind. One partner may therefore, in general, buy goods, order insurances to be effected, pledge partnership property, give a joint guaranty, and the like, so as to bind his copartners.

But one partner cannot bind the rest by *bond* or *deed*, unless his signature is on behalf of the firm and with their express sanction, or in their presence; but the partner himself will be bound. In bankruptcy, however, one partner can bind the rest even in deed; but this is a mere exception to the general rule. A *release* also by one partner may bind all the copartners, if it be intended to affect their rights. So a receipt by or payment to one is sufficient.

So also in legal proceedings, partners being identified in interest, the acts and admissions of one with reference to the common objects are the acts and declarations of all, and are binding upon all.

In general, however, one partner cannot bind the firm by an agreement to refer to arbitration.¹

Legal Remedies between Partners.

We will now proceed to inquire into the remedies which partners have against each other; and first, of the *legal* remedies, and afterwards of those which must be sought in a *court of equity*.

Formerly an action *of account* was resorted to; but that form of action having become obsolete,² it is now usual to have recourse to a bill in equity where such species of remedy is sought.

A much more efficacious remedy for partners than the action of account is an action of *covenant*. This can be resorted to only where the deed of partnership is under seal, and is for the purpose of obtaining commensurate damages for the breach or non-performance of any of the covenants contained in it. It seems, however, that an action is not maintainable for non-performance of a covenant to refer disputes to arbitration, such a covenant having a tendency to exclude the jurisdiction of the superior courts.

The most usual remedy at law, however, is the action of *assumpsit*, which is resorted to where there is a breach of an agreement to become a partner, or where the articles of partnership, not being under seal, are infringed.

As a court of law has now no power to take an account between partners, before an action of assumpsit for money laid out and expended can be commenced, an account must be taken in equity; though if an account has been taken, and a general and final balance ascertained, then the action of assumpsit may proceed.

When one partner retains a sum of money belonging to another, and not received on account of the partnership, *quoad* this sum they are like two indifferent persons, and an action of assumpsit may be maintained to recover it.

Each subscriber to a scheme, who pays his subscription on a prospect that the scheme will continue, and does no act rendering himself liable to the expences of attempting to bring it into operation, may, if it afterwards prove abortive, or be abandoned, recover back the whole money advanced by him, without deducting any part towards the expences incurred, even though the scheme would have been open to the objection of illegality had it been carried on. In the case of *Nockels v. Crosby*,³ it is laid down as a general principle, that where persons set a scheme on foot, and assume to be directors or managers, all the expences incurred before the scheme is in actual operation must in the first instance be borne by them.⁵ When it is in operation, the expences and charge of management should be borne by the concern, and then it may be fair that the preliminary expence should be repaid, in the same way as the subscribers at large reap the benefit. But even then the previous expences are not to be paid out of the concern, unless they are adopted when it is in operation.

¹ Mr. Western, in the 3d volume of his *Conveyancing*, p. 313, with the authority of Lord Loughborough, says, "*this may be done*," and has introduced a precedent for the purpose. See *Halfhide v. Fenning*,

² Bro. C. C. 336; and *Mitchell v. Harris*,
² Ves. Jun. 132.

³ See 1 Archbold's *Nisi Prius*, 298.

⁵ 3 Barn. & C. 814.

One partner being employed to do certain work for the partnership in his individual capacity, cannot *at law* sue his copartners for the price of it, as he would in fact be suing himself, and those whom he sued would have a right to call on him for contribution.¹

For the reason last-mentioned, an action for contribution cannot be maintained against a general partner, and redress can only be obtained by a suit in equity. But, as concerns partners in single transactions, one of them may enforce contribution by an action of *assumpsit*.

In all cases it is to be remembered, that a party must show that he stands on fair ground when he calls on a court of justice to administer relief to him; therefore whenever the prosecution of his claim discloses the transaction to have been such as is prohibited by law, the rule *Ex turpi causâ non oritur actio* will apply.

Although partners covenant that all differences arising between them or their executors or administrators shall be referred to the decision of two indifferent persons to be elected by the partners themselves, yet on the death of one an action cannot be maintained by his representatives against the other for refusing to nominate a referee; and many cases exist in which, an award or a submission to a reference having been pleaded, the court has nevertheless gone into the merits.

It is very doubtful whether one partner can maintain an action of trover against another; it has been settled that such action will not lie between joint tenants or tenants in common. Where one partner is tenant to another, an action of ejectment may be maintained.² So also, in cases of wilful waste or destruction.³

Equitable Remedies against Partners.

In most instances of partnership dissension, relief is sought from a court of equity, which obtains its controul over this subject under its general jurisdiction in matters of account; for, in most cases of dispute between partners, it is necessary that an account should be taken between them.

To entitle a partner to file a bill for an account, it is needful that there be nothing illegal in the constitution of the partnership. Where two persons had been jointly engaged in the business of underwriters (which was then prohibited by act of parliament in favour of the chartered companies), a bill filed by one for an account of profits was dismissed on that ground.

But where the transactions do not contravene the policy of the common law or the provisions of a statute, this remedy is not confined to private partnerships; for a court of equity has jurisdiction against a corporation in the nature of a partnership, on a bill filed for an account of profits.

Before, however, the court interferes with voluntary associations, it

¹ This principle has been qualified with respect to joint-stock companies carrying on the business of bankers under the 7 Geo. IV. c. 46 and other acts before enumerated; and actions, suits, or other proceedings at law or in equity may be brought by such companies in the name of their public officer against any of the members,

or by any of the members in like manner against such companies.

² Fox v. Frith and another, 10 Mee & W. 131.

³ Fennings v. Lord Grenville, 1 Taunt, 241; Bernadiston v. Chapman, 4 East, 121; Buller, N.P. 34; Barton v. Williams, 5 Barn. & Ald. 395.

will see that it is under an obligation to act, and can effectually do so for the benefit of persons interested; and where such associations have not conformed to or observed the articles by which they were formed, the court will not interpose.

And with respect to partnerships in general, there has been said to be no instance in which one partner can file such a bill for an account merely, and not seek also a dissolution of the partnership. However, the point does not seem yet to be fairly settled; for in *Harrison v. Armitage*¹ the vice-chancellor entertained such suit without a prayer for dissolution, while in *Loscomb v. Russell*,² which is a later case, we are informed, a contrary decision was again come to.

It is a general rule on bills of this description, that all the partners and persons interested must be made parties, however numerous they may be, as the court cannot otherwise do complete justice. But where one partner agrees to give a third person a moiety of his share, such third person may file a bill against that partner to compel performance of the agreement without making the rest parties; and indeed the courts are now much inclined to relax the above general rule, when from the great number of parties it would be inconvenient to bring all before the court, and therefore allow three or four to sue on behalf of themselves and the rest.

The principal objection to a relaxation of the rule arises where a dissolution is sought; for there, though those suing may seek and wish for a dissolution, yet those who are not parties to the suit may desire quite the contrary, and then the court could not adjudicate in their absence.

In equity, a plea of a stated account, in order to be of any avail, must show that the account was in writing, and the balance likewise, or at least set forth what the balance was; at the same time there is no absolute necessity that the account should be signed by the parties who have mutual dealings, to make it a stated account, as acquiescence in it without objection for a length of time will render it a stated account.³ And if the bill charge fraud or errors in such stated account, the plea must deny such statements unequivocally. Where an account has been settled and closed for six years, the Statute of Limitations is a bar to its being again opened.

In equity, a covenant to refer to arbitration has as little binding effect on the parties as at law; it can neither be made the foundation of a suit for specific performance, nor pleaded in bar to a suit by one partner against another. Where, however, the agreement itself furnishes the means of redress for the particular subject of complaint, it may be used by the defendant as an objection to the summary interference of the court upon the subject matter of such agreement; and there are cases in which the court has obliged the parties to resort to such arrangement in the first instance.⁴

Where an account is to be taken, each partner is entitled to be allowed against the other every thing he has advanced or brought into the partnership, and to charge his copartner in that account with what he ought to have but has not brought in, and with what he has taken

¹ 4 Mad. 143.

² Before V.C., Aug. 1830.

³ See cases, Chit. Eq. Ind., tit. *Account*.

⁴ *Waters v. Taylor*, 15 Ves. 18; *Carlen v. Drury*, 1 Ves. & B. 154.

out beyond the proportion to which he was entitled; and nothing is to be considered as his share but his proportion of the residue in the balance of the account. But this is, of course, subject to any other arrangement between the parties.

It has been decided in the Exchequer, that if two persons enter into trade, intending originally that both should reside upon the premises, and one of them afterwards removes to another dwelling, leaving the other in possession and management of the whole business, the latter, on taking the account, is not entitled to charge usual and necessary expences incurred in treating customers, where balances have been struck yearly without noticing or demanding them.

If one partner borrow money of the firm on a promissory note or otherwise, he is liable to pay interest, though he gave a greater sum in the joint stock than the amount of the loan.

One partner paying a partnership debt out of his own funds is entitled to contribution by the others. Courts of law and of equity now exercise concurrent jurisdiction upon this subject. If one of the parties jointly bound be insolvent, contribution for his share cannot be recovered against the others, but it is the subject matter of equity only; for the legal remedy is founded upon the principle, that one pays that to which all are liable.

If fraud has been practised to induce a man to become a partner, and a premium is fraudulently obtained, equity will order repayment of the premium, and treat the articles of partnership as a nullity. And where a party was allowed to retire, and was paid for the same, under the understanding that he was not to set up the same trade within a certain distance, a court of equity will prevent him opening trade within the prescribed limits, upon parol evidence of the understanding. Indeed, in almost all cases of fraud equity will interpose.

With respect to the interposition of a court of equity to decree specific performance of an agreement to enter into partnership, it will be exercised, it seems, provided the agreement be that the partnership shall exist for a time certain. But if it is general in this particular, equity will not interfere, since the defendant may, at any subsequent moment, dissolve the partnership, and so render any decree abortive. Yet, even in that case, where it is desirable to the plaintiff to be vested with the legal rights for which he has contracted, though but for a moment, the court has entertained such a suit. In no case, however, will the court, on making such a decree, give an account of past profits, but the plaintiff in equity must resort to his legal remedies.

Wherever there is a flagrant breach of the partnership covenants, the court will interfere and dissolve the partnership; as where a partner raises money for himself on the partnership credit, or prevents another from enjoying his partnership rights; and the court will sometimes appoint a manager or receiver to manage and wind up the affairs in the interim. As we have already stated, the court will sometimes interfere, though no dissolution is sought to be obtained.

The first ingredient to these suits is the establishment of the fact that a partnership exists; if that fact is disputed, it must be established at law before a court of equity will entertain any suit between partners.¹

¹ Gow on Partnership, 93—115.

Legal Remedies against Strangers.

We shall now proceed to inquire into the rights of partners as to choses in action, and at the same time point out what remedies are afforded them for the assertion of such rights when invaded by strangers.

These rights arise chiefly out of executory contracts. A promise to one in the course of the business is a promise made to all, and all may avail themselves of it. In case of doubt, the criterion to determine the nature of the promise must be the nature of the consideration, and from whence it proceeds. A promise of this nature has no continuance independently of the particular individuals of whom the partnership is then formed; so that there is no transmission to successors in a mercantile house, but all running agreements with a partnership cease when any change takes place by death or otherwise.

Immoral or illegal contracts, of course, avail nothing against any party.

The only instance in which an action for a *personal* tort is maintainable by partners, is in the case of a slander or libel on the partnership as such, whereon they may sue jointly.

If one partner, X, in a house A, be also partner in a house B, inasmuch as a partnership action must be brought in the name of all its members, and as a man cannot be both plaintiff and defendant in a suit or action, suing himself, it follows that the house A cannot, under any circumstances, sue the house B upon any promise or engagement. Neither would it alter the principle if X were dead, and represented by his executors or administrators.

If a guaranty, intended for the benefit of a firm, is entered into with one only of the firm, the whole firm may sue on it, and one partner cannot alone sustain an action on it under such circumstances. And, as already adverted to, if any change takes place in a partnership, a guaranty given to the firm before the change cannot be sued on by those afterwards composing it; and therefore where guaranties are entered into on behalf of clerks &c., they ought to be renewed upon any change in the firm. But there is some doubt against this principle, where the engagement is not with the members by name, but with the firm by its known name, especially in the case of incorporated societies; and in such cases, it seems, the liability continues, notwithstanding a change of the individual partners. Societies incorporated by act of parliament are, in general, enabled to sue and be sued in the name of their secretaries for the time being.

In actions founded on contract, or *ex contractu*, the general rule is, that if the cause of action be joint, all the joint contractors, if living, must concur and join in bringing the action; or if some are dead, the action must be brought by the survivors. Partners, therefore, in actions instituted to enforce contracts made by them, must all join, otherwise a nonsuit will be the consequence. Neither is it a sufficient answer to the objection arising from non-joinder of parties, that the partner omitted is either bankrupt or infant; for in the former case his assignees must be joined, and in the latter there is no objection to the infant's suing conjointly with the rest. A dormant partner, though he may be, yet need not be joined. Neither need a nominal partner,

having no interest in the concern. If, however, there are three partners, and the defendant has paid to two of them their proportion of the debt, the third alone may sue the defendant for his proportion of it without objection. The executors of a deceased partner need not be joined, as the whole interest in the partnership at law vests in the surviving partners, and such executors or administrators can only resort to the courts of equity to obtain their share of the thing recovered, and to which, as before shown, they are entitled.

Actions arising out of some wrongful injury committed by a stranger affecting partnership property, or *ex delicto*, are of less frequent occurrence than those resulting from breach of contract. The foregoing rules as to joinder of parties, nevertheless, in general apply to this species of action, though there is more laxity allowed; and to take advantage of any non-joinder, the defendant must plead it in abatement, or he cannot afterwards avail himself of it on the trial.

In actions brought by partners, as in those commenced by individuals, any set-off that the defendant has may be made use of in reduction or extinguishment of the debt on which the action is brought.¹ As to the right of set-off: Where an action is brought by all the partners, nothing is capable of being set-off against their demand, except a joint debt due to the defendant, as the debt must be due in the same right. Where an action is brought by a surviving partner, a debt due from him as surviving partner, may be set off against a debt due to him in his own right; and *è converso*, a debt due to the defendant as surviving partner may be set off against a demand upon the defendant in his own right.²

The Legal Remedies against Partners.

The very constitution of the relation of copartners furnishes a presumption that each individual is an authorized agent for the rest. though such presumption conveys no right to a creditor who has express notice to the contrary, or where the transaction takes place in fraud of the rest.

We have already shown the instances in which one partner alone may bind the rest; whence it may readily be collected that in those instances, as well as where the entire firm contracts, there can be no doubt of the legal remedies against the copartnership.

A partnership cannot acquire property in goods obtained by the fraud of one of the partners, to which the rest are not privy. But the fraudulent conduct of one partner does not afford his copartner a legitimate excuse for the nonfulfilment of a joint contract entered into by the former on behalf of the partnership.³

If a person giving credit to a partnership at the instance of one of the firm knows at the time in any way that it is contrary to the partnership agreement that the single partner should so bind the firm, or if it is notorious that the partners have separate departments and separate interests, the partnership cannot be sued jointly; but the particular

¹ As to set-off, see *ante*, p. 385.

² Gow, 116—139; and see further as to the evidence in such actions by partners, *id.* 139—144.

³ Rapp v. Latham, 2 B. & A. 795; Hume v. Bollond, 1 Ry. & M. 371; Stone v. Marsh, 6 B. & C. 551; S. C. 1 Ry. & M. 364.

partner trusted is individually liable. If the partnership concern be that of coach proprietors, they are all jointly liable to passengers for breach or neglect of duty.

In cases that are destitute of any intrinsic circumstances operating the discharge of the innocent partners from responsibility, under a contract entered into fraudulently by a single partner for his own benefit, it is incumbent upon the party with whom he deals to observe the most ingenuous conduct; for if he can be considered as apprised of the nature of the transaction, and still more if it be manifest that the transaction has only a separate relation to the individual partner, it will be unavailing in him to attempt to affect the firm, unless he can show that the single partner had the authority of his copartners to pledge their credit. If, indeed, he had obtained from the individual partner a joint negotiable security, though conscious at the time of the misapplication, he may, by sending it into circulation, render it available against the firm in the hands of a *bond fide* holder.

A joint contract, however, entered into by one or more individuals is binding only upon those who have a joint interest in it at the time of its inception; for no subsequent act by any person who may afterwards become a partner, not even an acknowledgment that he is liable, will entail upon that person the obligation of fulfilling such a contract if it clearly appear that a partnership did not exist at the time the contract was made. The joint interest must be contemporaneous with the formation of the contract itself, to superinduce the corresponding liability to perform it. But where two or more persons are to share in goods to be purchased, and, by virtue of a previous agreement, a joint interest in the goods attaches the instant they are purchased, there, although one of them purchase, concealing at the time the names of the others, or, in fact, without any express authority from them to purchase on the joint account, it is nevertheless the same as if all the names had been announced to the seller, and they are all liable for the value of them. It is not, however, sufficient to constitute a joint liability for the capital brought into the trade, that there is to be a subsequent participation in the profits to be derived from it. In such a case the right to participation can only take its origin from the time of the introduction of the capital; and although communion of profit is a strong circumstance to explain a contract in itself doubtful, and to produce a legal presumption that a partnership existed at the time among the participants, yet where the nature of the contract clearly appears, it cannot have such a retrospect as to alter it, and to substitute the responsibility of several for that of an individual contractor. If also a purchase is made by one on an agreement between him and other persons, that each shall have a distinct share of the whole, and there is neither a communion of profits nor a joint interest in the articles purchased, the liability as partners does not attach.¹ And the same rule applies where others take an interest under a *sub-contract* only.

In addition to the possession also of a joint interest, it is necessary that credit should be given to the firm, and not merely to the single partner; though if a dormant partner be discovered to have existed

¹ Hoare v. Dawes, 1 Doug. 371.

at the time of the transaction, he must be sued in conjunction with the visible partner who was trusted. And indeed it has been determined,¹ that where one member of a club ordered goods for the benefit of all, every member who either concurred in the order or afterwards assented to it was liable, although the member who gave the order alone appeared as the debtor in the creditor's books; unless it also appear that credit was intended to be given solely to him.

Where partners have once become jointly liable, any private agreement between themselves, as is usual on a dissolution, that one shall be or remain alone responsible, can in no way affect the right of the creditor to look to all for payment, even though he assent to the arrangement and take collateral securities from the individual partner for the joint debt. If, however, without the assent of the other partners, the creditor renews the security with the single partner, and takes his separate security, or where by any other mode of dealing between the creditor and a single partner the rest are in any way injured or debarred of their remedies against the single partner, the joint liability becomes extinguished. Neither are the rights of the creditor or the responsibility of the partners varied by the secession of some of the old members and the introduction of new ones into the concern, although the creditor continue to deal with the new firm, without notice that he looks to the old firm for payment.

If, indeed, a person be merely a nominal partner, without participation in the profits, and the creditor knows that fact, he will not be liable to the creditor in conjunction with the rest.

In order to obtain rights of any kind, it is necessary that the subject of them be free from any taint of illegality. But one partner cannot defeat a creditor's claim, by setting up that the contract was illegal because there was a secret partnership which was illegal, as was the case with underwriters prior to the alteration of the law by 5 Geo. IV. c. 114. Neither can a partner set up a known partnership in abatement of a demand made upon him individually, in a case in which his conduct has been fraudulent both as regards his copartners and the creditor who seeks to fix him individually.

Partners are not generally responsible for the *criminal* acts of each other. If all join in one trespass or tort, of course all are liable; but an action for it would arise from their personal misconduct, and not upon the ground of the existence of partnership. In general, acts done in the course of the partnership trade in violation of law will only implicate those who are actually guilty of them. But actions for *torts* may sometimes be maintained against partners jointly; as where a coach or a steam boat runs down or otherwise damages the plaintiff's property. So in an action of *trover* it is not necessary that there should be a joint conversion in fact, in order to implicate all the partners; for such a conversion may arise by construction of law. And if copartners are engaged in smuggling, which is a species of tort, on an information filed for the penalty, they are jointly as well as separately liable. So also in the instance of a libel, the joint proprietors are liable not only civilly but criminally. In actions *quasi ex contractu* (as they are termed), which, although in their form actions for a tort, are substan-

tially founded on contracts, they are clearly responsible for the acts of each other; as where carriers are guilty of the loss of a parcel, and the like.

The same rules apply to *dormant* partners. When discovered, they are equally liable as if their names had been used, although unknown as partners at the time of furnishing the subject matter of the demand. But in transactions unconnected with the joint trade, no liability will be entailed on the dormant partner where his joint responsibility was not originally regarded, and the fact of his being a partner was unknown at the time the claim arose. Therefore, where one partner accepted a bill in the name of the firm, but not in a partnership transaction, it was held that the indorsee could not maintain an action on such acceptance against a dormant partner whose name did not appear and who was not known to be a partner, nor the bill taken on his credit.¹

Equitable Relief against Partners.

In many instances more effectual relief is administered in equity than the forms and technicalities of courts of law allow them to grant; for the former, contrary to the doctrines of the latter, adopt the general mercantile law to its full extent for their guidance; and on the ground that each partner is liable for a partnership debt, a court of equity not only sanctions the remedy which the law gives against a *surviving* partner, but, ascribing a several as well as joint operation to partnership contracts, will likewise decree satisfaction out of the estate of the *deceased* partner. We have already briefly shown how far it is requisite to join all the partners as parties in a suit; as nothing more, therefore, remains to be considered on this branch of the subject, we shall proceed to consider the rules as to a dissolution of partnership, and, first,

The Causes of a Dissolution of Partnership.

A partnership may exist as to an individual transaction; and consequently when that particular transaction is completed, there is an end of the partnership. General partnerships are either formed for a definite or indefinite period, both of which may be dissolved by agreement, by the act of God, by the act of the parties, or by the operation of law.

1st. Dissolution by Act of God.—This ensues either from the death or from the confirmed insanity of one of the members. By the former the contract is *ipso facto* dissolved, not only as to the deceased, but as between the survivors, unless it is otherwise provided by the partnership deed. The deed may also provide that the widow or children, or other person or persons, shall continue to enjoy the rights of partnership on the death of one; but in the absence of such express provision, the partner dying has no power to appoint a successor. However, if the surviving partner claims any thing under the will making such appointment, he must abide by the will *in toto*, and so admit such appointee into the partnership, or relinquish his claim under it. In the event of a dissolution by death, it is not necessary to give public notice of the death in order to free the estate of the deceased

¹ Gow on Partnership, 145—160.

from future liability; and therefore, as it can work no injury, a court of equity will not prevent the surviving partner from continuing the use of the deceased's name.

Insanity is not an absolute *de facto* dissolution; neither is it by any means a settled rule, that a court of equity will decree a dissolution on account of it. In most cases it depends on the existing state of circumstances, whether the disease is permanent or temporary, and the degree of injury that would arise from the continuance of the partnership; for it is possible that by the terms of the partnership the unfortunate individual may not be required to take any active part in the business, and therefore no inconvenience can arise from his state of mind. In such cases, depending solely upon the particular circumstances, the jurisdiction of equity (whereby alone a dissolution from this cause in any event can take place) is most difficult and delicate, and to be exercised with very great caution; and the court will always direct an inquiry to be made before one of the masters in chancery, to ascertain how far a dissolution is needful.

2dly. *By the Act of the Parties.*—A partnership for a stipulated period can only be dissolved *adversely* by the effluxion of the specified time; but if the partners are all willing, they may of course agree to and effect a dissolution.

When the partnership is formed for an indefinite duration of time, a dissolution may be brought about by a notice given by one partner to the other, signifying his dissent to the further continuance of the partnership, there being no necessity to resort to a court of equity for its aid or intervention. Regularly a partnership constituted by deed for an indefinite period can only be dissolved by an instrument of as high a nature, according to the maxim, *unumquodque dissolvitur eo ligamine quo ligatur*. But although the partnership is commenced by articles unsealed, in which is contained an agreement for a partnership deed, it is nevertheless in legal effect a partnership formed by parol, and may consequently be dissolved by verbal notice, though a written one is always preferable. And where there is a partnership constituted by deed, a notice that it is dissolved, signified by the parties for the purpose of being inserted in the Gazette, is sufficient evidence of the dissolution for all purposes against the parties signing it.

The existence of engagements with third persons not yet concluded forms no objection to the dissolution, though the dissolution cannot be made to affect the rights of those third persons.

If the articles of partnership contain any provision as to notice of dissolution, it must be strictly followed; but if a partnership be commenced for a limited period, with a right reserved to each partner of dissolving it on giving a year's notice, and, after the period limited for its continuance, the partners by mutual consent continue the partnership, it may then be dissolved at the option of either party. There may be an *implied* contract for its continuance up to a limited period, although there is none expressed; and the circumstance of a lease being taken for a certain number of years for partnership purposes may, though it does not necessarily, raise such an implication.

When the dissolution of a partnership, to which any partner is en-

titled, is opposed by some of the members, a court of equity will interfere; and under such circumstances it may be more prudent to file a bill, which may not only pray a dissolution, but likewise an account, and an injunction to restrain those dissentient from executing securities or otherwise meddling with the property in the meantime. There is an instance of an application to a court of equity to prohibit the dissolution of a commercial partnership; and it has been said that, on proper grounds, such an application may be sustained.

It may be doubted whether, as against a client, who having employed solicitors in partnership has a right to their united exertions, the solicitors are at liberty to dissolve their partnership and turn their client over to one of them; it should seem they have not, as against him, the power of dissolving their partnership. But, however that may be, the retiring partner could not be considered as a discharged solicitor. The client, after such dissolution of partnership, cannot employ both, and it would be impossible to maintain that, if he employ one, the other is let loose and discharged from all those obligations which he had undertaken. A solicitor under such circumstances, if retained against his former client, must (however high his personal character) be considered, hypothetically, as employed for no other reason except the very improper one, that he had been previously employed by the other party; and, upon the clearest general principle, that cannot be admitted.

The marriage of a *feme sole* partner would, it seems, operate as a dissolution.

3dly, A partnership, whether for a definite or indefinite period, may be dissolved *by operation of law*.

Where, from the failure of, or other similar event attaching on the object of the original institution of the partnership, it becomes impossible to carry on the partnership, a court of equity will dissolve it. And if the conduct of partners be such as to render it impossible to carry on the partnership on the terms on which it was entered into, or if one partner be entirely excluded by the others from his interest in the partnership, or if there be a gross breach of good faith, or a violent or lasting dissension between them, the partnership will be dissolved even on the complaint of one partner only. So the court will dissolve friendly societies not enrolled if they are founded on a principle calculated to produce a failure of the undertaking.

An act of bankruptcy of one partner, followed by a fiat and adjudication, is an absolute dissolution as to that partner; and it so affects the solvent partner that he cannot afterwards deal with the partnership property, since the bankrupt's share, as it stands at the time of the act of bankruptcy, vests at once in the assignees. If, however, the fiat be issued fraudulently, and for the mere purpose of working a dissolution, it will be annulled.

An execution, under which all the interest of one partner is seized, is also a cause of dissolution.

The Consequences of a Dissolution.

The consequences resulting from a dissolution of partnership are either a *total* or *partial* destruction of the partnership,—a complete

annihilation of the firm, or a dissolution merely for the purpose of making an alteration in it.

When it is actually ended as regards all the former partners, no number short of the whole can make any disposition of the partnership property which is inconsistent with the winding up of the concern, and therefore they can create no fresh obligations; but until the affairs are wound up, the connexion between them subsists, and in that sense, until such settlement takes place, the partnership may be said to continue, and the ex-members of the firm may be sued as existing partners.

The arrangement of the affairs being the sole object of a dissolution, a court of equity will in all cases interpose where the conduct of partners is of a description not likely to be attended with such a result. Therefore, if one partner trade with the joint property on his separate account, or interfere with it otherwise than towards a settlement of the joint affairs, or if, in closing the concern, some of the members seek to exclude others from their just share, a court of equity will appoint a manager or receiver to wind up the concern; but a receiver will never be appointed unless a strong necessity appears. Sometimes, as in the case of the bankruptcy of one partner, the co-partner is appointed receiver, though without a salary.

At the dissolution the *joint* property consists of the remainder of the stock which existed at the formation of the partnership, with the additions made to it in the course of trade during its continuance. Real estate purchased by the partnership forms also a portion of the joint fund, whether conveyed to one partner only or to all. So, though a lease is renewed in the name of one partner only, though done by him clandestinely, it is considered as for the benefit of the firm. So mines, for many purposes, are partnership property, and liable to partnership debts. But that only is to be considered as copartnership property which belongs jointly to all the partners, whether it arise simply from contributions *inter se*, or be composed partly of contributions and partly of acquisitions made by or profits derived from the use and application of the capital formed by such contributions. And therefore a distinct and independent fund belonging to different but not to all the individual members of the firm, which is not commensurate with the joint property, and does not succeed to the place of it, does not fall within the meaning of, and is not distributable as joint estate; if it were so distributable, the partners uninterested would be relieved from the weight of debt which otherwise they must bear, at the same time, probably, that the separate creditors of the actual owners might have claims against it, and would therefore be entitled to priority of satisfaction. This latter description of property constitutes, as regards the entire partnership, the separate estate of those members, short of the whole, to whom in point of fact it belongs. For instance, if one joint owner of a ship insure his share or interest and a loss happens, the money recovered on the policy will be separate and not joint property.

When the common property is ascertained, each partner on dissolution may insist on a sale of the whole concern. The whole must then be valued and sold, and each partner's aliquot proportion of the pecuniary produce paid to him; and therefore no one can insist

on retaining any specific part of the joint property. A sale of the whole is the first thing directed by a court of equity in this event.

Out of the joint property the creditors of the partnership as such have a prior claim upon its produce; and in the event of there being no joint creditors, or of their being paid in full, and there being a surplus divisible among the individual members, the separate creditors of each partner must next be paid out of the share to which each individual partner is entitled; which share is, however, liable in the first instance to be reduced by the allowance to be made in account to any partner who has advanced money for, or who has any other claim against the partnership.

The foregoing observations are also applicable to a *partial* dissolution, if the same do not take place by agreement and arrangement. In this event, however, it is generally agreed that the retiring partner shall receive a sum of money, or an annuity, proportioned to his share in the concern, in return for which he makes over to the partners continuing the trade whatever interest he had in the joint property. If the consideration of his retirement be any thing in the nature of an annuity, he must take care that the amount is independent of the quantum of profits derived to the continuing partners; for otherwise he may, as before shown, in fact continue and be considered a dormant partner.

The effect that the premium paid to a retiring partner has on the joint creditors is always open to a question of *bona fides*. If it appear that there was *mala fides* as regards creditors in the transaction, they may in equity obtain relief against the payment; but if the transaction were *bonâ fide*, whatever may happen to the remaining partners, as though their insolvency take place shortly afterwards, the retiring partner will not be affected thereby.

It may as well be here observed, that if on one partner's retiring it is intended that he shall assign his good-will also, he should be made expressly to covenant not to carry on the same trade within a certain number of miles distance.

The retiring partner should also take care to give public notice at least in the London Gazette, and express notice to all persons then dealing with the firm, that the partnership is as to him at an end; or otherwise, if the fact of his retirement be unknown to parties subsequently trusting the firm, it will not determine his liability to them for the subsequent partnership debts.

In no case can the dissolution of the partnership, either absolute or partial, determine the liability of any one member for the partnership debts incurred prior to the dissolution. And the only course for a retiring partner is either to see that the partnership debts up to that time are fully satisfied, or obtain the consent of the creditors that he shall be no longer responsible, or else to make the remaining partners covenant to indemnify him against the event of his being afterwards called on to bear any portion of such debts.

In many instances of dissolution the remaining partner is by agreement exclusively authorized to arrange the joint affairs, and to receive the partnership credits as the fund out of which to discharge the partnership debts. Where this is the case, and notice as well of the dissolution as of the private arrangement between the partners is given,

a debtor to the firm cannot, by colluding with the outgoing partner, obtain from him a discharge of the debt. A receipt given by the latter for the debt, though dated anterior to the dissolution, will be fraudulent and void, and will not estop the remaining partner from disclosing the transaction and recovering payment. So if the remaining partner have the exclusive right in equity to all the debts, and a debtor is conscious of that right, a payment to the outgoing partner will not affect the claim of the remaining partner; but without notice such a payment would discharge the debtor. And where, on a dissolution, it was agreed that the joint debts should be received by an agent appointed by both partners, to which arrangement a debtor acceded, but afterwards one of the partners countermanded the authority given to the agent, and personally demanded the debt, a receipt from such partner in the name of both was held to be a discharge to the debtor.

It remains to be observed, that where there is not a renunciation by the outgoing partner of his right to his proportion of the capital, his copartner, if he continue the trade after a dissolution and employ the common capital in it, will be bound to account for the profits which may be derived, although if the profits are made solely by the skill of the remaining partner, it is said to be the practice of courts of equity to allow him a compensation commensurate with his exertions. But where the profits arise out of the use of the partnership stock mixed with the separate property of the remaining partner, it has been doubted whether the outgoing partner is entitled to insist upon a participation. A court of equity will enforce an agreement made on a dissolution that a particular book used in the trade should become the exclusive property of one of the partners, and that a copy of it should be delivered to the other.¹

It would be anticipating the subject of bankruptcy, of which we shall treat in a subsequent part of this work, were we in this place to treat of the consequences of a dissolution *by bankruptcy*; we shall therefore, leave the consideration of this branch of the law of partnership to subsequent pages, and proceed to investigate—

The Consequences of a Dissolution by Death.

These may be considered, 1st, as they relate to survivorship; 2dly, as they affect suits between the survivors and the representative of the deceased partner; 3dly, as they apply to suits either by the survivors against third persons, or *à contra*; and 4thly and lastly, as they regard proceedings against the assets of the deceased partner.

We have already seen, that, as regards partnership property, there is no right of survivorship whatever either in equity or at law; it only exists for the purpose of enabling the survivors to get in outstanding debts. &c., which, when so recovered, become liable to the joint right of the representative of the deceased. In like manner in real estate and leaseholds such representative has a right in equity to participate. The only subject for doubt is as to the good-will of the business, namely, whether such representative has a right to have that sold and to participate in the price which it fetches. Two pre-eminently learned chancellors, Lord Rosslyn and Lord Eldon, have differed upon this

¹ Gow, 230—256; and see Exp. Trueman, 1 Dea. and Ch. 464.

point. But a very intelligible distinction has been suggested between a *commercial* and a *professional* association. In the case of *Farr v. Pearce*,¹ Sir John Leach expressed his opinion, that it would be difficult to maintain that where a partnership is formed between professional persons, as surgeons, and one dies, the other is obliged to give up his business and sell the connexion for the joint benefit of himself and the estate of his deceased partner. When such partnerships, therefore, are determined, unless there are stipulations to the contrary, each partner must be at liberty to continue his own exertions; and where the determination is by the death of one, the right of the survivor cannot be affected, such being very different from *commercial* partnerships. At all events, if any right to the good-will goes over to the deceased partner's representatives, the deceased cannot, as we have already seen, give a third party (as a legatee in a will) any interest in the partnership, unless the surviving partner, by assenting to take a benefit under it, binds himself in equity to the fulfilment of the testator's intentions as to such third party. It is, however, very common, and certainly proper, for the articles of copartnership to provide for such contingencies as these.

We have already seen, that when death operates a dissolution, in the absence of any special agreement upon the subject, the representatives of the deceased take no interest as partners, though they have an interest in the property till the concern is wound up; but such representatives have a right to require the special appropriation of the joint property to the payment of the joint debts, and a division of the surplus. If, within a reasonable time, the survivor do not account with them and come to a settlement, equity will grant an injunction, restraining him from disposing of the joint stock, and from receiving the outstanding debts. And a surviving partner has the same right in respect of the winding up the affairs.

The surviving partner having at law the right to the custody, care, and management of the joint estate, a court of equity will not, generally speaking, on a bill filed against him for an account, deprive him of his legal right by appointing a receiver. But if he be guilty of acts of gross mismanagement or improper conduct, inconsistent with his duty and the interests of other persons concerned, then equity will exercise its power to appoint a receiver to collect the debts and dispose of the property. But if both partners die, equity will, as a matter of course, appoint a receiver, if either of their representatives require it.

As no injury can arise to the estate of a deceased partner from the continued use of his name by the old firm, equity will not enjoin them from making use of it, even although it is a species of fraud upon the public.

No notice is necessary to third persons of the death of a partner: the partnership is dissolved, and all liabilities for subsequent acts cease. The surviving parties are to be sued alone for the partnership liabilities and obligations, for which they are liable to the full extent. But they are not liable for the separate debts of the deceased partner, unless, after payment of all the joint debts, they have a surplus of the partnership effects in their hands. If the joint effects be insufficient to pay

¹ 3 Mad. 78.

the partnership debts, the separate estate of the deceased partner, if he have any, is liable for the deficiency.

With respect to actions by or against the partnership, in case of death the right of action, either by or against the firm, rests in the survivor. In actions brought *by* him, the representatives of the deceased, having no title at law, cannot be joined, though they have an interest in the thing recovered; and in actions *against* the firm, the survivor in like manner bears all the burthen, though he may call for contribution out of the deceased's estate; or in case of the survivor's insolvency, the creditor has relief in equity against the deceased's assets. In this case, as in bankruptcy, the separate creditors of the deceased have a prior claim to payment out of his separate estate to the creditors of the partnership; and the liability of the separate estate of the deceased to partnership debts only extends to debts contracted at the time of his death.¹

CHAPTER XXIX.

Of Ambassadors and Consuls.

THE rights of ambassadors are established by the law of nations, and are therefore matter of universal concern. These, so far as they relate to commerce, are fully discussed in 1 Chitty's Commercial Law.² We shall here only consider their general personal privileges, if indeed they can be considered personal at all.

The common law recognizes them in their full extent by immediately stopping all legal process sued out through the ignorance or rashness of individuals, which may intrench upon the immunities of a foreign minister, or any of his domestic servants. And the more effectually to enforce the law of nations in this respect, when violated through wantonness or insolence, the 7 Ann. c.12 declares that all process whereby the person of any ambassador or his *domestic* servant may be arrested, or his goods distrained or seized, shall be utterly void; and that all persons prosecuting, soliciting, or executing such process, being convicted by confession or the oath of one witness before the lord chancellor or the chief justices, or any two of them, shall be deemed violators of the law of nations and disturbers of the public repose, and shall suffer such penalties and corporal punishment as the said judges, or any two or more of them, shall think fit. Thus, in cases of extraordinary outrage, for which the law has provided no special penalty, the legislature has entrusted to the three principal judges of the kingdom an unlimited power of proportioning the punishment to the crime.

A person claiming the benefit of the privilege as domestic servant to a public minister must be really and *bonâ fide* his servant at the time of the arrest, and must clearly show by affidavit the general nature of his

¹ Gow, 348—371.

² See Index, tit. *Ambassador and Consul*.

service and the actual performance of it, and that he was not a trader or the object of the bankrupt laws; for, by the law of nations, a public minister cannot protect a person who is not *bonâ fide* his servant. It is the law that gives the protection; and though the process of the law shall not take a *bonâ fide* servant out of the service of a public minister, yet on the other hand a public minister shall not take a person who is not *bonâ fide* his servant out of the custody of the law, or screen him from the payment of his just debts. This privilege, however, has long been settled to extend to the servants of a public minister being natives of the country where he resides, as well as to his foreign servants, and not merely to servants lying in his house (for many houses are not large enough to contain and lodge all the servants of some public ministers), but also to his real and actual servants lying out of his house. Nor is it necessary, to entitle them to the privilege, that their names should have been registered at the secretary of state's office and transmitted to the sheriff's office; though, unless they have been so registered and transmitted, the sheriff or his officers cannot be proceeded against for arresting them. And it cannot be expected that every particular act of service should be specified; it is enough if an actual *bonâ fide* service be proved; and if a service be sufficiently made out by affidavit, the court will not, upon bare suspicion, suppose it to have been merely colourable and collusive. Where the servant of an ambassador did not reside in his master's house, but rented and lived in another, part of which he let in lodgings, it was held that his goods in that house, not being necessary for the convenience of the ambassador, were liable to be distrained for poor rates. And where the wife of a foreign ambassador's secretary was arrested upon a writ issued against husband and wife, the court refused to quash the writ, though the husband swore that before and at the time of the arrest he was in the actual employment of the ambassador, and in daily attendance upon him in writing dispatches and other official documents.¹ This act does not extend to consuls, and they have therefore been held liable to arrest.² But in that case the party was a merchant residing here, and merely acting in the capacity of consul.

The privileges of ambassadors and other foreign ministers are not, strictly speaking, personal privileges, but rather belong to the sovereigns whom they represent; and therefore such privileges cannot be waived by any means.³

If a bill in equity is brought against an ambassador of this country who is abroad to redeem or foreclose a mortgage, the court will order all proceedings to be stayed for a year and a day, unless the ambassador sooner returns. They have always a right to the *essoign* of a year and a day, and afterwards to renew it if occasion require.⁴

An ambassador or consul resident abroad bringing a bill is not required to give security for the costs of suit, as plaintiffs residing abroad usually are.⁵ But an ambassador's servant residing here, and claiming his privilege of freedom from arrest, will be required to give such security if he commences a suit.⁶

¹ Chit. Stat. p. 13, note.

² *Viveash v. Becker*, 3 M. & S. 284.

³ *Barbuit's case*, Forr. 281.

⁴ *Pilkington v. Stanhope*, 2 Vern. 317.

⁵ *Colebrook v. Jones*, Dick. 154.

⁶ *Goodwin v. Archer*, 2 P. W. 452. S. P. *Adderley v. Smith*, Dick. 355.

CHAPTER XXX.

Of Barristers.

To the members of this profession is intrusted the privilege of advocating the rights of all persons who have the misfortune to become involved either as plaintiffs or defendants in legal disputes. They are of several degrees, and take precedence, with the right of pre-audience in courts of justice, in the following order:—

The Queen's Attorney General	Serjeants at Law
———— Solicitor General	The Recorder of London
———— Premier Serjeant	Common Serjeant of London
———— Ancient Serjeant	Advocates of the Civil Law
———— Advocate General	Barristers behind the bar not holding any
———— Serjeants	of the above appointments.
———— Counsel	

Those of each class take precedence among themselves according to the date at which they came to the rank they hold. Thus, barristers according to the date of their call to the bar, and serjeants according to their appointment as such, and so forth. But, independently of this, the crown has power to give any counsel precedence over those of older standing, by granting letters patent of precedence, which specify the extent of precedence.

The queen's attorney or solicitor general, besides being the legal advisers of the crown in all affairs, are *ex officio* the prosecutors in various revenue and criminal matters, and are made parties to all suits and informations in equity concerning either the rights of the crown or the administration of charity funds.

The queen's counsel are the retained additional counsel of the crown, who, without a special licence for the particular purpose, can never be concerned in any proceeding against the interests of the crown.

The serjeants had formerly great privileges in the Common Pleas, inasmuch as no other counsel could plead in that court, except as junior to a serjeant. But by the 9 & 10 Vic. c. 55, intituled "An act to extend to all barristers practising in the superior courts at Westminster the privileges of serjeants-at-law in the court of Common Pleas," that court has been thrown open; so that any barrister may now plead therein as in the other courts of Westminster Hall.

As all rank is conferred at the will of the crown, when a person is first called to the bar he is required to take the usual oaths of allegiance, supremacy, &c.

The profession of a barrister is strictly speaking honorary; in conformity with which it has been long established, that he cannot maintain an action for his fees. They are, in fact, considered as a gratuity,

and on that account cannot, when once given, be recovered back by the client under any circumstances.

A barrister likewise has, as far as he pursues his instructions, and so long as he confines himself to the matter before the court, and observations pertinent thereto, perfect freedom of speech, and cannot be made liable for any thing uttered by him in the course of his professional duty. They can never be obliged to discover that which they know in professional confidence. And if a counsel is so improvident as to betray the secrets of his client's case to his opponent, so that his client receives an injury therefrom, he may, it has been said, be made responsible for the consequences.

In equity they are required to sign many of the pleadings as a pledge of their propriety, and if in such case they put their signature to documents containing scandalous or other improper matter, they may be visited with disagreeable consequences, which in instances which occurred long ago (for, to the honour of the profession, there are none of modern date) amounted to be virtually disbarred and restrained from practising.¹

If any person contracts that he shall have any part of a thing to be recovered in reward for his assistance towards doing so, it amounts to champerty and maintenance of suit, which is altogether illegal under the 32 Hen. VIII. c. 9, and other acts, and is strongly discountenanced by all courts.² And if a barrister even take any part as a reward for his services, though not in pursuance of a prior contract, an old case declares that it would for ever remain a blemish upon his reputation.³

The consent of counsel, given in court, is in general held to be binding on their clients, as it is given upon their own conception of their instructions, and that although they had no instructions so to consent, provided they were at the time apprised of all those facts of which the knowledge was essential to the proper exercise of their discretion.⁴

Where two counsel happen to appear for the same client, upon instructions furnished by two different solicitors, the matter before the court must stand over in order to verify the retainer of the attorney.⁵ But the question, whether a counsel is retained for one client or for another, is one in which the lord chancellor has lately declared he has no right to interfere.

Both barristers and attorneys are entitled to attend at sessions, to take upon them the causes of others, and to prosecute for the crown. Where a sufficient number of barristers attend at sessions, it is usual to give them sole audience, and the attorneys are in consequence not heard in person. Where the bar do not attend, as in most boroughs and cities, it is usual to hear the attorneys as advocates; and though it may be doubted whether in strictness they are entitled to prosecute indictments, it is customary and certainly convenient to allow them that privilege. Where the bar has not been accustomed to attend, but two or more barristers wish to do so, it is usual for them to intimate their desire to the chairman, and to request that they may have pre-audi-

¹ See Chit. Eq. Ind. tit. *Barristers*.

² See Chit. Eq. Ind. tit. *Champerty*.

³ See Penroe's case mentioned in Keeney v. Brown, 3 Ridgw. P. C. 502.

⁴ Mole v. Smith, Jac. & W. 673: Funnell v. Bogle, 4 Russ. 142.

⁵ Butterworth v. Clapham, 1 J. & W. 673.

ence; and if this request be granted, the attorneys cannot afterwards be heard in their presence, unless all the counsel happen to be retained on one side. It appears that neither counsel nor attorneys have a legal right to be present in any preliminary proceeding before a grand jury, nor in an examination for felony before a magistrate; but in the latter instance it is often allowed in courtesy. Formerly the attendance of counsel before commissioners of bankruptcy on behalf of a witness was not a matter of right, though in courtesy it was allowed; but, by the recent changes in the system of bankruptcy, parties have now a right to employ counsel on their behalf. At a *public* meeting before one or more commissioners, it has been required by the commissioners at Basinghall-street, and it is usual, for the barrister retained to attend in his forensic costume, although he may be opposed to an attorney who appears in his usual dress. But at a *private* meeting this ceremony is dispensed with.

In a recent work¹ there are many valuable and useful observations as to the course of study, the admission, and general conduct and duty of this part of the profession, which are well worthy the attention of all who desire to enter it.

We may observe, lastly, that barristers of all descriptions are entitled to the rank of esquires; and, for the benefit of their clients, they are privileged from arrest for debt while attending their professional duties in court, *eundo, morando, et redeundo*, in the same manner as witnesses are privileged. So likewise all actions against them must be commenced, and the venue be laid, in Middlesex.

CHAPTER XXXI.

Of Physicians, Surgeons, and Apothecaries.

THE profession of a physician, like that of a barrister, is also purely honorary, and he cannot, any more than the latter, maintain any action for the recovery of his fees.

In order to guard against the evil consequences of quackery and ignorance, which at that time greatly predominated, the College of Physicians was established in London by a charter of Henry VIII., confirmed by the 14 & 15 Hen. VIII., and it is now a corporate body with the usual corporate rights and qualities.

Physicians in England are to be examined and approved by the college, and have testimonials from the president and three elects of the college, unless they be graduate physicians of Oxford or Cambridge. Persons practising as physicians in London, or within seven miles thereof, not so qualified, forfeit 5*l.* for each offence. A Scotch

¹ 2 Chit. Gen. Pr. 37—45; and see id. 71.

diploma does not seem to be sufficient to justify a physician in practising in London.

It may be very questionable, in the present day, whether the rights of the college do not amount to a monopoly prejudicial to the benefit of mankind. For the science of medicine, however it may have advanced within the last quarter of a century, is still in its infancy; and inasmuch as no person can pass an examination before the college unless his general theory coincides with that of his examiners, the consequence must be, that if he attempt to introduce a new system, or even improve the old one, he must either break through the collegiate rights, or conceal such of his ideas as are at variance with those of his examiners. However dangerous it might seem to admit of quackery, yet in the present enlightened age every thing is soon brought to its right test; and if a single real benefit could be drawn from even quackery itself, it is desirable that the world at large should enjoy the advantage. The college therefore, in our view, acts wisely in not often bringing their privileges into public discussion.

By the 32 Hen. VIII. c. 40, four physicians are chosen by the college to search apothecaries' wares; and if they find any such, they may, in company of the warden of the mystery of apothecaries, destroy all adulterated drugs, &c. The penalty on physicians for refusing to act is 2*l.*, and on apothecaries refusing to allow the search, 5*l.* for each offence.

Although, by 32 Hen. VIII. c. 40, § 1, the president of the commonalty and fellowship of the faculty of physic in London and the commons and fellows of the same, are discharged of watch and ward there, and shall not be chosen constable, or to any other office, yet it seems to have been holden that the act does not extend to other physicians not mentioned in it. And it seems that a practising physician being chosen constable in pursuance of the custom in respect of his lands in a town, has no remedy for his discharge; for there is no precedent of the kind, and his calling is private. Yet if he be chosen constable of a town which hath sufficient persons besides to execute the office, and there is no special custom concerning it, perhaps he may be relieved by the Queen's Bench.

By the 6 Geo. IV. c. 50, § 2, members and licentiates of the College of Physicians in London are exempt from serving on juries.

If a physician or properly licensed person give medicine to a person with a proper motive and due care, though death itself ensue, he is not liable for manslaughter; but it is questionable what would be the consequences to an unlicensed person. Indeed, it was said in *Mr. St. John Long's case*,¹ that, whether licensed or not, if the death ensue from his particular treatment, and he has shown gross ignorance in his art, or gross inattention to the patient's safety, or gross rashness in the application of a dangerous remedy, he is criminally liable, and guilty of manslaughter. This decision is, however, very questionable in principle.

It does not seem that a medical man is privileged to withhold any private or secret communication made to him by a patient, when interrogated by a competent authority.

¹ 4 Car. & P. 398, 423.

Upon questions of skill and judgment, the opinions of competent judges are admissible in evidence; but, in general, mere matter of opinion is not so. Thus, on a trial, where the defence is insanity, a witness of medical skill may be asked whether such and such appearances, proved by other witnesses, are in his judgment symptoms of insanity; but it is questionable if he can be asked, whether, from other testimony given, the act with which the prisoner is charged is in his opinion an act of insanity, which is the very point to be decided by a jury. A physician who has not seen the particular patient may, after hearing the evidence of others, be called on to prove on oath the general effects of the disease described by them, and its probable consequences in the particular case.

Apothecaries, to enable them to practise, must be examined by the Apothecaries Company, and must produce testimonials and certificate of having practised as apprentice for five years; and the penalty for not having a certificate is 20*l.* if as principal, and 5*l.* if as assistant merely. If an action is brought against a person for practising without a certificate, it lies on him to show that he has a certificate. By § 21 of the act, an apothecary not duly licensed cannot recover any charges. So neither can he recover even for the phials in which the medicines were sent. If duly licensed, he may charge for the medicine *or* for the attendances, but he cannot sue for both. And a surgeon, though he may sue for attendance, cannot sue for medicine furnished, unless he be also certificated by the Apothecaries Company; except, indeed, for medicines necessarily furnished in a surgical case.

By the 55 Geo. III. c. 194, § 5, if any apothecary either refuse or neglect to mix and compound, make, prepare, apply, give, or administer medicines when required, or shall improperly mix the same, he forfeits 5*l.* for the first offence, 10*l.* for the second, and his certificate for the third.

Apothecaries and surgeons are in general exempt from all public offices.

Anatomy.—Until the passing of the 2 & 3 Wm. IV. c. 75 (with the exception that the bodies of convicted murderers were, after execution, delivered up for dissection) there were no legitimate means by which human bodies could be obtained for the study of anatomy; and the procuring of them for this purpose gave rise to frequent offences against the laws, and latterly even to murder itself, for the sole object of selling the bodies of the persons so murdered. That act was accordingly passed, not only for the purpose of preventing such crimes, but for promoting, under certain regulations, the study and practice of anatomy. With this view, every person teaching or practising anatomy is required to have a licence from the secretary of state, which is to be obtained upon an application countersigned by two justices of peace; and inspectors (not fewer than three) are to be appointed by such secretary, at a salary not exceeding 100*l.* each, for the purpose of visiting places where the practice of anatomy is carried on, who are to make quarterly returns of all bodies brought for anatomical examination to each of such places within their respective districts. And any person carrying on or teaching anatomy at any place, or receiving or possessing for anatomical examination, or dissecting any body after removal,

unless such party, or the owner of the place, or some party by this act authorized to examine bodies anatomically, shall, at least one week before the receipt or possession of a body for such purpose at such place, have given notice to the secretary of state of the intention to practise anatomy at such place, is guilty of a misdemeanor, punishable by three months imprisonment, or a fine not exceeding 50*l*. But nothing herein is to be construed to prohibit the *post mortem* examination of any human body directed by a competent legal authority.

Any executor or other person in lawful possession of a dead body (not being an undertaker or other person entrusted with it for the purpose of interment merely) may permit it to undergo anatomical examination, unless the deceased had expressed his desire at any time in writing during his life, or verbally in his last illness, that his body should not undergo such examination, or unless the surviving husband or wife or other nearest known relative object thereto. And if any person, by writing in his life-time, or verbally in the presence of two witnesses in his last illness, direct that his body shall be examined anatomically after his death, or nominate any party by this act authorized to make such examination, and before the burial such direction or nomination be made known to the party having possession of the dead body, such person shall direct such examination to be made, unless the surviving husband or wife, or any one or more of the deceased person's nearest known relatives, object thereto. But in no case is the body to be removed for anatomical examination until after forty-eight hours from the decease, nor until after twenty-four hours notice to the inspector of the district; and a certificate of the cause of death, signed by the medical practitioner who attended the deceased during his last illness (or if no such medical man attended, then by some physician, surgeon, or apothecary called in to view the body, and who shall not be concerned in such removal) is to be delivered with the body to the party receiving the same for anatomical examination. And such party shall transmit the certificate within twenty-four hours to the inspector of the district, with a return stating the day and hour and from whom the body was received, the date and place of death, the sex, christian and surname, age, and last place of abode; and shall also enter the said particulars, with a copy of the certificate, in a book to be kept by him, which he shall produce, whenever required, to the inspector. The body, before removal, is to be placed in a decent coffin or-shell, and after undergoing anatomical examination is to be interred in consecrated ground, or in some public burial ground belonging to persons of the same religious persuasion; and a certificate of the interment is to be transmitted within six weeks to the inspector.

Previous to the passing of this act, the dissection of the body after death constituted part of the sentence pronounced upon persons convicted of the crime of murder; but this being considered to have a tendency to strengthen the natural repugnance generally entertained against the anatomical examination of human bodies, so much of the 9 Geo. IV. c. 37 as authorized the bodies of persons convicted of murder to be delivered up for dissection is repealed; and, instead thereof, it is enacted, that the court may direct the bodies of such criminals, after execution, either to be hung in chains, or buried within the precincts of the prison.

CHAPTER XXXIV.

Of Pawnbrokers.

ALL persons receiving goods by way of pawn or pledge, for the repayment of money lent thereon at a higher rate of interest than five per cent, are deemed *pawnbrokers*.

Every person exercising the trade of a pawnbroker must take out a licence, renewable annually ten days at least before the end of the year, for which he shall pay, within the cities of London and Westminster and the limits of the twopenny-post, 15*l.*; elsewhere, 7*l.* 10*s.*, on pain of forfeiting 50*l.* No person can keep more than one house or shop by virtue of one licence. But persons in partnership carrying on trade in one house only are not obliged to take out more than one licence.

The principal regulations as to persons carrying on this business are contained in the 39 & 40 Geo. III. c. 99, and are as follow:—

Every pawnbroker shall cause to be painted or written, in large legible characters over the door of his shop, the christian and surname or names of the persons carrying on the said trade, and the word *Pawnbroker* or *Pawnbrokers*, upon pain of forfeiting 10*l.* for every shop or place made use of for one week without having the same put up; to be recovered, upon confession, or on the oath of one credible witness, by distress, by warrant under the hands and seals of two justices, half to the informer and half to the poor; and, for want of sufficient distress, the offender may be committed to gaol or house of correction for not exceeding three calendar months nor less than fourteen days, unless such penalty and the reasonable charges are sooner paid.

Pawnbrokers, before they redeliver the goods pawned, may demand and take, over and above the principal sum advanced, the following

Rates of Profit.

For every pledge upon which there shall have been lent any sum not exceeding 2*s.* 6*d.*, one half-penny for any term not exceeding one calendar month, and the same for every month afterwards, including the current month in which such pledge is redeemed, though such month be not expired.

<i>s.</i>	<i>d.</i>	<i>s.</i>	<i>d.</i>		<i>s.</i>	<i>d.</i>
If 5	0	have been lent	0	1 per month.	If 12 <i>s.</i> 6 <i>d.</i>	0 2½ per month.
7	6	.....	0	1½ " "	15 0	0 3 " "
10	0	.....	0	2 " "	17 6	0 3½ " "
					20 0	0 4 " "

And so in proportion for any sum not exceeding 40*s.*

And if exceeding 40*s.* and not exceeding 42*s.*..... 0 8 per month.

If exceeding 42*s.* and not exceeding 10*l.*, after the rate of *threepence* for every 20*s.* by the calendar month, including the current month, and so in proportion for any fractional sum.

Which sums are to be in lieu of and as a satisfaction for all interest due, and charges of warehouse room.

Where any *intermediate* sum lent upon pawn shall exceed 2*s.* 6*d.* and not amount to 40*s.*, the pawnbroker may take a profit as aforesaid of 4*d.* and no more for the loan of 20*s.* by the calendar month, including the current month.

But persons applying for the redemption of goods pawned within seven days after the end of the first calendar month after they have been pledged, may redeem the same without paying any thing for such seven days, and if before the expiration of fourteen days of the second calendar month, upon paying the profit payable for one month and a half; but after the expiration of the said fourteen days, the broker may take a profit of the whole second calendar month; and the same regulation and restriction apply to every subsequent month.

Pawnbrokers must give farthings in exchange, or abate the odd farthing.

Pawnbrokers are required to put up in large legible characters, in some conspicuous part of their shop, a list of the rates of profit allowed by this act to be taken, and of the sums allowed to be charged for duplicates, and of the expence of obtaining a second duplicate where a former one has been lost or mislaid.

Where more than 5s. is lent on any pawn, the pawnbroker, before advancing the money, shall enter in a book to be kept for that purpose, a description of the goods, the sum lent thereon, the day of the month and year, the name of the person pawning, and of the street and number of the house (if numbered) where he resides, and whether he be a lodger or housekeeper, by using the letter L if a lodger, and the letter H if a housekeeper, and also the name and place of abode of the owner, according to the information of the person offering the pledge; and if the sum lent shall not exceed 5s., such entry shall be made within four hours after the goods have been pawned. Pledges upon which more than 10s. are lent are to be entered in a separate book; and such entries are to be numbered progressively, beginning a fresh series of numbers in each calendar month.

At the time of taking the pawn, a note or memorandum, being a duplicate of the entry in the book, and containing also the name and place of abode of the pawnbroker, is to be given by the pawnbroker to the person pawning; which duplicate the party pawning is required to take; and unless he take the same, the pawnbroker shall not receive the pledge. Such duplicate, where the sum lent is under 5s. shall be given gratis;

	£.	s.	d.		£.	s.	d.		£.	s.	d.
If the sum lent is	0	5	0	and under	0	10	0	the broker may take	0	0	0
"	0	10	0	—	1	0	0	"	0	1	0
"	1	0	0	—	5	0	0	"	0	2	0
"	5	0	0	or upwards				"	0	4	0

Which duplicate shall be produced to the broker before he shall be obliged to re-deliver the goods, except as hereafter excepted.

When goods are redeemed, the pawnbroker shall write upon the duplicate the profit taken by him, and keep the duplicate for one year.

Any person pawning or exchanging or unlawfully disposing of the goods of any other person without his consent may be apprehended on the warrant of a justice; and being convicted, by the oath of one witness or on confession, shall forfeit not more than 5l. nor less than 20s. and the value of the goods. If not forthwith paid, the justice shall commit him to the house of correction, to be kept to hard labour, for not more than three calendar months, unless the forfeiture be

sooner paid; and if within three days before the expiration of the term of commitment the forfeiture be not paid, the justice may order such person to be publicly whipped. The forfeiture, when recovered, is to be applied towards making satisfaction to the party injured, and defraying the costs of the prosecution; but if the party injured decline to accept of such satisfaction and costs, or if there be any overplus, the same shall be paid to the overseers for the use of the poor.

Persons counterfeiting, forging, or altering duplicates, or uttering, vending, or selling such, knowing the same to have been counterfeited, forged, or altered, with intent to defraud any person, may be committed to the house of correction for not exceeding three calendar months; and any person, or his servant or agent, to whom such note shall be uttered or offered, which he shall have reason to suspect has been counterfeited, forged, or altered, may seize the person offering the same, and deliver him to a constable, who shall convey him before a justice.

If any person offering by way of pawn, pledge, exchange, or sale, any goods, shall refuse to give a satisfactory account of himself, or of the means by which he became possessed thereof, or shall wilfully give any false information as to whether such goods are his own property, or of his name and place of abode, or of the name and place of abode of the owner; or if there be any other reason to suspect that such goods are stolen or otherwise illegally or clandestinely obtained; or if any person not entitled shall attempt to redeem the same, it shall be lawful for any person, or his servant or agent, to whom the same are offered, to detain such person and the same goods, and deliver him immediately into the custody of a constable, who shall convey such person and the said goods before a justice. And if the justice, upon examination, have cause to suspect that the goods were stolen or illegally or clandestinely obtained, or that the person offering to redeem the same hath not any pretence or colour of right so to do, he shall commit such person into safe custody for such reasonable time as may be necessary for obtaining proper information, in order to be further examined. And if upon either examination it appear that the goods were stolen or illegally or clandestinely obtained, or that the person offering to redeem the same hath not any pretence or right so to do, he shall commit such offender to prison, to be dealt with according to law; and where the nature of the offence shall not authorize such commitment by any other law, the same shall be for any time not exceeding three calendar months.

If any person shall knowingly buy, or take in pawn or exchange, any goods of any manufacture, either mixed or separate, or any materials plainly intended for or put into a state or course of manufacture, before such goods are finished for the purpose of wear, or any linen or apparel entrusted to any person to wash, scour, iron, mend, manufacture, work up, finish, or make up, he shall, on conviction before a justice, forfeit double the sum given for or lent on the same, to be paid to the poor; and such goods or materials shall also be restored to the owner in the presence of such justice.

If the owner of any such unfinished goods, or of any linen or ap-

parel so entrusted to wash &c., shall make out, on his oath or on the oath of a witness, before a justice of peace, that there is just cause to suspect that any person has taken in pawn or exchange any such goods without his knowledge, or if the owner of any goods unlawfully pawned, pledged, or exchanged, shall make out, on his own oath or on the oath of a witness, that he has had such goods unlawfully obtained or taken from him, and there is just cause to suspect that any person hath knowingly and unlawfully taken the same in pawn or by way of pledge or in exchange, such justice may issue his warrant for searching, within the hours of business, the house, warehouse, or other place of any person so charged on oath as suspected of having received the same; and if the occupier of the place shall, upon request, refuse to open the same, and permit such search, any peace officer may break open such house, warehouse, or place within the hours of business, and search for the goods suspected to be there, doing no wilful damage; and if the goods so pawned or exchanged be found, and the property of the owner be made out to the satisfaction of the justice, by the oath of one witness or by the confession of the person charged, such justice shall cause the goods to be forthwith restored to the owner.

If any pawnbroker refuse to deliver up any pledge on which a sum not exceeding 10*l.* shall have been lent, on tender of the principal money lent and the rate of profit allowed by this act within the year (or within a year and three months in case of notice having been given), any justice of the peace, on application of the owner, shall summon the pawnbroker before him, and direct the goods so pawned to be forthwith delivered up, or on refusal commit him to prison until the goods be delivered up, or satisfaction be made to the party entitled to the redemption.

The person in possession of the duplicate is to be deemed the owner, and entitled to the redemption of the goods, unless previous notice has been given by the real owner not to deliver such goods, or that the same are suspected to have been fraudulently or feloniously taken or obtained, and unless the real owner proceed in manner hereafter mentioned for redeeming goods pledged where duplicates have been lost, mislaid, destroyed, or fraudulently obtained from the owner.

In case any pawnbroker shall have had such notice, or if any duplicate be lost, mislaid, destroyed, or fraudulently obtained from the owner, and the goods remain unredeemed, the broker, at the request of any person representing himself as the owner, shall deliver a copy of such duplicate, with the form of an affidavit of the particular circumstances attending the case written thereon, as stated to him by the party applying; for which copy and affidavit, in case the money lent shall not exceed 5*s.*, the broker shall receive one halfpenny; and if above 5*s.* and not exceeding 10*s.*, he shall receive 1*d.*; and if above 10*s.*, he shall receive the like sum as he is entitled to take on giving the original duplicate, to be paid by the person applying. And such person having proved his property in such goods to the satisfaction of some justice, and verified on oath the truth of the particular circumstances attending the case mentioned in the affidavit (the taking of such oath being authenticated by the hand-writing of such justice), the broker

shall suffer such person to redeem the goods, leaving the duplicate and affidavit with him.

All pawned goods are deemed forfeited and may be sold at the end of one whole year; unless notice be given in writing, or in the presence of a witness, within the year, by the person entitled to redeem them, in which case they are to be kept for three months beyond the year, and during such time the owner is entitled to redeem them. All goods so forfeited, on which above 20*s.* and under 10*l.* has been lent, are to be sold by public auction, notice of such sale being twice given, at least three days before the auction, in a public newspaper, upon pain of forfeiting to the owner not more than 5*l.* nor less than 2*l.* Pictures, prints, books, bronzes, statues, busts, carvings in ivory or marble, cameos, intaglios, musical, mathematical, and philosophical instruments, and china, are to be sold by themselves, and without any other goods, four times only in every year, *viz.* on the first Monday in the months of January, April, July, and October, yearly, and following days, if the sale exceed one day, and at no other time.

Pawnbrokers are to enter in a book a just account of such sales, expressing the day when and the money for which the goods were sold, with the names and places of abode of the auctioneer and purchaser; and if the goods are sold for upwards of 10*s.* or for more than is due thereon, the overplus (after deducting all necessary costs and charges) shall be paid, on demand within three years after the sale, to the person who pawned the goods, and who shall be permitted to inspect the entry on payment of 1*s.*, or, on refusal, the pawnbroker shall forfeit 10*l.* and treble the sum the goods were originally pawned for, to be levied by distress.

No person having goods in pawn shall purchase any such goods during the time they remain in his custody (except at such public auction); nor shall suffer the same to be redeemed with a view or intention of purchasing thereof; nor make any contract with any person offering to pawn the same, or with the owner of the pawn, for the purchase, sale, or disposition of the said goods, before the end of one year from the time of pawning the same; nor shall purchase, receive, or take any goods in pawn from any person who shall appear to be under the age of twelve years, or to be intoxicated with liquor; or purchase or take in pawn or exchange the duplicate of any other broker; nor buy any goods in the course of his trade before eight o'clock in the morning or after seven in the evening; nor employ any servant or apprentice or other person under sixteen years of age to take in any pawn; nor receive any goods by way of pawn or exchange before eight in the morning or after seven¹ in the evening between Michaelmas-day and Lady-day, nor before seven in the morning and after nine² in the evening the remainder of the year, except only on Saturday evenings, and the evenings preceding Good Friday, Christmas-day, and every Fast or Thanksgiving day, when pledges may be taken in till eleven o'clock, under penalty of not less than twenty shillings nor exceeding 5*l.*, to be levied by distress.

If it be proved upon oath before a justice, that any goods pawned have been sold before the time limited, or embezzled, or lost, or become of less value than when pawned, through the neglect or wilful

¹ 9 & 10 Vic. c. 98.

² *Id.*

misbehaviour of the person to whom they were pawled, such justice shall award a reasonable satisfaction to the owner; and the sum so awarded, in case the same shall not amount to the principal and profit due to such broker, shall be deducted thereout, and it shall be sufficient for the pawner to pay or tender the balance; and upon so doing such justice shall proceed as if the pawner had paid or tendered the whole money due for the principal and profit as aforesaid; and if such satisfaction to be allowed be equal to or exceed the principal and profit as aforesaid, then such broker shall deliver the goods so pledged to the owner without being paid any thing for principal or profit, and also pay such excess (if any), on penalty of 10*l.*, to be recovered as hereafter mentioned.

The justice may require the production of any book, note, voucher, memorandum, duplicate, or other paper in the hands of the broker; and if he neglect to attend, or to produce the same in its true and perfect state, he shall forfeit not exceeding 10*l.* nor less than 5*l.*

Pawnbrokers neglecting to make any entry hereby required shall forfeit for each offence not exceeding 10*l.*; and for every other offence, where no other penalty is imposed, not more than 10*l.* nor less than 40*s.*, to be levied by distress and sale, half to the person complaining and half to the poor.

But no person shall be liable for any prosecution before any justice, unless information be given within twelve calendar months after the offence was committed; and such prosecution shall be before some neighbouring justice where the offence shall have been committed, except in London.

The churchwardens and overseers of the parish or place where any offence is supposed to have been committed, or some one of them, at the discretion of the justice, on having notice from him for that purpose, shall prosecute the offender at the expence of the parish or place.

No person who has been convicted of any fraud, or of obtaining money under false pretences, or of any felony, shall prosecute or inform against any person for any offence against this act.

Nothing herein extends to any person lending money upon pawn or pledge at the rate of 5*l.* per cent interest, without taking any greater profit for the loan thereof.

The provisions of this act extend to and include the executors, administrators, and assigns of any deceased pawnbroker, except that no such executor or administrator shall be answerable for any penalty personally, or out of his own estate, unless forfeited by his own act or neglect.

Any person aggrieved by the conviction of a justice or justices under this act may appeal to the quarter sessions, on entering into a recognizance with two sureties, at the time of conviction, in double the sum which he is adjudged to pay; but if the judgment be affirmed at the sessions, the appellant shall immediately pay the sum forfeited, together with the costs awarded for defraying the expences of the appeal.

By the 5 Geo. IV. c. 107, § 1, the commissioners of Chelsea Hospital are authorized to mark all their clothes, stores, &c. with the words

Chelsea Hospital, and persons pawning or receiving in pawn any such goods are liable to 10*l.* penalty, one moiety to the informer and the other to the hospital, to be recovered by distress, or else the offending party may be committed to prison for three months.

By 1 Jas. I. c. 21, it is provided, that the sale of any goods wrongfully taken to a pawnbroker in *London or within ten miles thereof*, shall not alter the *property* thereof.

And if plate be left to one for term of life, and he pawn it, the pawnee has no lien on it after the death of the pawner, for the person in remainder may recover it from him by action of trover.¹

A pawn cannot be taken in an execution against a pawnbroker; nor can it be *used*, without the consent (express or implied) of the owner.

It has been held by the Court of King's Bench, that a pawnbroker has no right to sell unredeemed pledges after the expiration of a year from the time the goods were pledged, if, while the goods are in his possession, the original owner tender him the principal and interest due.² On a motion for a new trial, Lord Tenterden said, "I am of opinion, that if the pledge be not redeemed at the expiration of a year and a day (and no notice given that three months further are to be allowed for its redemption), the pawnbroker has a right to expose it to sale as soon as he can consistently with the provisions of the act; but if, *at any time before the sale has actually taken place*, the owner of the goods tender the principal and interest and expences incurred, he has a right to his goods; and the pawnbroker is not injured, for the power of sale is allowed him merely to secure to him the money which he has advanced, together with the high rate of interest which the law allows to him in his character of pawnbroker."

In the late case of *Exp. Cording*³ it was decided, that a pawnbroker is not liable to the penalties and consequences mentioned in § 24 of the before-mentioned act for the loss and consequent non-delivery of goods pawned, where the loss is occasioned by *accidental fire*.

In *Cowie v. Harris*⁴ it was held, that if a pawnbroker, upon one contract or bargain of loan, advance more than 10*l.* (*viz.* 100*l.*), and pretend to divide the same as if it were in different loans, and for that purpose give several tickets, dated on different days, the transaction is a mere contrivance to conceal usury, and is illegal and void.

We have already noticed the duties and liabilities of bailees on pledge or pawn, whence may be gathered those which attach on pawnbrokers.⁵

¹ Hoare et al. v. Parker, 2 T. R. 376.

⁴ Barn. & Adol. 198.

² Walter v. Smith, 5 B. & A. 439; S.C.,
1 D. & R. 1.

³ Mood. & M. C. N. P. 141.

⁵ *Ante*, p. 294.

BOOK II.

OF PROPERTY AND ITS INCIDENTS.

CHAPTER I.

Of Real Property; and first, of Corporeal Hereditaments.

Our inquiry is now to be directed to those rights which a man may acquire in and to external things, or such rights as have private property for their direct and immediate subject.

When mankind increased in number, craft, and ambition, it became necessary to appropriate to individuals not only the immediate *use* of that of which they had the visible possession, but the substance of the thing used, and which we may term the *absolute property* or *dominion* thereof. Though this dominion or property was at first limited to the period of actual corporeal possession, it was soon by universal consent extended to the duration of the life of the possessor; and, ultimately, the right of disposing of it at his death was ceded in like manner.

This division of property into *real* and *personal* ought to be attentively observed, and constantly remembered; for it separates the laws of England, as it were, into two distinct systems, and is preserved with an unbending tenacity, much more so than in the civil institutions of any other nation. Hence, landed and personal estate are almost constantly regarded as subject to different codes.

The objects of property are *things*, as contradistinguished from *persons*; and things, by the law of England, are distributed into two kinds,—things real, and things personal. Things *real* are such as are permanent, fixed, and immovable, which cannot be carried out of their place, as lands and tenements: things *personal* are goods, money, and all other moveables, which may attend the owner's person wherever he goes.

In treating of THINGS REAL, or real property, we shall consider—1st, Their several *sorts* or *kinds*; 2dly, The *tenures* by which they may be holden; 3dly, The *estates* which may be had in them; and 4thly, The *title* to them, or the means of acquiring and losing them.

Things real are usually said to consist of lands, tenements, or hereditaments. *Land* is a word of very extensive signification, and comprehends all things of a permanent substantial nature. *Tenement* is a word of still greater extent; and though in its vulgar acceptation it is only applied to houses and other buildings, yet in its proper, original, and legal sense it signifies every thing that may be *holden*, provided it

is also *permanent* in its nature, whether substantial and sensible, or of an unsubstantial or ideal kind. Thus, *liberum tenementum*, a free tenement, or freehold, is applicable to offices, rents, commons, advowsons, franchises, peerages, and such like, as well as to lands and other solid objects. The term *hereditament*, however, is by much the largest and comprehensive expression, as it includes whatever may be *inherited*, whether corporeal or incorporeal, real, personal, or mixed. Thus an heirloom is neither land nor tenement, but a mere moveable, yet being inheritable is comprised under the word hereditament; and a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament.

Hereditaments, then, to use the largest expression, are of two kinds—corporeal and incorporeal. *Corporeal* consist of such as are sensible, visible, and tangible; *incorporeal* are such as are not the objects of sense, can neither be seen nor handled, but exist only in contemplation.

CORPOREAL hereditaments consist wholly of substantial and permanent objects, all which may be comprehended under the general denomination of *land* only; for land comprehends, in its legal signification, any ground, soil, or earth, whether arable, meadow, pasture, wood, moor, land covered with water,¹ marsh, furze, or heath. So it includes all buildings and structures upon it; so that a conveyance of the land will pass the buildings thereon.

The right to land also includes the right to the space upwards towards the heavens—" *Cujus est solum, ejus est usque ad cælum*;" therefore the owner of the land has a right to remove all things of another which overhang it. So, again, he has a right, not only to the surface of the land, but to all the soil and its mineral contents, from the surface down to the very centre of the earth. Thus the right to mines.

The term *close*, in its general legal signification, means the separate interest of a party in a particular spot of land, whether inclosed or not. If a man make a feoffment (that is, *by deed*) of a house "*with the appurtenances*," nothing passes by those words but the garden, curtilage, and close adjoining to the house, and no other land, although usually occupied with the house; but by a *devise* of a messuage, even without the words "*with the appurtenances*," the garden and curtilage will pass, and, where the intention is apparent, even other adjacent property.

The term *farm*, though in common acceptation it imports a tract of land with a house, outbuildings, and cultivated land, in law signifies only the leasehold interest in the premises.

By a grant of *water*, neither the right to the body of water itself nor to the land under it will pass, but only a right of fishery.

¹ It is to be observed, that in prosecuting "acres of land covered with water," and a right to a piece of water, water-course, not as such a body of water, for water is &c., it is always described as so many common by the laws of nature.

CHAPTER II.

Of Incorporeal Hereditaments.

AN *incorporeal hereditament* is a right issuing out of a thing corporeal (whether real or personal), or concerning or annexed to or exercisable within the same; consequently it is not the thing corporeal itself, nor is its existence more than in idea and abstract contemplation. Thus, a rent or an annuity is an incorporeal hereditament; for though the money, which is the fruit or produce of it, is doubtless corporeal, yet the annuity itself, which produces it, is incorporeal. So tithes, in like manner, are incorporeal. Incorporeal hereditaments are principally of ten sorts:—advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

ADVOWSONS.

An advowson is the right of presentation to a church or ecclesiastical benefice; and he who has the advowson is called a *patron*.

The patron has no right to the church or glebe himself, but only to present and appoint another person, who is in orders, to officiate as minister therein; and if, after such appointment, the patron takes corporeal possession of the church or its appurtenances, he is an intruder upon the property of the parson, to whom during his life the corporeal possession belongs. Advowson is therefore strictly an incorporeal hereditament.

Advowsons are either appendant or in gross: *appendant*, where they still continue annexed to the manor in which the church is situate; *in gross*, where they have once been separated from it by legal conveyance. It is to be remembered, that originally most churches were built by the lords of the manors in which they are situate, the tithes of the parish (when the division into parishes arose) being appointed by the lord to the clergyman to whom the living was given, and thence the lord of the manor is generally the patron of the parish church. So long therefore as the advowson is appendant, it is annexed to the manor or lands; but when once it is in gross, it is for the future annexed to the person of its owner, and not to his manor or lands.

Again, advowsons are either presentative, collative, or donative: *presentative*, which is the usual advowson, where the patron has a right to present to the bishop a clerk, whom he is bound to accept if he finds him canonically qualified; *collative*, where the bishop has the advowson in his own hands; and *donative*, where the king, or any subject by his licence, founds a church or chapel, and ordains that it shall be merely in the gift or disposal of a patron, subject to his visitation only, and not to that of the ordinary, and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction. This is said to have been anciently the only way of conferring ecclesiastical benefices in England. If, however, this right of donation is once waived by the patron presenting to the bishop, and

his clerk is admitted and instituted, it becomes for ever after presentative, and never regains its donative quality.

Although, however, as before observed, the person on whom a donative is bestowed does not require either presentation, institution, or induction, several things are necessary in order to complete and maintain the possession. 1. The donee must be a priest in holy orders by episcopal ordination. 2. Within two months after he shall be in actual possession of his donative, he must read the morning and evening prayers in his church or chapel (unless, in case of impediment, the ordinary extend the time, and then within one month after the impediment is removed), together with the form of giving assent thereto. 3. He must subscribe the declaration of conformity to the liturgy of the church of England, before the archbishop or bishop or ordinary of the diocese; and if the donative have a parish church, must take a certificate of his declaration of conformity, and read it in the parish church. 4. He must take the oaths of supremacy and allegiance before the patron. 5. He must subscribe to the Thirty-nine Articles of our church. 6. He must, within six months, take the oaths of supremacy, allegiance, and abjuration in one of the superior courts at Westminster, or at the general or quarter sessions. 7. He must read and assent to the Thirty-nine Articles at the evening and morning prayers within two months, if it be a place with the cure of souls. And 8. He must, within three months after, read the ordinary's certificate of his subscription, and again make the same declaration in the parish church.

Unlike the other species of advowson, a donative does not lapse, unless such be the terms of the foundation, or unless it has been augmented by Queen Anne's Bounty, when it is made subject to lapse by act of parliament. But the ordinary may, by ecclesiastical censures, compel the patron to fill the church, as his power refers to the parson, who is subject to the ecclesiastical jurisdiction, although not to the place.

Donatives are not confined absolutely to any particular class of ecclesiastical preferment, as there are other benefices and dignities which resemble donatives, and are *quasi* donatives. For the most part archbishoprics and bishoprics are in the hands of the crown. So also deaneries and prebends may be, and frequently are, donatives.

The peculiarities of this kind of advowson are, that in case of a vacancy in the life-time of the ancestor, the heir, and not the executor, has the right of donation; and, in the time of a vacancy, the patron can take the profits to his own use. Donatives are freed from procurations, and the incumbent is exempted from attended at visitations. The presentation does not devolve to the king, as in other livings, when the incumbent is made a bishop. They are within the acts of uniformity when with care of souls, and within the statute against simony as well as that against pluralities if a donative be first taken. But if a donative is the second benefice taken without dispensation, the first would not be avoided within the Pluralities act.

Donatives are resigned by offer of resignation by the incumbent to the patron, and the patron's acceptance of it.

Alienation of Advowsons.—With respect to the alienation of advowsons, in general it may result from a wrongful act divesting the ad-

vowson from the person to whom by due course of law it would appertain, or it may be the consequence of those legal provisions by which property passes from one hand to another by the mere disposition of the law, or it may arise from the proprietor of the advowson disposing of it by way of conveyance.

The consequences of *usurpation*, whatever they formerly were, are now much diminished; for, by the 7 Ann. c. 18, no usurpation displaces the right of the patron, whether the advowson be appendant or in gross, but only operates for the present turn; so that if there be three coparceners and a usurpation takes place of the right of the second's presentation, the right of the third comes in again on the third turn or vacancy. A usurpation against a bishop is a bar as to him, but not to his successors.

Although *disseisin* of a manor whereto an advowson is appendant puts the disseisee out of possession of his advowson, he may notwithstanding present to the advowson before he regains seisin of the manor, if prior to any presentation by the disseisor.

When the right of entry is lost, and a party cannot enter on the property alienated by his own authority, but can only recover by action, the possession is said to be *discontinued*. In general, discontinuance is the effect of alienations made by husbands seised in right of their wives; by sole corporations, such as ecclesiastics seised *jure ecclesie*; or by tenants in tail. The two former are now restrained by statute. As an advowson must pass by grant, a conveyance by deed of the tenant in tail will not work a discontinuance. A conveyance of record by fine &c. would not create a discontinuance, which can only arise in things which may pass by livery. Hence an advowson in gross cannot be discontinued; but an advowson appendant will undergo all the consequences of a discontinuance of the principal, subject to certain qualifications.

Where the real proprietor being out of possession, and having no right to enter without recovering possession in an action, has afterwards the freehold cast upon him by some subsequent, though defective title, he is said to be *remitted* to his ancient estate; and as a remitter to the principal is a remitter to the accessory, by the remitter to the manor the patron is remitted to the advowson also.

The transfer of advowsons may also be effected by the act of law. Thus, if a widow receive for her dower a manor to which an advowson is appendant, she is entitled to such advowson. So if she is entitled to the third part only of a manor, the third presentation belongs to her.

There may be a curtesy of an advowson appendant, provided there has been seisin of the principal; but of an advowson in gross there is no need of seisin.

A guardian in socage shall not present, but the infant himself shall; and lord chancellor King confirmed the appointment of a child, though it appeared that the infant was under a year old, and the guardian himself guided the infant's hand in making his mark and setting his seal to the appointment.

In cases of descent the advowson follows the principal, and goes to the heir; but if a vacancy has occurred in the life-time of the ancestor,

the executor presents to that turn, and not the heir, except in case of donative advowsons. In the case of descent among coparceners, if they disagree, the eldest has the first presentation, and so forth.

An advowson appendant to a manor is clearly legal assets, because, the manor being assets, what is appendant must be assets likewise; and, although the contrary is laid down, an advowson in gross is said by Lord Coke and others to be assets, as it may be sold, it comes to the heir by descent, and it may be recovered in value.

The transfer of advowsons may also be effected by conveyance of the proprietor. A person may have the same estate in an advowson as in any other real possession. So there may be an equitable owner of an advowson, as a cestuique trust, or a purchaser before conveyance; but a trustee or mortgagee will have but the bare right of presentation, and not of nomination.

Advowsons in gross may be transferred by every species of conveyance whereby other incorporeal property is transferable. So advowsons appendant, by every species of conveyance by which real property corporeal is transferred.

An advowson appendant cannot pass as an appurtenant where the manor itself is leased for years only, because no lease for years of an advowson is good; but otherwise, being strictly an appurtenant to the manor, it will be included under those usual terms or words whereby appurtenances in general pass.

In order to effect a transfer of an advowson from the crown, it must be specifically named in the grant; for nothing passes by royal grant but what is specifically mentioned as intended to pass.

Of the Grant of Avoidances.—There are two kinds of avoidances, or modes by which a vacancy may occur; the one, an actual vacancy in deed, by the death of the incumbent; and the other, an avoidance by law, arising at a moment when the church is actually full, and the incumbent is to be removed, either on account of resignation, plurality of livings, deprivation, incapacity, union of parishes or churches,¹ or simony.

An *actual vacancy* can in no case be granted by a subject; though, it seems, where a person is both patron and incumbent, he may *devise* the next presentation, as the vacancy has not at that time arisen; for the avoidance granted must be a *future* avoidance. The grant or conveyance must also be by deed, specifying the particular vacancy that is intended to pass. Nothing more than the interest which the grantor has can pass by the grant, and for the excess the deed is void. Thus, if a tenant in tail of a manor to which an advowson is appendant grant the next avoidance and die, and the issue in tail enter on the manor, the grant becomes void. So if a tenant for life grant the next avoidance, it is good so long as he lives, but void as against the remainder man. So if a tenant for years of a manor grant the next avoidance, neither he nor his executors can avoid the grant, so long as the term continues, by surrender of the term to the superior patron or otherwise.

The next avoidance is but a personal chattel, and though it be by the

¹ By the common law, when churches are poor, and unable to support the charges to which they are subject, they may be consolidated or united, with the consent of the parson, patron, or ordinary. See further, as to unions, Mirehouse on Advowsons, 106 *et seq.*

deed granted to a man and his heirs and assigns, it goes to his executors or administrators on his death.

*Presentation.*¹—Presentation is the offering of a clerk to the ordinary to be instituted to a benefice, or it may be to a deanery, arch-deaconry, prebend, hospital, church, or chapel. It is made by writing, in the nature of a letter missive to the bishop of the diocese; and if by the crown, to a benefice of 10*l.* yearly value on the queen's books, a 20*l.* stamp is required.² Without this there can be no evidence of presentation.

The crown, as supreme, is the patron paramount of all benefices; and unless the patronage be in some subject, it must be in the crown. This supremacy was declared in the first instance by the 26 Hen. VIII. c. 1; and, though suspended in the reign of Philip and Mary, was restored by the very first act in the reign of queen Elizabeth.³ This is the foundation of the oath of supremacy.

If a church in the bishop's patronage become vacant in the life of the bishop and he die, or if a bishop collate a prebendary and die before induction, the crown, and not the bishop's executors, shall present, contrary to the case of a common patron.

The lord chancellor, or keeper of the great seal for the time being, has the right of presentation to all benefices appertaining to the queen of or below the value of 20*l.* in the queen's books; the only difference in a presentation by the queen and the lord chancellor is, that the former commands, and the other requests the presentation to take place.

It sometimes happens that one person has the right of nomination, and another that of presentation. When the queen has the latter right only, the right of nomination is not affected, but the lord chancellor must present the person nominated.

The queen may revoke her presentation at any time before induction; and if her presentee die before induction, though the queen have only one turn, she shall present again, but a common patron would in such case lose his turn.

As before observed, the right of presentation descends by the course of inheritance from heir to heir; though, if a vacancy occur during the life of the ancestor, and he die without having presented, the right to present is then a mere chattel, which goes, not to the heir, but to the executors. If the testator having presented die before the presentee is admitted, and the executor present a different person, the bishop may accept which of the two presentees he pleases. If, however, the patron and incumbent be the same person and he die, the heir shall then present, and not the executor; subject, however, to the devise of the patron, by which it may be affected.

If a woman has the advowson to her and her heirs, and she marry, the husband and she must jointly present. If issue is born, the husband after her death presents alone, as a tenant by curtesy; or if the wife have no issue, and she die before presentation during a vacancy, the husband shall present that turn as her administrator, or rather in his marital right to her chattels.

¹ We have already briefly shown the manner and requisites of a person becoming a parson or vicar, *ante*, p. 231.

² *Ante*, 151.

³ 1 Eliz. c. 1.

The widow of a patron shall have her dower out of an advowson by a right to present on the third vacancy, the heir having the first two.

Joint tenants must also concur in the presentation, or else the bishop may elect which he pleases, or he may refuse to admit the presentee of one only, and collate if they do not agree in time. But joint tenants may make partition, and present by turn according to agreement between themselves. If an advowson is vested in trustees, they become joint tenants, and all must join. With tenants in common, however, it is otherwise, as the one by presentation may bind the other. In case of coparceners, they must either agree in the presentation, or the eldest sister has the first right, the next elder the second, and so forth.

Corporations must present under the common seal, and by the true name of the corporation.

A mortgagee cannot take advantage of a vacancy; for though he, as the legal owner of that out of which the right of presentation arises, must present, yet the right of nomination is in the mortgagor, and for this reason, *viz.* that as the possession of the mortgagee is only for the purpose of repaying himself his debt, and he is trustee for the mortgagor for all the surplus, the right of presenting, not being capable of returning a profit in the eye of the law for which the mortgagee can account to the mortgagor in reduction of his debt, is considered as an excrescence belonging to the latter. For a somewhat similar reason, namely, because it is a maxim of law that he can meddle with nothing but that for which he can account, a guardian in socage cannot present, but the infant, however tender in years, is the party to exercise the right.

On the bankruptcy of a patron, the commissioners may sell the right of next presentation or the advowson; but if a vacancy occur before the sale, the bankrupt is the party in whom lies the right to present on that turn.

Though formerly thought otherwise, presentations may be revoked before admission and institution; but after that, the church is full, except as against the crown and the parson himself.

Of Lapse.—Lapse is a devolution of the right of patronage from the patron to the bishop as ordinary, to the metropolitan as superior, or to the queen as patron paramount of all the benefices within the realm; and it arises when the patron who should have presented has omitted his opportunity. The time within which the right should be exercised is six months, or 182 days, from the time the vacancy happened, or in some cases, as we shall see presently, from the time of his receiving notice thereof from the ordinary or bishop.

When, therefore, a clerk has received a presentation to a living, he should, within six months from the vacancy, tender the same to the bishop of the diocese, or his vicar general, or, in case the bishopric be vacant, to the guardian of the spiritualities within which the church is situate. If this is neglected and the six months run out, the patron's right to present is gone for that turn, and it devolves by *lapse* on the bishop.

As before intimated, the patron is sometimes entitled to notice of the vacancy before a lapse can occur, and sometimes not. Where the

vacancy arises by death, creation, cession, or by statute, no notice is necessary. It is however said, that if the clerk die beyond seas, the six months run from the time when the patron could reasonably have gained intelligence thereof. So neither in the case of union of churches need the bishop give notice. But where the avoidance arises by acts between the ordinary and the incumbent, notice must be given to the patron, as in cases of deprivation or resignation, or if the avoidance is by canon or common law, as by the incumbent's taking a second living under value in the queen's books without dispensation. If the presentee of a *lay* patron be refused by the ordinary, in most cases (as for simony, adultery, or illiterature) the patron is entitled to notice; but where an *ecclesiastical* patron presents a clerk who is refused on the ground of illiterature, the patron must nevertheless present another fit person within the six months from the vacancy, although no notice of the objection be given to him. The reason of this difference between an ecclesiastical and a lay patron is, because the former is presumed to know what are the requisite qualifications of him whom he presents to fill the offices of the church.

If the ordinary die without giving the requisite notice, his successor must give the notice, and no lapse can accrue to the successor till six months after such notice. Where notice is requisite, it must be given to the patron himself from the bishop himself or other ordinary; and if the patron live in the same county, it may then be published in the parish church, and affixed to the church door. If there is a suit pending relative to the presentation to a church, and the bishop is therein a *bonâ fide* litigating party, no lapse to the bishop can accrue till the question is determined. But if two patrons are litigating the right between themselves, and each presents a clerk, the bishop may reject both, and so cause a lapse, unless one of the patrons or clerks pray him to award a writ of *jure patronatus* to determine the right.

The law of lapse has three gradations: 1st, After the neglect of the original patron, the bishop of the diocese may collate, unless the crown is patron. 2dly, After the end of the second six months, if the vacancy still exist, the metropolitan or archbishop of the province has the right to present during the next six months. 3dly, After which, the vacancy still existing, the crown shall present, against which no time runs. If the patron be the ordinary or the metropolitan, he has nevertheless but one six months in which to present. But no lapse occurs as against the crown, whether it be the original patron or its right accrue by a default in others and consequent lapse to it. If, however, the crown neglects to present, the ordinary may send a deputy to serve the cure, and sequester the profits of the church.

Simony.—In relation to advowsons, we shall, lastly, consider the subject of simony.

Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward. To constitute it, it is necessary that a vacancy shall have occurred at the time of the payment of the money or making the contract, or at least in the *immediate* expectation thereof; the purchase of the next avoidance being otherwise purely legal and proper. Besides being contrary to many old church canons, simony is against the oath which every presentee is bound to take, that it has

not been committed by any person to his knowledge in his own particular case. Several acts of parliament have been passed to prevent it by the imposition of severe penalties, viz. forfeiture of the turn and double the value of one year's profits of the living, and the presentee, if guilty, is declared disqualified for that living. And the penalty for corruptly resigning or exchanging a benefice with cure of souls is, that the giver and the taker shall lose double the money given, one moiety thereof and also of the forfeiture of double the value of the year's profits to go to the crown, and the other to the party suing. Besides these, the clerk who takes the oath before mentioned against simony is liable to be indicted for perjury if he be convicted of simony. If he is not privy or consenting to the simoniacal contract, he is then only deprived of his benefice; for the presentation is void, though the presentee were not privy thereto, but he may be presented again to the same living.

Although the money be not given to the patron, and he be ignorant of money being given by the clerk, yet is the presentation simoniacal. Any contract or contrivance whereby the strict letter of the law respecting simony is sought to be evaded is considered simony; as where a person who wanted to be made a bishop, conversing with a person who had interest at court on the subject of a see that was vacant, offered to bet him a large sum of money that he himself would not be promoted to the bishopric, this was clearly an attempted evasion of simony, and a mere collusion to disguise the real intention. So the purchase of the next avoidance from a patron, when the incumbent is sick and ready to die, or, as it is termed, *in extremis*, is clearly simony. Nor is it requisite that the purchase be made with a view to the promotion of any particular clerk. It must not be forgotten, that the law of simony only relates to the purchase of an actual vacancy, or one that is likely immediately to occur; and therefore if the purchase extended likewise to the advowson or right to future presentations, as to such the purchaser would have a full legal title. But if the contract be made for the purpose of carrying a simoniacal contract into execution, it is void as to so much as goes to effect that purpose; and if the sound part cannot be separated from that which is corrupt, the whole is altogether void.

Bonds to resign at any particular period may or may not be legal, according to the nature of the bond and the uses made of it. Thus, if it is a special bond to resign in favour of some certain person, as the patron's son, relation, or friend, at a particular period, it has been held valid; but a bond to resign generally at the will of the patron, and no particular object expressed, has lately been held to be absolutely void. In fact, courts always look as near as they can to the real object of the parties, and endeavour to sift out whether the intention be to evade the law; and they take care not to suffer an attempted infraction to go unpunished.¹

¹ See further, Mirehouse on Advowsons, *per tot.*; whence the foregoing summary has been in a great measure collected.

TITHES.

Tithes are the tenth part of the produce arising from land, from the stock upon land, and from the personal industry of the inhabitants.

They are of three kinds: *prædial*, or those which arise from the land itself, as corn, hay, hemp, flax, grass, fruit, herbs, and wood; *mixed*, or those which arise from the increase of animals receiving nutriment from the earth, as cattle, sheep, pigs, wool, milk, and eggs; and *personal*, or such as are acquired purely by man's own industry, as of mills and fisheries.

They are also divided into *great* and *small* tithes. The former are corn, peas and beans, hay, and wood; and the latter, all other *prædial*, and all mixed and personal tithes. If hay of any kind, as clover, instead of being cut as hay, be left for seed, the tithe is then a small tithe; and it is also settled, that hops, flax, potatoes, turnips, herbs, apples, fruit, cole seed, clover seed, rape seed, saffron, teagles, thyme, and tobacco, are small tithes, however large the quantity grown.

The rector is *primâ facie* entitled to all the tithes of the parish, great and small; and the vicar, in order to take any part of them from him, must either produce an endowment, or give such evidence of usage as pre-supposes anything *exparte* the vicar against the rector. An endowment is not, however, always conclusive, but may be affected by evidence of usage contrary to it.

On the other hand, if an endowment of a vicarage is produced, under which a vicar has been accustomed, time out of mind, to take particular tithes and profits, it will be no ground for withholding such tithes from him, that they are not expressed in such endowment, since it may from long possession be presumed that the vicarage has, at some time or other, been augmented therewith; and, indeed, proof of perception of tithes during living memory, where none can be shown to have been enjoyed by the rector, is sufficient to establish the vicar's claim, although his endowment expressly negatives the vicar's claim, and gives them to the rector.

When the vicarage is not endowed, the impropiator of the small tithes is bound to maintain a priest; and, upon an information, the crown may assign a proper allowance or portion of the small tithes for such vicar's support, but not where there is any endowment, be it ever so small. Otherwise there is no difference between the rights of a lay impropiator and a spiritual rector.

Curates have generally no title to any part of the tithes, though there are places, especially in Wales, where a right of that kind does exist.

Glebe land is a portion of land belonging to or parcel of the parsonage or vicarage, over and above the tithes. As between the rector and vicar, no tithe in respect of this is generally payable; but by the endowment the rector may be obliged to pay the vicar his small tithes out of it. Of glebe it may here be briefly remarked, that by the 28 Hen. VII. c. 11, the emblements go to the executor or administrator of the spiritual party who sowed the land, and not to his successor; but if corn thereon be cut after the late possessor's decease, the tithe thereof belongs to the successor.

In extra-parochial places the tithes belong to the crown.

An exemption from the payment of tithes may exist, in part or totally, by a real composition, by prescription or custom, or by privilege.

A *real composition* is where an agreement has been made between the owner of lands and the parson or vicar, with consent of the ordinary and patron, that the lands should be discharged from tithes by reason of some land or other real recompence given in lieu thereof. No such composition can have been made since the 13 Eliz. c. 10, by which (among other spiritual persons) parsons and vicars are restrained from making any conveyance of the estates of their churches for longer than three lives or twenty-one years. Compositions of this kind, however, are often made at the present day by act of parliament upon the inclosure of open fields and wastes.

The constant payment or performance of a fixed tribute or service in lieu of tithes is evidence of a prescriptive or customary composition originating before the time of memory, which is called a *modus*. It is essential that the benefit accruing from the *modus* should be constant and invariable; and if it consists in money (which is most frequently the case) it must not much exceed the probable value of the tithe in those ancient days, when money was not abundant.

The crown, by its prerogative, is discharged from the payment of all tithes. So ecclesiastical persons are exempt as to the lands which they hold in their spiritual character: the vicar pays no tithes to the rector, nor the rector to the vicar. These personal privileges are confined to the crown and the clergy; for their tenant or lessee pays tithes.

But, lastly, those lands are wholly exempt from tithes even in the hands of laymen, which formerly belonged to such religious houses as were dissolved by the 31 Hen. VIII. c. 13;* for that act enacts that all persons who should come to the possession of the lands of any abbey then dissolved should hold them free and discharged of tithes in as large and ample a manner as the abbeys themselves formerly held them.

COMMUTATION OF TITHES.—It had long been considered a desirable object to provide a fair and adequate compensation for tithes in lieu of their payment in kind; and with this view the legislature, in the year 1836, passed the act 6 & 7 Wm. IV. c. 71, entitled "An act for the commutation of tithes in England and Wales," of the scope and intentions of which we shall here endeavour to present the reader with a short outline.

The act provides for the conversion of all the tithes in England and Wales (including all uncommuted tithes, portions and parcels of tithes, and all *moduses*, compositions real, and prescriptive and customary payments) into a rent-charge on the property liable; such rent-charge being a *fixed* amount as represented by a certain quantity of corn, but payable in money, and therefore *variable* from year to year according to the average prices of corn for the seven preceding years.

The mode provided for making the commutation is, first, to ascertain the gross average money value of all the tithes in a parish (or in a district allowed by the commissioners to be treated as a parish for the purposes of such commutation) for the seven years ending Christmas 1835; next, to apportion that amount on the several lands chargeable with tithes in the parish; and then to compute the quantity of corn

which could be purchased with such sum, one-third of it being laid out in wheat, one-third in barley, and one-third in oats, at the average price of each sort of such grain as taken from the official returns for the seven years preceding Christmas 1835.¹ This gives the fixed amount of the rent-charge payable for the same lands &c. in every future year, as represented by a certain quantity of corn. But as the rent-charge is not to be paid in corn, but in money, the amount in money will be constantly *variable*, and will have to be ascertained from year to year by a similar computation of the value of that same quantity of corn according to the average prices for the seven years immediately previous and ending at the preceding Christmas, as taken from the like official returns.

The machinery by which the purposes of the act are to be carried into execution is a central board of commissioners, called, "The Tithe Commissioners for England and Wales," with power to appoint assistant commissioners, and an establishment under them adequate for the purpose.

Every commutation consists of two separate processes: first, the ascertaining of the total sum to be paid for the tithes of any parish or district; and secondly, the apportionment of such sum among the different lands &c. on which it is chargeable. There are also two methods by which either or both of these processes may be effected: first, voluntarily; and secondly, compulsorily.

A *voluntary agreement* as to the total rent-charge in any parish, executed by the owners of two-thirds of the titheable lands, two-thirds of the great tithes, and two-thirds of the small tithes, is, when confirmed by the commissioners, binding on the whole parish and on all parties interested.

When the total sum has been thus agreed on, the land-owners may meet and appoint valuers to apportion that sum among the several lands chargeable. If more than one, an *even* number of valuers must be chosen, one-half by the majority in point of number, and one-half by a majority in point of interest; though both majorities may agree and appoint the same person. At the same meeting the land-owners may settle the principles on which the valuers shall proceed, or they may leave them uncontrolled, to distribute the whole charge according to the best of their judgment, "having regard to the titheable produce and productive quality of the lands;" subject, however, to the provision, that all the lands are to have the full benefit of any *modus* or exemption attaching to them.

To give the fullest opportunity for effecting voluntary commutations, the *compulsory* powers of the commissioners were not to be brought into operation till the 1st October, 1838, except in the case of a compulsory apportionment after a voluntary agreement. But after that time, when a voluntary commutation had not been effected in any parish, or was not in progress, the commissioners were empowered to take the necessary steps for a compulsory commutation.

¹ The average prices of corn for the seven years preceding Christmas 1835, as taken from the official returns, were—Wheat, 56s. 3d.; barley, 31s. 3d.; and oats, 22s. per quarter. Or, reckoning by the bushel, wheat, 7s. 0½d.; barley, 3s. 11½d.; and oats, 2s. 9d.

In making a compulsory award as to the gross amount of the tithes in a parish, the commissioners are required to take the average value of the tithes if paid in kind, or of the compositions (if any), paid during the seven years ending at Christmas 1835, as the basis of the commutation. But in case of an appeal by the patron, or by one-half of the land owners, or of the owners of tithes (great or small), on the ground that the payments of those seven years do not fairly represent the permanent average value of the tithe, the commissioners may increase or diminish the average amount so ascertained to an extent not exceeding one-fifth, or twenty per cent, for the purpose of bringing it nearer to such value. And in cases of fraud, collusion, or special circumstances, a still greater latitude is allowed. There are also special provisions as to the tithe of hops, fruit, and garden produce. Moduses and the like are to be taken at their actual amount, the only change being that they will be called rent-charges instead of moduses, and will vary henceforth with the price of corn. But as the rent charge will be subject to all parochial and county rates, when the compositions have been paid free of such charges, an equivalent to what they would have paid had they been rated is to be added to the composition before the rent-charge is calculated.

When the award has been confirmed, the voluntary principle is again resorted to, and an assistant commissioner summons a meeting of land-owners to choose valuers, exactly as if the sum awarded had been voluntarily agreed on. But if a voluntary apportionment be not made in six months, the commissioners may appoint their own valuers and proceed to a compulsory apportionment. In whichever way effected, when completed, and confirmed by the commissioners, it becomes binding on all parties; the lands are for ever discharged from tithes, and the rent-charge is paid instead.

The rent-charge may be specially apportioned upon the several closes or portions, or according to an acreable rate or rates upon lands of different quality. And a land-owner may discharge any portion of his lands from rent-charge altogether by having the whole apportioned on other lands belonging to him in the parish held under the same title and for the same estate, provided that the land so charged be at least three times the value of the whole rent-charge on it.

In all cases of ecclesiastical tithe commuted by voluntary agreements, the consent of the patron is required; and such agreements are to be submitted to the bishop of the diocese for his observations and opinion before confirmation by the commissioners. And with the view of acquiring or enlarging glebe, land, to an extent not exceeding twenty acres, may, in the case of ecclesiastical tithes, be set apart, instead of an equivalent value of rent-charge, and the residue made up in rent-charge to be apportioned among all the land-owners, unless otherwise specially agreed.

The rent-charge, if held for life, or for any greater estate, is declared a freehold, and is made subject to the like liabilities, incidents, and exemptions, as tithes.

The rent-charges are not to merge in the estate out of which they issue, except when held by tenants in fee simple or fee tail, who, of course, may deal with them like other property held in fee, and, if they

see fit, may declare them merged before the intervention of the commissioners, and so, by extinguishing them, withdraw them from the operation of the act.

The rent-charge is subject to all parochial and county rates. These rates are assessable on the actual occupier of the lands out of which the rent-charge issues, although payable by the owner of the rent-charge. The occupier paying them may deduct them out of his rent, if a tenant; and the landlord may deduct the amount from the owner of the rent-charge in settling accounts with him.

No one is personally liable for the rent-charge; but the remedy, as in the case of ordinary rent-charges, is by distress and entry on the lands out of which it issues, the party entering being liable to account upon a judge's order.

If the rent-charge be unpaid for twenty-one days, power is given to distrain after ten days notice, as in case of a distress for common rent; but the arrears that can be recovered are limited to two years. In case the rent-charge be not satisfied by the distress, a power to enter is given after forty days arrear; but, instead of the tedious process of an ejectment, a cheaper remedy is substituted, as any judge, on an affidavit of the arrears being due, may order a writ to be issued, directed to the sheriff, to inquire and assess what is due; and on the return of the inquisition, a writ of *habere facias possessionem* may issue, as on an ordinary judgment. The land may be held till the arrears and costs, as also the costs of cultivation, shall be satisfied. On this being done or whenever the land-owner thinks fit, he can call for an account (by summons in the usual way before a judge in chambers); and on the account being rendered, and the amount of arrears and expences satisfied, possession may be regained by a writ of supersedeas to the writ of possession.

The distress and entry extend to all lands in the parish held under the same landlord by the occupier of the lands liable to the rent-charge.

In the case of Quakers, it is not necessary to impound the distress, which may be made on their goods and chattels whether on the premises or not; and no entry is to be made unless the owner of the rent-charge is unable to find sufficient distress.

Under the word *tithes* used in the act, as the subject of commutation, are included all uncommuted tithes, portions, and parcels of tithes, moduses, compositions real, and customary or prescriptive payments. But the act does not extend (unless by a special provision in any voluntary parochial agreement, and specially approved by the commissioners) to any Easter offerings, mortuaries, or surplice fees, or to the tithes of fish or of fishing, or to any personal tithes other than the tithes of mills, or to any mineral tithes, or to any payment instead of tithes arising or growing due within the city of London, or to any permanent rent-charge or other rent or payment in lieu of tithes, calculated on rents of houses or lands in any city or town under any local act or custom, or to any lands or tenements of which the tithes are already perpetually commuted or extinguished by act of parliament. These exceptions are grounded for the most part on the general principle, that there is no land on which to charge the commutation.

COMMONS.

Right of common consists in the liberty to feed cattle, to catch fish, to dig turf, cut wood, or the like, on or from another man's land. It is therefore chiefly of four sorts, namely, of pasture, piscary, turbary, and estovers.

Common of pasture is the right of feeding one's beasts on another's land; for in those waste lands which are called commons, the property of the soil is generally in the lord of the manor, as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant, because of vicinage, or in gross.

Common appendant is the right belonging to the owners of arable land to put commonable beasts (which are beasts of the plough, or such as manure the land) upon the lord's ground. It is a general right attaching on the grant of lands, but only belongs to arable land, and can only be claimed for so many cattle as are necessary to plough and manure the tenant's arable.

Common appurtenant arises from no connexion of tenure, nor from any absolute necessity, but may be annexed to lands in other lordships, or extend to other beasts besides such as are usually commonable, as hogs, goats, and the like. It is not a general right, like common appendant, and therefore could only be claimed by immemorial usage or prescription, though it may also be created by modern grant.

Common because of vicinage or neighbourhood, Blackstone explains to be, where the inhabitants of two townships which lie contiguous to each other have usually intercommoned with one another, the beasts of the one straying mutually into the fields of the other; and he states it to be only a permissive right, intended to excuse what in strictness is a trespass in both, and so prevent a multiplicity of suits; and says, that therefore either township may inclose and bar the other out, though they have intercommoned time out of mind; neither hath any person of one town a right to put his beasts originally into the other's common, but if they escape and stray thither of themselves, the law winks at the trespass. But this description, as a definition, is objected to, as being rather a descriptive example or illustration than a definition. The lords of the contiguous manors may inclose the adjacent waste; but if an open passage be left between the two commons sufficient for a highway, the common by vicinage still continues.

Common in gross is a right annexed to a man's person only, being granted to him and his heirs by deed &c. It is entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor.

There are other species of common, much of the same kind, in different parts of the country, such as *cattle gates* in the north, *beast gates* in Suffolk, &c.

All species of common of pasture are limited usually as to number and time; and therefore the possessor is not in general allowed to pasture more cattle than his own land will keep during the winter by its summer and autumn produce. The notion of common *without stint* is now exploded.

Of commons in general it is to be observed, that the lord of the

manor may inclose for tillage or wood land as much of the common as he pleases, provided he leave sufficient for the use of such as are entitled thereto. The lord has the sole interest in the soil; but that in the common is mutual between him and the commoners, and they may both bring actions for injuries either against strangers or each other. Though the commoners have rights of turbary, piscary, digging sand, or taking any species of estovers upon the common, such rights will not prevent the lord from inclosing, if sufficient be left.

The high price of all kinds of agricultural produce during the late war gave rise to the very general inclosure of commons; and, to facilitate that object, a General Inclosure act was passed, 41 Geo. III. c. 109, amended by the 1 & 2 Geo. IV. c. 23; and to these have been since added the 6 & 7 Wm. IV. c. 115, the 3 & 4 Vic. c. 31; and, more recently, the 8 & 9 Vic. c. 118, amended by 9 & 10 Vic. c. 70.

Common of piscary is the liberty of fishing in another man's waters, as common of *turbary* is that of digging turf or the soil, either for sand, coals, minerals, stone, or the like. So common of *estovers* is a liberty to take a necessary and reasonable quantity of wood off another's land for the use or furniture of a house or farm, or for farming utensils.

RIGHT OF WAY.

This is another species of incorporeal hereditament. A right of way must originally have been granted under seal; but twenty years uninterrupted enjoyment may establish a prescriptive right. Such long enjoyment of a way is, of itself, in general a sufficient *prima facie* title; and forty years is conclusive, unless it is shown to have been enjoyed by consent or agreement expressly made for that purpose by some written document.¹ These periods of prescriptive right have now been established by statute 2 & 3 Wm. IV. c. 71; see *post*, 565. It has been erroneously supposed that the permitting a funeral to pass across private grounds creates a public right of way; but this error has long been refuted.²

A purchaser or lessee of property with a supposed right of way should ascertain the title to the way; and if it be doubtful whether the prescriptive right may not have been destroyed by unity of seisin or other means, he should require a fresh express grant, or at least words sufficient to pass all ways theretofore used by the prior occupiers. The words *belonging to* are only synonymous with *appurtenant*, and not equivalent to *used*, and will not pass a way extinguished by unity of seisin, unless it be a way of necessity. A right of way may arise from necessity; as if a man let to another a field in the centre of his estate, a right of way to and from that field must exist as necessary to the enjoyment of the thing demised.

Injuries to a right of way may in general be remedied by abatement or removal of the obstruction, or by action on the case; but not by action of ejectment, or of trespass, unless in case of assault upon the person attempting to use his right of way.³

OFFICES.

These afford us another instance of incorporeal property, whether the estate in them be to a man and his heirs for ever, or for life, or for

¹ 1 Chit. Gen. Pr. 214.

² *Ibid.* 25.

³ *Ibid.* 214.

years, or during pleasure only. Although the office be granted for life, the crown by its prerogative may prevent the exercise of the functions of it, though the salary still belongs to the grantee.

No office in the administration of public justice can endure longer than for the life of the officer; and if granted for a term of years, it would be void as to the excess, since the executors and administrators may be wholly unfit to exercise the functions. No *judicial* office can be granted in reversion, since by the time the reversion falls in, the grantee may be totally incompetent. But mere *ministerial* offices, as they may be performed by deputy, may be limited in any manner.

Buying of offices is for the most part illegal. By act of parliament it is a misdemeanor to buy, sell, advertise, or in any way promote the sale of offices; and an agent advertising the same incurs 50*l.* penalty.¹

The incumbrance also of an office is in general illegal. Thus the salary of an equerry to one of the royal family is not subject to a sequestration.² The sale of the place of Jew broker in the city is illegal.³ So is the sale of the command of a ship in the East India service.⁴ So is the assignment of the half-pay of an officer.⁵

But the sale of a commission in the army is not *per se* bad.⁶ Nor is that of the office of clerk to the deputy registrar in the prerogative court of Canterbury,⁷ nor of registrar of a consistory court,⁸ nor under-marshal of London,⁹ nor of a menial office in the House of Lords.¹⁰

FRANCHISES.

A franchise, or liberty, is a royal privilege or branch of the crown's prerogative subsisting in the hands of a subject. It must therefore arise from a grant from the crown, or be held by prescription, which presupposes such grant. The kinds of franchises are various; the following are some of the principal. To be a county palatine is a franchise vested in a number of persons. It is likewise a franchise to be incorporated as a body politic, and each member of such corporation is said to have a franchise or freedom. Other franchises are, to hold a court leet; to have a manor or lordship, or at least a lordship paramount; to have waifs, wrecks, estrays, treasure trove, royal fish, forfeitures, and deodands; to have a court of one's own; to have the cognizance of pleas; to have a bailiwick wherein the grantee only and his officers execute process; to have a fair or market, with liberty of taking toll, either there or at other public places, as bridges, wharfs, &c., which tolls must have a reasonable cause of commencement (as in consideration of repairs or the like), or the franchise is illegal and void; or, lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty; on which last species of franchise we shall make a few observations.

¹ The 5 & 6 Edw. VI. c. 16, renders any agreement for the sale of an office for the collection of the revenue absolutely void; and by the 49 Geo. III. c. 126, such a contract is made a misdemeanor. See Garforth v. Fearon, 1 H. Bl.; Parsons v. Thompson, *ibid.*; Lee v. Coleshill, Cro. Elz. 529; Norton v. Summers, Hob. 14; Co. Litt. 234; 3 Inst. 164; Willes, 241; Wiggins v. Bambridge, Willes, 571; Long v. Payne, 2 Wils. 133; Stanhope v. Erie, 8 T. R.; Waldo v. Martin, 4 Barn & C. 319.

² Fenton v. Lowther, 1 Cox, 315.

³ Exp. Lyon, Ambl. 89.

⁴ E. I. Comp. v. Neave, 5 Ves. 181; Hartwell v. Hartwell, 4 Ves. 815.

⁵ M'Carty v. Gould, 1 Ball & B. 389; Stone v. Lidderdale, 2 Ast. 533.

⁶ Id 4 Ves. 815.

⁷ Aston v. Gwinnell, 3 Y. & J. 136.

⁸ Wheeler v. Trotter, 4 Swan. 174.

⁹ Exp. Butler, Ambl. 73.

¹⁰ Schellenger v. Blackely, 1 Ves sen. 347.

The *rights of forest*, properly so called, can only belong to the crown. A *chase* is a right to the game on an open waste not capable of being inclosed, and does not include any right to the land itself. It is said that there are only 13 legal chases in England. A *park* (of which there are said to be 781 in England) is an inclosed tract of land privileged for beasts of the chase, and can only be legally constituted by a grant from the crown. It gives rise to privileges which do not exist elsewhere; as, for instance, the owner of the franchise or his servants may shoot or destroy dogs found hunting deer; and the deer are real property attached to the land, and go to the heir at law, and not to the executor, contrary to the usual quality of chattels.

Free-warren is another franchise founded on express grant from the crown, or a prescription which supposes it. It is an exclusive privilege to preserve and kill hares, rabbits, roes, partridges, pheasants, rails, quails, woodcocks, mallards, and herons, (but not grouse), in a tract of land, even in exclusion of the owners of the soil. The owner of this franchise may obtain full costs of suit against a trespasser in pursuit of game, although no game be in fact killed, and only one farthing damages are given. He may also shoot self-hunting dogs. Here also the game goes to the heir, and not to the executor.

The rights of *free fishery*, *several fishery*, and *common of fishery*, have also been considered franchises. *Free fishery* is an exclusive right of fishery in a public navigable river, or sometimes in an arm or the sea. *Several fishery* is the same in a private water, or river not navigable, and may include the ownership of the soil, which the former cannot. *Common of fishery* does not import any exclusive right; nor any property in the fish before they are taken, but merely a right to take fish in common with other persons who have a similar independent right.

The remaining species of incorporeal hereditaments are *DIGNITIES*, *CORODIES* (which is a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance), *ANNUITIES*, and *RENTS* of all kinds.

CHAPTER III.

Of Tenures.

ALMOST all the real property in this kingdom is, by the policy of our laws, supposed to be holden of some superior lord, in consideration of certain services to be rendered to the lord by the tenant. The thing holden is called the *tenement*; the possessor or proprietor, whatever be his interest therein, is called the *tenant*; and the manner or condition of his possession, the *tenure*.

On the abolition of military tenures and their appendages by the 12 Car. II. c. 14, all tenures were converted into *free and common socage*, save only tenures in *frankalmoign*, *copyholds*, and the honorary services (without the slavish part) of *grand sergeanty*.

SOCAGE denotes a tenure by any certain and determinate service, and is constantly opposed by our ancient writers to knight's service, or military tenure, where the render was precarious and uncertain. It was divided into *free socage*, where the services were not only certain but honourable (as fealty only, or rent and fealty), and *villain socage*, where the services, though certain, were of a baser nature. As belonging to this species of tenure, we may rank *petit serjeanty*, tenure in *burgage*, and *gavelkind*.

Petit serjeanty consists in holding lands of the crown by the service of rendering annually some small implement of war, as a bow, a sword, or the like. The tenure by which the grants to the Duke of Marlborough and the Duke of Wellington for their great military services are held, is of this kind, each rendering a small flag or ensign annually, which is deposited in Windsor Castle. The more honorary part of the services of *grand serjeanty*, such as carrying the sword or banner, officiating as butler, carver, &c. at the coronation of the sovereign, are still reserved, though the slavish appendages belonging to it were abolished by the before-mentioned statute.

Burgage tenure is when the sovereign or some other is lord of an ancient borough, in which the tenements are held at a rent certain. A borough is usually distinguished from other towns by the right of sending members to parliament, and where the right of election is by *burgage tenure*, that alone is proof of the antiquity of the borough. There are a variety of customs affecting many tenements so held in ancient *burgage*, the most remarkable of which is that of *borough English*, which is, that the youngest instead of the eldest son shall succeed to the property on the death of the parent. For this custom various reasons are adduced, but the most rational seems to be, because the younger son by reason of his tender age is not so capable as the rest of his brethren to help himself.

Gavelkind, which exists principally in Kent, has these distinguishing properties: 1st. The tenant is of age sufficient to alienate his estate by feoffment at the age of fifteen years. 2nd. The estate does not escheat in case of an attainder and execution for felony; though if a tenant in *gavelkind* being indicted for felony absent himself and be outlawed, after proclamation made for him in the county (and formerly if he had taken sanctuary, or had abjured the realm), his heir shall reap no benefit by the custom, but the lands shall escheat to the lord, and the crown shall have a year and a day and waste in them, if holden of it, in like manner as the common law directs of lands not subject to this custom. 3rd. In most places the tenant had a power of disposing of the lands by will, before the Statute of Wills in the reign of Henry VII. was made. 4th. The lands descend not to the eldest, youngest, or any one son only, but to all the sons together.

FRANKALMOIGN is that kind of tenure by which *religious* corporations, sole or aggregate, hold lands of the donor, to them and their successors for ever. Formerly the services were such as to pray for the soul of the donor; but, since the Reformation, this kind of service has of course been abolished, and the tenure cannot now be created. In general, such corporations hold the lands discharged of any kind of service and absolutely, though if the service be defined, as to

distribute a certain amount of money in alms, or the like, the visitor (that is, either the heir of the donor, or such other person as he appointed visitor, or else the crown) has a remedy to enforce the performance of the service.

COPYHOLDS.—Another, and in the present day a very important tenure, is that of copyhold, or tenure by copy of the court rolls at the will of the lord. Manors are in substance as ancient as the Saxon constitution, though perhaps they differed a little in some immaterial circumstances from those which exist in the present day. They are portions of land originally held by lords or great personages, a certain portion of which they retained for their own use, which were called their *demesne* lands; another portion of which they granted to their tenants and followers, originally at will only, and afterwards during the observance of certain customs or the performance of certain services; and the residue, consisting of waste and uncultivated lands and commons, served for public roads, and for common of pasture to the lord and his tenant. Manors were formerly called *baronies*, as they still are *lordships*; and each lord or baron was empowered to hold a domestic court, called the court baron, for redressing misdemeanors and nuisances within the manor, and for settling disputes of property among the tenants. This court is an inseparable attendant of every manor; and if the number of suitors should so fail as not to leave sufficient to make a jury or homage, that is, two tenants at least, the manor itself was lost. But this is now altered, as we shall presently see, by the recent act for the enfranchisement of copyholds. Formerly, manors within manors were granted; but this subinfeudation was put a stop to by several statutes besides Magna Charta; so that all manors existing at this day must have existed as early as the reign of Edward I.

In different manors, the customs or conditions of tenure, as they may be termed, differ; and so do the durations of holding. As before observed, originally the tenure was purely at the will of the lord; but, step by step, it has, according to the degree of vigilance with which the lords have preserved their original rights, crept into an inheritable right, or at least a right for life. In some manors, where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are copyholds of inheritance; in others, copyholds for life: for the custom of the manor has in both cases so far superseded the will of the lord, that, provided the services are performed as stipulated for by fealty, he cannot, in the first instance, refuse to admit the heir of the tenant upon his death; nor in the second can he remove his present tenant so long as he lives, though *nominally* holding by the precarious tenure of the lord's will.

As soon as the death of a copyhold tenant is known to the homage, it should be presented at the next general court, and three several proclamations should be made at three successive general courts for the heir or other person claiming title to the land whereof such copyholder died seized to come in and be admitted. Proclamation is said to be unnecessary where the heir appears in court, either personally or by attorney; but until such presentment and proclamations, the heir, though of full age, is not bound to come into court to be admitted. If, after the third proclamation, no such person claims to be admitted, a

precept may be issued by the lord or steward to the bailiff of the manor, to seize the lands into the lord's hands for want of a tenant; but the seizure must be *quousque* &c., and not as an absolute forfeiture, unless there be a custom to warrant it.

The admittance is merely as between the lord and the tenant, for the title of the heir to a copyhold is, as against all but the lord, complete without admittance. The ceremony of admittance is said to be for the lord's sake only; therefore in one case the court refused a *mandamus* to the lord to admit a person who claimed by descent. But a *mandamus* will be granted if a proper case be laid before the court; and recently the court, as a matter of right, granted a *mandamus* to admit a person claiming by descent. If the heir be refused admittance, he shall be *terre tenant*, even though the lord loses his fine; for the lord is only trustee for the heir, and merely the instrument of the custom for the purpose of admittance. So also is the steward; and therefore an admittance by him will be good, though he act by a counterfeited authority, it being sufficient if in appearance he is steward.

The fruits and appendages of copyhold tenure are fealty, services (as well in rents as otherwise), relief, and escheats. The two latter belong only to copyholds of inheritance; the former to those for life also. Besides these, copyholds have also *heriots*, *wardships*, and *finer*.

An *heriot* is the right in the lord to have a render made to him of the best beast or other chattel by the heir upon the death of the ancestral tenant. This may exist in both species of copyhold. But *wardship*, which is the right of the lord to act as legal guardian, on the death of the natural one, to his infant tenant, and *finer*, which are due on the death of the tenant, or on any alienation of the land, belong only to copyholds of inheritance. Fines are sometimes arbitrary and at the will of the lord, and sometimes fixed by custom; but even where arbitrary, the courts will take care that no more than reasonable fines shall be demanded; and, unless in peculiar circumstances, no fine on descent or alienation of more than two years improved value is allowed to be taken. In ascertaining the yearly value, the quit rent must be deducted, but not the land tax. The fine may be recovered by the lord in an action of *assumpsit*; but he has no right to it till the admittance of the tenant. The lord assesses the fine at his peril; and if he assess it at too high a rate, he cannot recover it. But the assessment need not be entered on the court roll.

Where there exist a tenant for life and a remainder-man, the fine on admission is to be apportioned between them, the admission of the former operating as the admission of the latter also. The lord in these cases may make an apportionment, but he cannot remit the whole to the tenant for life, and charge the whole on the remainder-man; though if he remit the tenant for life's portion, that does not discharge the remainder-man as to the residue.

It may be observed, that if a copyhold is forfeited by breach of the custom on which it is held, though it is absolute at law, equity will relieve against it in general, where compensation for the breach can in the view of the court be made; otherwise it will not.

Where the copyholder had such a power within the custom of the manor, and was anxious to leave his copyhold estate to any person other

than his heir, it was necessary that he should first surrender it to the use of his will. Afterwards the 55 Geo. III. c. 192 provided, that where there existed any power to devise a copyhold by will, there should be no necessity for a previous formal surrender. Now, however, by the 7 Wm. IV. & 1 Vict. c. 26 (the New Wills Act), all copyholds as well as all other property whatever, real or personal, may be disposed of by will. This power of devising is expressly stated to extend to "all real-estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that (being entitled as heir, devisee, or otherwise to be admitted thereto) he shall not have been admitted thereto, or notwithstanding that the same (in consequence of the want of a custom to devise or surrender to the use of a will or otherwise) could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same (in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom) could not have been disposed of by will if this act had not been made."

Tenure in ancient demesne is only a more exalted species of copyhold tenure. Ancient demesne consists of those lands which were formerly the demesne lands of the crown. The tenants of some of these lands continued for a long time *pure villeins*, and their successors now differ only in a few points from common copyholders. Others were in a great measure enfranchised by the royal favour, being only bound to perform some better sort of villein services, and those certain and determinate, all of which are now changed into pecuniary rents. These tenants had many immunities and privileges granted to them; as, to try the right of their property in a peculiar court of their own, called a court of ancient demesne, by a peculiar process denominated a writ of right close; not to pay toll or taxes; not to contribute to the expences of knights of the shire; not to be put on juries; and the like. These tenants, therefore, though their tenures be properly copyhold, yet have an interest equivalent to a freehold. Lands holden by this tenure however, while they differ from the common copyholds principally in the privileges before mentioned, are distinguished from freeholds by one special mark of villeinage, *viz.* that they cannot be conveyed by feoffment or the like, but must pass by surrender to the lord or his steward in the manner of common copyholds, yet with this distinction, that in the surrender it is said, "to hold according to the custom of the manor," not "to hold according to the will of the lord."

Commutation of Manorial Rights, and Enfranchisement of Copyholds.—With a view to the improvement of this kind of tenure, and also to the gradual abolition of it, an act has been passed, (4 & 5 Vict. c. 35,) for effecting a commutation of the rents, fines, and heriots payable to the lords of manors, and of the lords' rights in timber, in respect of lands of copyhold and customary tenure, and other lands subject to such payments, and for facilitating the voluntary enfranchisement of such lands. The plan is similar to that adopted for the commutation of tithes; and the Tithe Commissioners are constituted a board, under the title of "The Copyhold Commissioners" for carrying the act into execution.

The commutation for such manorial rights may be the payment of an annual sum by way of rent-charge and a small fixed fine (not exceeding 5s.) upon death or alienation; or it may be the payment of a fine only on death or alienation, or at fixed periods; such rent-charge, or such commutation fine, when exceeding 20s. to be *valued and variable* according to the price of corn, in like manner as is provided with regard to the tithe-commutation rent-charge.

The commutation may be effected either by *general* agreements between the lord and three-fourths of the tenants, which will then extend to all the tenants of the manor; or by *separate* agreements between the lord and any one or more of the tenants, which only bind the parties to them; but in all cases to be confirmed by the commissioners. The former may extend not only to the rights above-mentioned, but also to the lord's rights in mines and minerals, if expressly agreed on; and the latter may embrace the same, and also any other of the lord's rights affecting the lands. The agreement, of whichever nature, may determine the entire rent-charge, and also the apportionment for each tenant; or it may leave either or both to be fixed by valuers, subject to confirmation by the commissioners.

And from the 1st of January next following the confirmation of the schedule of apportionment by the commissioners, the lands are to be absolutely discharged from the payment of all the lord's rents, fines, and heriots, and from the lord's rights in timber, and from any other right which may be the subject of such commutation. They will continue to be held by copy of court-roll or by custom, and to be conveyed by surrender or admittance or otherwise as heretofore; but with respect to descent, dower, and curtesy, they will become subject to the same laws as lands held in fee and common socage, saving only the custom of gavelkind in the county of Kent.

The rent-charge, when in arrear for twenty-one days, may be recovered by distress and entry, and the other means provided for recovery of tithe-commutation rent-charge; and any tenant paying it is entitled to deduct the amount from his rent.

The commutation fine is recoverable in the same manner as fines upon death or alienation are now by law recoverable.

Enfranchisements.—By the same act, provision is made for enabling lords and tenants of manors to effect either general or partial *enfranchisements* of their lands. Any lord of a manor (whatever be his estate or interest) is empowered, with the consent of the commissioners, to enfranchise all or any of the lands of his manor in consideration of such sum or sums of money as shall be agreed on by the tenant, and which may be made payable either forthwith or at a future time.

Where all the tenants of a manor, or any twelve of them, shall agree at the same time with the lord for such enfranchisement, it may be effected by a schedule of apportionment either specifically agreed upon between them, or prepared by the steward of the manor, and in either case afterwards confirmed by the commissioners. Such schedule must state the sums to be paid for enfranchisement by the several tenants, or charged on their respective lands, the period for the payment of the principal money respectively, and for the commencement of interest, and also the compensation to be paid to the steward and other officers

of the manor for the loss they may sustain by such enfranchisement. And all the provisions of the act for carrying into effect a commutation apportionment are extended, so far as applicable, to the case of an enfranchisement, save that the commissioners shall not make any alteration therein without the consent of the parties interested. But when the estate of any party is less than an estate in fee simple, or corresponding copyhold or customary estate, notice is to be given to the person entitled to the next estate of inheritance in remainder or reversion.

Where such agreement for an enfranchisement is not entered into with all the tenants of a manor, or their number shall be less than twelve, or whatever be their number, if the parties think fit, an enfranchisement may be effected, with the consent of the commissioners, by such a conveyance, deed, or assurance as would or might be adopted if the lord were seised of the manor for an absolute estate of inheritance in fee simple in possession.

And from the date of the final confirmation by the commissioners of the apportionment or conveyance by which such enfranchisement is effected, the several lands shall stand charged with the respective sums mentioned therein, with lawful interest for the same; and, until payment, the person for the time being seised of the manor shall be deemed to stand seised of the said lands as mortgagee in fee thereof, for the benefit of the lord as to the sums payable to him, and of the steward or other officers as to the sums payable to him or them; and the same shall be a first charge on the lands, and have priority over all incumbrances whatsoever, tithe rent-charge only excepted.

And after enfranchisement the lands will become in all respects of freehold tenure, subject to the payment of the enfranchisement consideration; but the tenant is not therefore to be deprived of any commonable right to which he was previously entitled. Nor is such conversion into freehold to affect any mortgage (except as aforesaid), or to defeat the beneficial limitations of any will or settlement theretofore executed, or alter the descent or distribution of any estate or interest in land on the decease of any tenant or person entitled thereto in possession or remainder at the time of such enfranchisement.

After the 31st December, 1841, customary courts may be holden by the lord of a manor, his steward, or the deputy, though there be no tenants, or none present. But no proclamation made at any such court shall affect the estate or interest of any person not present, unless notice be duly served on him within one month afterwards. Lords of manors may make grants of lands, and admit tenants, without holding a court; and presentment by the homage shall be no longer essential to an admission. But every surrender to the lord, and will delivered, either in or out of court, and every grant and admission, shall be entered on the court rolls.

By the custom of some manors tenants could not aliene their tenements otherwise than by entireties; but any tenant may now, by licence from the lord (which licence he is hereby empowered to give), dispose of his ancient tenements, or any part thereof by devise, sale, exchange, or mortgage, in such parcels as he may think proper, subject to the payment of such portion of the lord's rent as shall be apportioned thereon by the lord or his steward.

CHAPTER IV.

Of Freehold Estates of Inheritance.

THE next subject for our inquiry is the nature and properties of estates. An *estate* in lands, tenements, or hereditaments, signifies the interest which the person possessed has therein.¹ Sometimes the term is used merely as a local description, as "all my estate at A.;" but the above is the legal signification of the word.

This subject may be considered under the three following views:—1st, The quantity of interest; 2dly, The time of enjoyment; 3dly, The number and connexion of the tenants or owners of the estate.

With regard to the *quantity of interest*, estates may be divided into—1. Estates of freehold; and 2. Estates less than freehold.

A *freehold* is the possession of the soil by a freeman; which possession could only be given at common law by *livery of seisin*, that is, a formal delivery of possession on the land itself, and which was effected by delivery of a clod of earth, a stick, the key of the outer door, or the like. The want of it, however, was sometimes relieved in equity.² But now, by 8 & 9 Vic. c. 106, all corporeal tenements and hereditaments, as regards the conveyance of the immediate freehold, lie in *grant* as well as in *livery*.

Freeholds may be either freeholds of inheritance or freeholds not of inheritance.² The former, again, are divided into inheritances absolute, or fee simple, and inheritances limited, one species of which is usually called *fee-tail*.

I. AN ESTATE IN FEE SIMPLE, OR IN FEE, is where the person holding it has the absolute dominion over the property, so that he may do just what he pleases with it. Every other estate may be created out of it, and all others merge in it (excepting *estates tail*) when the owner of the fee simple becomes entitled to them.

Its attributes are—1. An unlimited power of alienation by deed or will; 2. An uncontrollable power of committing waste; 3. It is liable, into whosoever hands the estate may come, to dower, curtesy, docketed judgments, enrolled annuities charged on the land, debts of a bankrupt owner, crown debts of record. In the hands of the heir it was always liable to specialty debts; and now, by the recent act, 3 & 4 Wm. IV. c. 104 it is rendered liable to simple contract debts also, though it is first to pay specialty debts. In the hands of a purchaser *with notice*, it is liable to unenrolled annuities charged on land, simple contract crown debts, and undocketed judgments. 4. Another attribute of it is, descent to a man's heirs general. 5. It is liable to escheat and forfeiture—for *treason*, to the crown absolutely; for *murder*, to the crown for a year and a day, without restriction as to waste, then to the lord of the manor absolutely; and for *other felonies*, to the crown for a year and a day, without restriction as to waste, and

¹ See *Randall v. Tuchin*, 6 Taunt. 410; *Bridgwater v. Bolton*, 1 Salk. 236. It is a word of importance.

² See 1 Mad. Cha. 40; 1 Fonbl. Eq. 37, note.

then the rents and profits go to the lord of the manor for the felon's life, the legal estate being still in the felon.

Fee simples are *created* by deed or will. In a *deed*, the word "heirs" is absolutely necessary, except in the case of corporations, when the word "successors" is equivalent. In *wills* the same strictness is not required; for, even before the passing of the recent Wills Act, 1 Vict. c. 27, where words of perpetuity were used a fee would pass, though the legal word of inheritance, "heirs," was omitted. And now by this act it is provided, that a devise without any limitation shall pass the fee, unless a contrary intention appear. This act, however, does not extend to wills made before the 1st January, 1838.

A fee passes to a corporation *aggregate* without the word "successors;" also to a dean and chapter; but not to a corporation sole, as a bishop, parson, &c., except to the crown, which in this respect is like a corporation aggregate.

A rent granted by one coparcener to her companion for equality of partition, will pass an estate in fee without the word "heirs."

II. LIMITED FEES are of two sorts:—1. Base or qualified fees; and, 2. Fees *conditional*, as they were called at common law, and afterwards *fees tail* by the statute *De donis*, 13 Edw. I. c. 1.

1. **BASE or QUALIFIED FEES** are such as have a qualification subjoined thereto, and which must be determined whenever the qualification annexed to them is at an end: as, if lands are given "to A and his heirs, *tenants of the manor of Dale*;" here, whenever the heirs of A cease to be tenants of the manor of Dale, the estate is determined. This estate is a fee, because it may possibly descend to a man and his heirs *for ever*; but as the purity of the donation is qualified or debased by the duration being left dependent on a collateral circumstance, it is called a qualified or *base* fee.

A base fee has all the incidents of a fee simple except the first, *viz.*, an unlimited power of alienation. Unlike the conditional fee, or fee tail, it merged in the immediate reversion or remainder whenever the two estates became united in the same person; but this is now altered by the recent act 3 & 4 Wm. IV. c. 74, § 39, and the base fee is thereby enlarged.

2. **ESTATES IN FEE TAIL.**—When an estate is limited to a person and his or her descendants the heirs of the grantee's body, it is called an *estate tail*, or *fee tail*; as, to a man "and the heirs of his body," to a woman "and the heirs of her body," to a man and woman "and the heirs of their bodies." If it be to the heirs of his, her, or their bodies generally, it is called *tail general*, as any descendant (whether male or female) may inherit. If "to Thomas and the heirs of his body by his wife Jane," or "Jane &c. by her husband Thomas," or "to Thomas and Jane and the heirs of their bodies," it is *tail special*, so that only the children of Jane's body begotten by Thomas (be they male or female) can inherit. If "to the heirs *male* of the body &c." it is *tail male*, so that in default of male issue, the female cannot take. If "to the heirs *female* of the body &c.," *tail female*, so that the heirs male cannot take if there are no female heirs. Half blood is no impediment in the descent of estates tail.

Where an estate is given to a brother and sister, or to others who

may not intermarry, "and the heirs of their bodies," the first takers have a joint estate for life, with several inheritances in tail, as tenants in common, to their issue.

The words "heirs of the body" are absolutely necessary to create an estate tail *in a deed*.

Of barring Entails.—Before the statute *De donis conditionalibus*, 13 Edw. I. c. 1, if lands and tenements were given to a man "and the heirs of his body," the estate was considered a *fee simple conditional*, which could not be absolutely aliened until the performance of the implied condition, namely, that a child should be born to the donee. But as, when any condition is performed, it is thenceforth considered entirely gone, and the thing to which it was before annexed becomes absolute and wholly unconditional; so, as soon as the grantee had any issue born, his estate was supposed to become absolute, at least for these three purposes: 1. To enable the tenant to aliene the land, and thereby bar, not only his own issue, but also the donor and his heirs of their interest in the reversion; 2. To subject him to forfeit it for treason, which he could not do, till issue born, longer than for his own life; and 3. To empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind the issue. If the tenant, however, did not in fact aliene the land, the course of descent was not altered by this performance of the condition. But this notion, that it became absolutely the property of the donee on the birth of issue, was put an end to by the above-mentioned statute, which declared, that although the estate should descend to the issue, if there were any, according to the tenor of the grant or deed, yet if there were none, that it should revert to the donor.

Upon the construction of this act the judges determined, that the donee had no longer a conditional fee simple, which might be rendered absolute by birth of issue; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee-tail*, and vesting in the donor the ultimate fee simple of the land, expectant on the failure of issue: which expectant estate is now termed a *reversion*.

However, the interest both of the issue in tail and of the donor himself was at length, in the reign of Edward IV., held capable of being barred by a *common recovery* suffered by the tenant in possession; and afterwards, by the statute 32 Hen. VIII. c. 36, a *fine* duly levied by tenant in tail was declared to be a complete bar to him and his heirs and all other persons claiming under such entail. Yet, in order to preserve the property of the crown from any danger of infringement, all estates tail created by the crown, and of which the crown has the reversion, are excepted by this statute; and the same exception is made with regard to common recoveries by the 34 & 35 Hen VIII. c. 29.

Next, by the 33 Hen. VIII. c. 32, all estates tail are rendered liable to be charged for payment of debts due to the crown by record or special contract; as since, by the bankrupt laws, they have been made subject to be sold for the debts contracted by a bankrupt. And lastly, by the construction of the 43 Eliz. c. 4, an appointment by tenant in tail of the lands entailed to a charitable use is held good without fine or recovery.

Estates tail, being thus by degrees unfettered, were at length reduced to almost the same state, even before issue born, as conditional fees were in at the common law after the condition was performed by the birth of issue. They became extendible into a fee simple, and capable of alienation, in particular cases and modes. Where the tenant in tail had also the immediate fee in expectancy, he might acquire the absolute ownership by levying a *fine*, whether his estate tail was immediate or expectant on a preceding life or other partial estate. Where, however, the property was limited over to another on failure of the lineal heirs in the entail, then the tenant in tail, in order to acquire the absolute fee, was obliged to resort to a *common recovery*; and this was practicable only where either he himself was entitled to the possession, or he could obtain the concurrence of the immediate tenant of the freehold, as in the ordinary instance of a son tenant in tail expectant upon the death of his father having a preceding life estate.

Fines and recoveries, however, are now abolished, and more simple modes of effecting the objects they were intended to accomplish are provided by the 3 & 4 Wm. IV. c. 74.

By this act, an actual tenant in tail, whether in possession, remainder, contingency, or otherwise, may, by a deed enrolled within six months, make an absolute disposition either of the fee simple or of any less estate, which shall be effectual against all persons claiming by force of any estate tail vested in or claimed by him at the time of his making such disposition, and also against all persons whose estates are to take effect after the determination or in defeasance of such estate tail; saving, however, the rights of persons in respect of estates prior to the estate tail. But such power of disposition is not to extend to tenants of estates tail who by the 34 & 35 Hen. VIII. or any other act are restrained from barring their estates tail, nor to tenants in tail after possibility of issue extinct. Nor is it to be exercised by women tenants in tail *ex provisione viri*, under the 11 Hen. VII. c. 20, but with the assent required by that act. Nor are persons enabled to dispose of lands entailed in respect of any expectant interest as issue inheritable to an estate tail therein.

Tenants in tail may in like manner make a disposition by way of mortgage, or for any other limited purpose.

But as, before this act, tenant in tail expectant on an estate of freehold could only have barred his own issue by a *fine*, unless he obtained the concurrence of the tenant of the immediate freehold in suffering a *recovery*, so now his power is equally limited by the present act, unless he obtain the concurrence of the tenant of the immediate freehold, who is here styled the Protector of the Settlement; and the act contains a variety of provisions to explain who shall be such protector in cases where it might be otherwise doubtful. The protector may give consent by the same deed by which the estate tail is disposed of, or by a separate deed; but the consent deed must be enrolled at or before the time of enrolling the assurance.

By the law as it previously stood, where a tenant in tail who had also the immediate reversion, acquired a base fee, the base fee merged in the reversion. This led to many very inconvenient results, espe

¹ He may therefore grant leases for any term, and untrammelled by any condition.

cially where the reversion had been encumbered by the ancestor. Now, however, by § 39 of this act, the base fee is thereby enlarged.

Every disposition by tenant in tail under this act must be evidenced by deed; he cannot bind the entail by *will*, nor even by deed if resting only in *contract*. And all assurances by him (except leases not exceeding twenty-one years at rack rent) must be enrolled within six months.

Courts of equity are excluded from giving effect to dispositions by tenants in tail, or consents of protectors of settlement, which would not be effectual in courts of law.

The preceding clauses apply also to copyholds, so far as circumstances and the different tenures will admit, except as they are altered by the subsequent clauses, and except that the tenant in tail of a *legal* estate in copyholds shall convey by surrender, and of an *equitable* estate by surrender or deed. Equitable tenants in tail of copyholds may dispose of such lands as if they were of freehold tenure; and no enrolment is in such case necessary.

A married woman, with the concurrence of her husband, may convey as a feme sole. The power of disposition thus given to her, however, is not to interfere with any power which, independently of this act, may be vested in or limited or reserved to her. Every deed executed by her under this act (except as protector) is to be acknowledged by her before one of the judges, or a master in chancery, or two commissioners appointed under the provisions of the act; and she must be examined to see if she freely and voluntarily consent before she is permitted to acknowledge the deed.

CHAPTER V.

Of Freehold Estates not of Inheritance.

NEXT to freeholds of inheritance are ranked freeholds not of inheritance.

An *estate for life*, whether for one's own life, or for the life of another, is an estate of freehold, though not of inheritance. It is an estate, in possession, remainder, or reversion, in either corporeal or incorporeal hereditaments, which is held for life, or for some *uncertain* interest,¹ created by will, or by some mode of conveyance capable of transferring the freehold, which may last during the life of the devisee or grantee, or during the life or lives of some other person.

A freehold, in the eye of the law, is always a greater interest than a term of years, which is only a chattel interest. Thus, an estate for life, though that life may not endure two days, is more valuable *in the eye of the law* than an estate for 1000 years; and consequently, as the lesser

¹ There are interests in land which, although of uncertain duration, are nevertheless *chattels*, such as estates by statute merchant, statute staple, and elegit. The possessors are said to hold the land as freehold, but their interest is really a chattel only.

estate always merges in the greater, if a term of 1000 years and an estate for life meet in the same person, the term merges in the freehold, *unless some other estate intervene.*

A freehold interest may be had in *offices relating to land*, or exercisable within *particular districts*, as the office of marshal of England, chamberlain of the exchequer, forester, &c.

Estates of *freehold not of inheritance* may be divided into—

1. Estate of tenant in tail after possibility of issue extinct.
2. Estate for life (*eo nomine*)
3. Estate *pur autre vie*.
4. Estate of dower.
5. Estate of jointure.
6. Estate by curtesy.
7. Estate by special occupancy.

1. TENANT IN TAIL AFTER POSSIBILITY OF ISSUE EXTINGUISHED.—

This estate arises when lands are limited in *tail special*, and one of the parties from whom the issue is to proceed dies, or, having left issue, that issue becomes extinct; the survivor is entitled to the lands &c. for his or her life, and is then called *tenant in tail after possibility of issue extinct*. This is an estate arising by operation of law, and not from contract. It can only be created by the death of the party from whose body the issue was to spring; and therefore a divorce will not be sufficient to create it. It may exist in remainder.

So far as respects *alienation*, it resembles a tenancy for life; but he has several privileges above tenant for life; as, for instance, he is not punishable for waste. These privileges are in respect of the privacy of estate, and the inheritance once in him; and therefore if he assign, the assignee is mere tenant *pur autre vie*.

Coke mentions four circumstances in which it resembles a common life estate: 1. Liability to forfeiture if the tenant attempt to alienate the estate in fee. 2. It will merge in the fee simple or fee tail. 3. The reversioner or remainder-man shall be received upon his or her default. 4. An *exchange* with a mere tenant for life, or for any estate of equal value, is good.

2. ESTATE FOR LIFE.—By the words *an estate for life* is generally understood an estate for *one's own life*. This is an estate of freehold, and generally arises out of contract; as where a lease is made to a man, to hold for his own or any other person or persons' life or lives. That of which we now treat is for a man's own life; and this estate could formerly have been created or transferred only by livery of seisin, lease and release, bargain and sale enrolled, or surrender, but it may now be made by deed of grant under 8 & 9 Vic. c. 106. It may be created, not only by express words, but also by a general grant, without defining or limiting any specific estate; as if one grants to A the manor of D, this makes him tenant for life. And a grant "for life" generally, without saying whose life, is, if the grantor has power to grant so much, generally construed to mean the grantee's life.

Coke mentions several estates of uncertain duration, the tenants of which may, in pleading, allege that they are seised for their lives, viz. "An estate to a woman so long as she continues sole," or "during her widowhood," or "so long as she conducts herself properly," or "to a man and woman during coverture," or "so long as grantee shall

dwell in such a place," or "so long as grantee pay 100*l.* per annum," or "till grantee be promoted to a benefice," or "to A, till B make T. S. bailiff of his manor."

An estate for life is *forfeited* by any act displacing or divesting the remainders or reversions; as if tenant for life attempt to alienate for another's life, in tail, or in fee, his own estate is forfeited to the remainder-man or reversioner. But lease and release, bargain and sale enrolled, and covenant to stand seised, being innocent conveyances, work no forfeiture; for even though professing to pass the fee, they pass no more than the releasor, bargainor, or covenantor may lawfully part with.

Tenant for life may cut down underwood, or work *open* mines, and sink new shafts to pursue open veins. But he may not work open mines if they were illegally opened by a preceding tenant in tail; and it is waste to open a new mine. He may fell timber for repairs, but not otherwise; and if he sell timber, *though he apply the money in repairs*, it is waste. He is entitled to estovers, house, plough, and hay *bote without assignment*, and is bound to repair buildings, banks, sea and river walls. It is waste to convert one species of land into another, as pasture into arable, or wood into meadow; and it is equally waste to cut down decaying timber as any other.

The action for waste has been superseded by an action on the case in the nature of waste, to be brought by any one in remainder or reversion, either for years, life, or inheritance.

Chancery will grant an injunction to stay waste, on bill filed by tenant for life in remainder. If tenant for life cut timber, the first person having an estate in inheritance may bring an action of *trover*. *Where*, however, it is manifestly proper, the court of chancery will order timber to be felled for the benefit of the estate. And the court of chancery will interfere to prevent collusion between tenant for life and a remote remainder-man, to the injury of unborn children; and also if the tenant for life has the next *vested* estate of inheritance.

Although generally a tenant for life is liable for waste committed by him, yet sometimes he is, by the deed &c. which creates his estate, unimpeachable for waste. When such is the case, he may open mines, and fell timber (except ornamental); is entitled to timber blown down on the estate; and he may grant leases out of his own interest without impeachment of waste. But he may not, nor may his lessee, *maliciously* waste the estate, by pulling down houses &c.; if they do, an injunction will be granted, and they are bound to repair.

The tenant for life's executor, and his under-tenants, are entitled to the *emblements*, or profits of the growing crop, in all cases where the estate determines by the act of God; but it is otherwise if by his own act, in which case it is doubtful whether even the under-tenants are entitled to emblements.

Emblements are corn, peas, beans, tares, hemp, flax, and annual roots, as parsnips, carrots, and turnips; and if the lessee for life of a hop ground die in August before severance of the hops, the executor shall have them, though on ancient roots; for all these are produced by great manurance and industry. But all other roots and trees not annuals; fruit on the trees, though ripe; and grass growing, though

ready to be cut into hay, and improved by manure and the labour and industry of the occupier by trenching, or sowing hay seed, are not emblements, but belong to the remainder-man or heir.

With respect to *who is entitled to emblements*, Lord Ellenborough observed, in 8 East. 343, that the distinction between the heir and devisee in this respect is capricious enough. In the testator himself, the standing corn, though part of the realty, subsists for some purposes as a chattel interest, which goes on his death to his executor, as against the heir; though as against the executors, it goes to the devisee of the land, who is in the place of the heir, unless otherwise directed. This is founded upon a presumed intention of the deviser in favour of the devisee. But this again may be rebutted by words which show an intent that the executor shall have it. A devise to the executor of all the testator's stock on the farm entitles him to the crops in opposition to the devisee of the estate. Every one who has an uncertain estate or interest, if his estate determine by the act of God before severance of the corn, shall have the emblements, or they go to his executors or administrator: as if a tenant for life sow the land and die before severance, or if he be tenant *pur autre vie* and *cestuique vie* die, or tenant for years if he so long live, or the lessee of tenant for life, or a lessee strictly at will; or if a tenant by statute merchant &c. sow, and his debt be satisfied by the casual profits before severance. However, a lessee of tenant for life is bound to take notice of the time of the death of his lessor; and if, in ignorance of it, he afterwards sow corn, he is not entitled to the produce.

It has been held, that if a devise be to A for life, remainder to B, and before severance A dies, B shall have them; and that if a devise be to A for life, who dies before severance, he in reversion shall have them; but the contrary is now established, and the executor of the tenant for life shall have them, it being for the benefit of the kingdom, which is interested in the continual produce of corn.

If the particular estate determine by the act of another, as if a lessee at will sow the land, and before severance the lessor determine his will, the lessee shall have the emblements.

But if a person has a certain interest, and knows the determination of it, he shall not have the emblements at the end of his term, unless he can establish a right to an away-going crop, which sometimes exists by custom or local usage; as if lessee for years sow the land, and before the corn be severed his term end, the lessor or he in reversion shall have the corn; and if an outgoing tenant sow corn, even under a *bond fide* supposition that he is entitled to an away-going crop, when he is not so, and after the expiration of his tenancy cut and carry away the corn, the landlord may support trover for the same. So if a person determine his estate by his own act, he shall not have the emblements; as if lessee at will sow, and afterwards determine the will before severance. So if an estate determine by forfeiture for condition broken.

The statute 28 Hen. VIII. c. 11 enables the incumbent of a parish to bequeath by will the corn and grain growing upon the glebe land manured and sown at his own cost. But a person who resigns his living is not entitled to emblements.¹

¹ Emblements are deemed *personal* property, and pass as such to the executor or administrator of the occupier (whether owner in fee, for life, or for

Apportionment of Rent.—At common law, if tenant in fee died after sunset and before midnight of the last day when the rent became due, it went to the heir, and not to the executor, for the rent is not due till the last instant of the day.¹ This gave to the lessees of a tenant for life a most unreasonable advantage; for, at the death of their lessors, they might, if they pleased, quit the premises, and pay no rent to any body for the occupation of the land from the last quarter-day. But the 11 Geo. II. c. 19, § 15, after reciting that “where lessor or landlord, having only an estate for life in the lands, tenements, or hereditaments demised, happens to die before or on the day on which any rent is reserved or made payable, such rent, or any part thereof, is not by law recoverable by the executors or administrators of such lessor or landlord, nor is the person in reversion entitled thereto any other than for the use and occupation of such lands, tenements, or hereditaments from the death of the tenant for life, of which advantage hath been often taken by the under-tenants, who thereby avoid paying anything for the same,” for remedy thereof, enacts, “That where any tenant for life shall happen to die before or on the day on which any rent is reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments which determined on the death of such tenant for life, the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such under-tenant or under-tenants of such lands, tenements, or hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived of the last year or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively.”

years), if he die before he has actually cut and reaped or gathered the same; and this although, being affixed to the soil, for some purposes they may be considered, whilst growing, as part of the realty.

At common law, *fructus industriales*, as growing corn and other annual produce, which would go to the executor upon death, may be taken in execution. The appraisement and sale thereof are regulated by statute. And, by statute, growing crops may be taken as a distress, and sold when ripe. But a crop of *natural grass*, growing at the time of the death of a tenant for life, does not belong to his executor, but goes to the remainder-man.

At one time it was held that a crop of growing turnips, potatoes, or corn, partook so much of the real property where they were growing and continuing to improve, that a sale of them was in effect a sale of an interest in or concerning land, and that unless the contract of sale were in writing and signed by the vendor, it was void under the Statute against Frauds, 29 Car. II. c. 3, s. 4. Afterwards a distinction was taken as to the degree of maturity, and the time of the year when the sale took place; and if a crop of potatoes were sold in November,

when they had done growing, the land was considered merely as a warehouse, and the sale as in effect only of personalty. But finally another and more sensible principle was established, and which still prevails, that when the growing crop is of such a nature as that it would constitute emblements going to an executor in case of death, the same, in whatever state of maturity it may be, is to be considered as goods, and not an interest in land; though it might be otherwise in the case of a sale of a growing crop of natural grass. A sale of growing underwood, to be cut by the purchaser, has been considered a sale of an interest in land, though after the wood or trees had been cut, it would be otherwise; but now a sale of such underwood or of growing trees would be considered as merely a sale of goods. It has been observed, that the apparent desire of the courts rather to escape from the rule in *Crosby v. Wadsworth* respecting the sale of a growing crop of meadow grass, without over-ruling that case, renders it difficult to apply the law to individual cases.—1 *Chit. Gen. Pr.* 91—94.

¹ See *post*, *Division of Time*, under title *TERMS OF YEARS*.

But where the mischief recited in this act did not apply, and the lease did not determine on the death of the tenant for life, the case was not affected by it; and therefore if a tenant for life with a leasing power demised the premises pursuant to such power, and died before the rent became due, as the rent and the means of recovering it went to the remainder-man or reversioner,² and therefore would not be lost, the case was considered as not within the act, and the executors of the tenant for life were not entitled to any proportion of the accruing rent. So if a tenant *pur autre vie* leased and the *cestui que vie* died, the lessee was not compellable to pay any rent from the last day of payment before the death of the *cestui que vie*. But now, by the 4 & 5 Wm. IV. c. 22, which recites that doubts have been entertained whether the provisions of the 11 Geo. II. c. 19 apply to every case in which the interests of persons determine on the death of the person by whom such interests have been created and on the death of any life or lives for which such person was entitled to the lands demised, although every such case is within the mischief intended to have been remedied by the said act; and that by law, rents, annuities, and other payments due at fixed or stated periods are not apportionable (unless express provision be made for that purpose), it is enacted, "That rents reserved and made payable on any demise or lease of lands, tenements, or hereditaments which have been or shall be made, and which leases or demises determined or shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life or lives for which such person was entitled to such hereditaments, shall, so far as respects the rents reserved by such leases, and the recovery of a proportion thereof by the person granting the same, his executors or administrators, be considered as within the provisions of the said act." And, by sect. 2, "all rents service reserved on any lease by a tenant in fee or for any life interest, or by a lease granted under any power (and which leases shall have been granted after the passing of this act), and all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the United Kingdom, made payable or coming due at fixed periods under any instrument executed after the passing of this act, or, being a will or testamentary instrument, that shall come into operation after the passing of this act, shall be apportioned in such manner that on the death of any person interested in such rents, annuities, pensions, dividends, moduses, compositions, or other payments, or in the estate, fund, office, or benefice from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person, he or she, and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents &c. according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents &c. being made; and that every such person, his executors, administrators, or assigns, shall have such and the same remedies at law and in equity for recovering such apportion-

² See 3 Maule & Selw. 182.

tioned parts of the said rents &c., when the entire portion of which such apportioned parts shall form part shall become due and payable, and not before, as they would have had for recovering and obtaining such entire rents &c. if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements, and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the persons who if this act had not passed would have been entitled to such entire rents; and such portions shall be recoverable from such persons by the parties entitled to the same under this act in any action or suit at law or in equity."

But, by § 3, the provisions herein contained shall not apply to any case in which it shall be *expressly stipulated* that no apportionment shall take place, nor to annual sums made payable in *policies of assurance* of any description.

3. ESTATE PUR AUTRE VIE.—An estate *pur autre vie* is the lowest estate of freehold. It is an estate for another's life, and is not regarded as so beneficial an estate as for one's own life.

If A have an estate for his own life, with remainder to B for the life of B, B can take a surrender from A; the effect of which will be, that A's estate will merge in B's, and B's will be accelerated into possession.

This estate cannot commence *in futuro*. Being freehold, it must be created by some mode of conveyance to pass a freehold in possession. It may be surrendered to the reversioner or remainder-man; and, though freehold, it may be limited to a man and his *executors and administrators* as well as to his *heirs*; and in such case his successors take as *special occupants*, and not by descent; which mode of limitation is frequently preferable, as it may save the estate from a minority.

It may be limited over by way of remainder, and, in effect, entailed by way of trust, or by a devise to uses on trust, &c. But those who have interests in the nature of estates tail may bar their issue and remainders by any mode of alienation, as by lease and release, surrender, &c., or even by marriage articles in equity. The remainder-man, if not barred, takes as special occupant. Moreover, estates *pur autre vie* may be limited by way of executory devise.

The tenant *pur autre vie* is entitled to *emblements* on the death of *cestui que vie*. But out of this species of estate neither *curtesy* nor *dower* can arise. As to *waste*, the same principles apply as in the case of tenant for life, already shown.

4, 5. DOWER AND JOINTURE.—We have already discussed the nature of estates in dower and in jointure.¹

6. ESTATE BY CURTESY.—Curtesy is an estate for life given *by law* to the husband in all the lands and tenements of inheritance of which the wife was solely seised, or which were left in trust for her, and to which the issue of the marriage might have inherited.

It is a freehold estate, and may be assigned, or surrendered to the heir or reversioner. There is, however, no estate by curtesy of a remainder or reversion on a freehold, nor of a freehold in possession *not of in-*

¹ See *ante*, tit HUSBAND AND WIFE, p. 318, 332.

heritance. To give title to curtesy, the wife must be solely seised, in fee simple or fee tail; the issue must be born alive, and must be such as might by possibility have inherited. It is immaterial when the issue was born, whether before or after the lands vested in the wife, or whether then alive or dead. The wife must have been seised *in lam*, a seisin in deed not being sufficient. The possession of a tenant for years is the possession of the wife.

Of advowsons, rents, &c. of which actual seisin cannot be had, there is curtesy, though the wife died before avoidance or receipt.

By *gavelkind*, the husband has a moiety only as long as he remains unmarried, whether he has issue or not.

A tenant by curtesy is subject to an action for *waste*, and to *forfeiture*. If seised of the freehold in possession, his concurrence was necessary to make a tenant to the præcipe, being, like a tenant in dower, omitted in the 14 Geo. II. c. 20. This estate is not forfeited by adultery. 1 Lloyd & G. 326.

7. ESTATE BY SPECIAL OCCUPANCY.—This arises out of an estate *pur autre vie*. By the Statute of Frauds (29 Car. II. c. 3), an estate *pur autre vie* is devisable, and the party to whom it comes after the death of the first tenant is termed the *special occupant*. If there is no devise, and it comes to the heir as special occupant, it is chargeable in his hands as assets by descent. If there be no other special occupant, it shall go to the executors or administrators of the party, and be assets in their hands. By 14 Geo. II. c. 20, § 9, if there be no devise nor special occupant, it shall be applied and distributed in the same manner as the personal estate of the intestate.

If the executor die intestate, the estate goes to his executor, and not to the administrator *de bonis non*.

CHAPTER VI.

Of Estates less than Freehold.

THERE are several leading distinctions between freehold estates or interests and those which are less than freehold. The former are termed *real estates*, the latter *personal*.

A freehold interest must formerly have been created either by feoffment and livery (applicable only to corporeal property), or by a *deed under seal*, operating under the Statute of Uses. It cannot be created by parol, or by an unsealed written instrument;¹ whereas an estate or interest less than freehold (except in an incorporeal hereditament), as a lease or demise even for 1000 years, might, before the 8 & 9 Vic. c. 106, have been created without deed, and before the Statute of Frauds (which requires a signed instrument when for a term exceeding three years), might have been created even by mere words.

¹ Thus, if a rector grant or demise his tithe by an instrument not under seal, he is still deemed in law the owner and occupier of the tithe, and as such to be rated in respect thereof, because the legal interest in the

tithe passes only by grant under seal: whereas if the same instrument had been under seal, the lessee would be the proper person to be rated.—Eagle on Tithes, 19.

Another distinction is, that a freehold cannot commence *in futuro* by any common law conveyance, as by feoffment and livery (which livery must be given at the time of the feoffment¹); though by a conveyance under the Statute of Uses a freehold may be created to commence *in futuro* with only an estate for years intervening. But, with respect to chattels real, a lease even for 1000 years may be created to commence *in futuro*; except where expressly prohibited, as in the case of tenants in tail.

Another rule is, that an estate of freehold cannot be derived from an *estate for years*. Therefore, where a rent was granted for life out of a long term of years, though it was decided to be a good charge as long as the term lasted, yet the court held it to be only a chattel, and not a freehold.

Another rule is, that no freehold interest in remainder can, by any common law conveyance, be supported by an intervening estate less than freehold.

Again, a freehold interest cannot merge in a chattel interest; though the latter may merge in the former, if both be legal, or both equitable estates, but not otherwise. Consequently, if an estate of freehold for his life vest in a person who is owner of a term of 1000 years, the freehold interest, though substantially of shorter duration, will not merge, but the term will merge in the freehold.

In pleading, the owner of a freehold is said to be *seised* in his demesne as of freehold &c.; whereas the owner of a term of years is said to be *possessed* of the tenements &c., or of the interest in a certain term, &c.

Estates less than freehold are of three sorts—1. Estates for years; 2. Estates at will; and 3. Estates by sufferance.

1. ESTATES FOR YEARS.—An estate for years is a contract for the possession of lands or tenements for some determinate period, and it takes place where a man lets them to another for a certain number of years agreed upon, and the lessee enters thereon. If a lease in writing be but for a half or a quarter of a year, the lessee is respected as and is termed lessee for years, a year being the shortest term of which the law takes notice in this case.²

¹ Nevertheless, a lease for lives, to begin from the day of the date thereof, with seisin delivered *afterwards*, is good, and shall not be said to commence *in futuro*. So a lessee under a lease for lives commencing *in futuro*, and who has covenanted to pay rent, will be stopped, whilst he continues in possession, from insisting that, being a lease for lives, it could not commence *in futuro*, or be granted without livery of seisin, or lease and release, or bargain and sale.

² It may not be improper to make a few observations on the division and calculation of *time* according to the law of England.

A *year* consists of 365 days; for though in leap years it consists actually of 366, yet by the stat. 21 Hen. III. the increasing day in leap year and the preceding day are counted one day only.

Before 1752, the year commenced on the 25th March, the Julian calendar being used,

and much inaccuracy and inconvenience resulted; which occasioned the introduction of the new style by the 24 Geo. II. c. 23, which enacted, that the 1st of January shall be reckoned the first day of the year; threw out 11 days in that year, from the 2d September to the 14th; and in other respects regulated the future computation of time, with a saving of ancient custom, &c.

Where a statute speaks of a *year*, it shall be computed to be the whole twelve months according to the calendar, and not twelve lunar months; but if a statute direct a prosecution to be within *twelve months*, it is too late to proceed after the expiration of twelve lunar months.

Half a year consists of 182 days, for there shall be no regard to a part or a fraction of a day. The time to collate within six months shall be reckoned half a year, or 182 days, and not lunar months. So a quarter of a

Every estate which must expire at a period certain and prefixed, by whatever words created, is a *term of years*. Therefore, if it is for

year consists but of 91 days, for the law does not regard the six hours afterwards. But both half years and quarters are usually divided according to certain feasts or holidays, rather than by a precise division of days, as Lady-day, Midsummer-day, Michaelmas-day, and Christmas, or Old Lady-day (6th April), and Old Michaelmas-day (11th October). In these cases such division of the year by the parties is regarded by the law; and therefore though half a year's notice to quit is necessary to determine a tenancy from year to year, yet a notice served on the 29th September to quit on the 25th March, being half a year's notice according to the above division, is good, though there be only 178 days.

A *month*, in law, is a lunar month, or 28 days, unless otherwise expressed; therefore, a lease for "twelve months" is only 48 weeks; but if it be for "a twelvemonth," it is for the whole year, or 365 days, it being generally understood that by the space of time called thus, in the singular number, a *twelvemonth*, is meant the whole year, consisting of one solar revolution.

In general, when a statute speaks of a month without adding "calendar," or other words showing a contrary intention, it shall be intended a *lunar* month of 28 days: and generally, in all matters *temporal*, the term *month* is understood to mean lunar. But in matters *ecclesiastical*, as non-residence, it is deemed a calendar month. So the six months of *lapse* and *quare impedit* are calendar months. The term, therefore, is taken in that sense which is conformable to the subject matter to which it is applied.

When a deed speaks of a month, it shall be intended a *lunar* month, unless it can be collected from the context that it was intended to be *calendar*. So in all other contracts, unless it be proved that the general understanding in that department of trade is, that bargains of that nature are according to calendar months. And the custom of trade, as in case of bills of exchange and promissory notes, has established, that a month named in those contracts shall be deemed *calendar*.

In all legal proceedings, as in commitments, pleadings, &c., a month means four weeks. When a calendar month's notice of action is required, the day on which it is served is included, and reckoned one of the days; and therefore if a notice be served on the 28th April, it expires on the 27th May, and the action may be commenced on the 28th May. And when a statute requires the action against an officer of the customs to be brought within three months, they mean lunar, though the same act requires a calendar month's notice of action.

A *day* is *natural*, which consists of 24 hours; or *artificial*, which contains the time

from the rising of the sun to the setting. A day is usually intended of a natural day; as, in an indictment for burglary, we say, "in the night of the same day." Sometimes days are calculated exclusively, as where an act required ten clear days' notice of the intention to appeal, it was held that the ten days are to be taken exclusively both of the day of serving the notice and the day of holding the sessions. A legal act done at any part of the day will in general relate to the first part of the day.

In the space of a *day* all the 24 hours are usually reckoned, the law generally rejecting fractions of a day, in order to avoid disputes. Therefore, if I am bound to pay money on any certain day, I discharge the obligation if I pay it before twelve o'clock at night; after which the following day commences.

But although the law generally rejects fractions of a day, yet it admits them in cases where it is necessary to distinguish for the purposes of justice; and there seems no reason why the very hour may not be so too, where it is necessary and can be done. A fraction of a day was admitted in support of a commission of bankruptcy, by allowing evidence that the act of bankruptcy, though on the same day, was previous to issuing the commission. So where the goods are seized under a *fieri facias* the same day that the party commits an act of bankruptcy, it is open to inquire at what time of the day the goods were seized and the act of bankruptcy was committed, and the validity of the execution depends on the actual priority. So, to prevent reputed ownership at the time of the act of bankruptcy.

An *hour* consists of sixty minutes. There is a distinction in law as to the certainty of stating a month or day, and an hour, when a fact took place. "About such an hour," is sufficient; but not so as to a day, which must be stated with precision, though it may be varied from in proof.

It has been considered an established rule, that if a thing is to be done within such a time after such a fact, the day of the fact shall be taken inclusive. And therefore where the statute 21 Jac. 1. c. 19, § 2, enacted, that a trader lying in prison two months after an arrest for debt should be adjudged a bankrupt, that included the day of arrest. When a month's notice of action is necessary, it begins with the day on which the notice is given; and if a robbery be committed on the 9th October, the action against the hundred must be brought in a year inclusive of that day. But where it is limited within such a time after the date of the deed &c. the day of the date of the deed shall be taken exclusive; as if a statute require the enrolment within a specified time after the date of the instrument. Thus, where a patent, dated 10th May, contained a proviso that a

so many years as A. shall name, when the time is named, it is a good term. But unless the duration is ascertainable immediately, it is not a good term. Thus, if it is for so many years as J. shall live, or be parson, it is bad. But if for 50 years, if J. shall so long live or be parson, then it is good; for although it may end on J.'s death or ceasing to be a parson, yet it cannot continue longer than 50 years.

The grant of an estate for years is called a *demise*, or *lease*. The proper words of creation are "demise, lease, and to farm let." It may be created by other means, as by bargain and sale not enrolled. It relates, however, only to the possession, and does not affect the *seisin* of the lands. Terms are merely chattel interests, for whatever length of time they may be granted; and they may commence *in futuro*.

A demise gives a *right of entry* only, and till entry the lessee has only an *interesse termini*. Therefore, before entry the lessee cannot receive a release or confirmation; nor can he surrender, except by a surrender in law. It is assignable and underleasable. An *assignment* is where the lessee parts with his *whole* interest; an *underlease* where *less*, as the whole term wanting a day. In an *assignment* the operative words are "assigned, transferred, and set over;" in an *underlease*, the same words as in an original lease. So also after entry the lessee may surrender, the operative words of which are, "doth surrender, yield up, and for ever quit claim;" but it is proper also to use words of *grant*, that the term may pass by the deed, if any thing should prevent its passing by surrender.

A *surrender at law* is the acceptance of a second lease incompatible with the first; but an *underlease* is not destroyed by a surrender of the lease. If, however, the original lease becomes *void*, the underlease goes with it. So, if the lease is defeated by entry of lessor for breach of condition, the underlease goes with it. By the Statute of Frauds (29 Car. II. c. 3) no term may be created, assigned, granted, or surrendered, otherwise than by deed or note in writing, signed by the grantee or his agent *authorized in writing*, or by act of law; and by 8 & 9 Vic. c. 106, an *assignment* of a chattel interest, not being copyhold, in any tenement or hereditament, and a *surrender* in writing of an interest in any tenement or hereditament, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the 1st October, 1845, is void at law unless made by deed.

Estates for years may be devised or limited *by way of trust*, to one for life and after his decease to another, or to A and the heirs of his body. But no limitations are allowed which would render them unalienable beyond a life or lives in being and twenty-one years afterwards.

specification shall be enrolled within one calendar month next and immediately after the date thereof, and the specification was enrolled on the 10th June following, it was held, that the month did not begin to run till the day after the date of the patent, and that the specification was in time. However, in a case in equity, the master of the rolls, after considering many of the decisions, said, upon the first part of this rule, that what-

¹ The 8 & 9 Vic. c. 106 has left the word where it implies a covenant.

ever *dicta* there may be that when a thing is to be done after the doing of an act, the day of its happening must be included, it is clear the actual decision cannot be brought under any such general rule; and he inclined for excluding the first day in all cases, and ruled, that where a security was to be given within six months after a testator's death, the day of the death was to be excluded.—2 *Chit. Bla. Com.* 14, n. 3.

demise to operate as at the common law

Terms created by devise do not require entry to vest them as estates, Terms of years may be made voidable by a defeasance made any time after their creation.

When terms are not vested in trustees, the tenant for life is, at law, considered as having the whole term vested in him, and the person entitled under the limitation over has only a possibility, and no actual estate; yet his interest is a legal right, since on the death of *quasi* tenant for life, he has at once a title to entry. He cannot, however, at law transfer his interest during the life of *quasi* tenant for life, but he may devise it; and his assignment even is good in equity. So he may release it to the tenant for life; and his grant to the same would be as an extinguishment. So a surrender to *reversioner* would operate as a release. The possession of the termor is, at law, the possession of the freeholder, or person entitled to the fee. One term will merge in another immediately reversionary to it, although the term in reversion be of a less duration, in point of time, to the one to which the party in possession is entitled, if both terms be in the same person. If they are in different persons, he who has the term first created is entitled to possession, and the person entitled to the term in reversion is entitled to the rents and services; consequently the first termor is legally tenant to the other, and this even if no rent is paid; therefore, the first may surrender to the other. When both *meet* in the same person, the first merges. The lessee, when not restrained by covenants or a reservation to the contrary (now usually made), is entitled to estovers. When a term is to determine on a collateral event, the lessee or his personal representatives are entitled to emblements when it happens. With respect to *waste* and *forfeiture*, the same rules apply to a lessee as to a tenant for life.

An estate from year to year may be created by parol or written agreement.

It is now raised by construction of law, instead of an estate at will, in every instance where possession is taken with consent of the legal owner without any conveyance or agreement conveying a *legal* interest, and where an annual rent is paid. Either party may at any time give notice to quit. But if there be no agreement on this point, notice must be at least *half a year's* (not six months), requiring, or offering to give up possession at the expiration of the current year, computed from the time when the tenancy commenced. Parol notice is enough, but written is better, for the sake of evidence. When the commencement of the tenancy cannot be ascertained, notice *personally served* to quit at the end of a year, regulated by the time of payment of rent, will be *prima facie* evidence of the commencement of the tenancy at that period, unless the tenant prove the contrary, or object to the notice at the time of its being served. In any case, notice to quit at the expiration of the current year which shall expire next after the end of half a year from the date of the notice, is sufficient. However, after notice to quit, acceptance of rent due after the determination of the tenancy according to the notice is a waiver of the notice.

A tenant from year to year, after entry, has possession with privity, and may receive a release from his lessor, whence arises the ordinary mode of conveyance by lease and release, of which we shall say more hereafter.

Of the Covenants attaching on Leasehold Property.—Leasehold covenants are divided into—1. Express, or collateral; and 2. Implied.

1. *Express, or collateral*, are those special ones expressly entered into between the parties.

2. *Implied* are those which, though not mentioned, the law always implies between the parties; as, for instance, on the landlord's part, that lessee shall quietly enjoy during the term; and on the tenant's part, to pay the rent, to cultivate the land, to keep the premises in repair, &c. These implied covenants are often narrowed or enlarged by express ones. Thus, the covenant for quiet enjoyment may be narrowed to "against lessor and those claiming under him;" that to pay rent, to "while the premises are inhabitable;" and the tenant is sometimes exempted from repairs rendered necessary by fire, wind, or tempest.

All implied covenants run with the land, and so do many express ones; that is, they are not personal only as between the first contracting parties, but follow and attach on the property, into whosoever hands it may fall, provided it is not adversely to such original parties.

The distinction between such express covenants as run with the land and those which do not, but are collateral thereto and affect only the person of the covenantor, is very refined.¹

The following express covenants run with the land, viz. For quiet enjoyment;—for further assurance;—for renewal;—to repair;—to pay rent;—to discharge lessor of charges, ordinary and extraordinary;—to permit a lessor free passage to any rooms excepted in the demise;—to cultivate the lands in a particular manner;—to reside upon the premises;—and not to carry on particular trades.

It is a settled rule, that covenants running with the land not only bind the covenantor during his life by the privity of contract, and his representatives in respect of assets, but also every one taking by assignment, though such assignee be not affected by privity of estate.²

Covenants in law bind the lessor and lessee, *in deed*, by privity of estate. Between them privity of estate exists no longer than the relation of landlord and tenant. If lessor assigns, the privity of estate is destroyed, and his liability so far ceases.³ But, to do this, the landlord's assent to the assignment is necessary. This assent is either express or implied, as by receiving rent, or recognizing the assignee as tenant by some other act.

It is otherwise in respect of privity of contract. When the lessee has expressly bound himself, he can by no means release himself.

* As between lessor and assignee, immediately upon assignment the lessor has a right against assignee by privity of estate, and may enforce all covenants which run with the land. Between lessor and underlessee there is neither privity of contract nor of estate. No covenants exist between them either at law or in deed. Still, by 4 Geo. II. c. 28, the landlord has a right of distress into whosoever hands the lands come, which no assignment or underlease can avoid.⁴

¹ See 4 Western's Conveyancing, 28, 45, 46, 53.

² All covenants run with the land, when either the liability to perform them, or the right to take advantage of them, passes to the assignee of the reversion.

³ See the recent case of *Woolveridge v. Stewart*, 3 Moo. & Scott, 561, in error, per Lord Denman C. J.

⁴ See further, tit. LANDLORD AND TENANT, ante, 352—371; and as to Emblements, ante, 512, tit. ESTATES FOR LIFE.

In an assignment, covenants at law pass from the assignor to assignee, being inherent to the estate itself; and express covenants which run with the land are on nearly the same footing.

As between the lessor and the latter, the implied covenants bind in any event; but the express covenants depend on the solvency of the lessee.

A covenant "not to assign, transfer, or set over, or otherwise do or put away with this present indenture of demise," was held not to extend to an underlease. But the words being "not to assign or set over or otherwise part with this indenture of lease," would not permit an underlease from year to year.

An agreement for a lease is sometimes resorted to as an evasion; but the lessor cannot distrain under such an agreement. A covenant "not to let, set, or assign, transfer, or set over, or otherwise part with the premises, or this indenture, or his term or interest or any part thereof," did not prevent the deposit of the lease by way of mortgage. A covenant on the part of the landlord for continued renewals, as it tends to create a perpetuity, is not favoured in any court.

It had been held that an equitable mortgagee of a lease deposited to secure a debt was liable to all the covenants, though he did not take possession. (7 Sim. 149.) But this has been since overruled.¹

Terms of Years to attend the Inheritance.—Terms of years to attend the inheritance are peculiar to the system of real property established in this country, and can only arise where there is a recognized distinction between the legal and equitable ownership of estates.

They are, at law, terminated in gross, and severed from the inheritance, even after the purposes of their creation are satisfied, unless a condition for *cesser* be annexed.

The courts of law will not enter into the equity of any persons claiming against the termor. But as in equity the freeholder, after the purposes for which the term was created are satisfied &c., is entitled to a surrender, equity regards the termor after such period as a trustee for the freeholder.

Common terms are but *chattels*, and go to the personal representatives of the party dying seised or possessed; but, in equity, a term to attend follows the fee, and the person entitled to that is *cestui que trust* of the term. Consequently, 1. It is *not* a chattel, and will not be forfeited by felony of the owner of the fee. 2. It does not, as against the heirs or devisees of the *cestui que trust*, or assignees of bankrupt, prevent dower or curtesy of the wife or husband of *cestui que trust*; and if the inheritance escheat, the term goes with it.

The advantage which a purchaser or incumbrancer secures, by procuring an assignment to a trustee in trust for himself is, that he protects his estate from being defeated or injured by prior titles and charges of which he is unacquainted, however valid they may be. But the only persons whom equity will so allow to protect themselves are purchasers for a valuable consideration, which includes claimants under marriage settlements, mortgagees, annuitants, &c. without notice of the incumbrance &c. at the time of purchase &c.

The 8 & 9 Vic. c. 112 (intituled "An act to render the assignment of satisfied terms unnecessary,") reciting that the assignment of sa-

¹ *Moores v. Choate*, 8 Sim. 508; *Close v. Wilberforce*, 1 Beav. 112. See 3 *Western's Conveyancing*, 67 *et seq.*

tified terms has been found to be attended with great difficulty, delay, and expence, and to operate in many cases to the prejudice of the persons justly entitled to the lands to which they relate, enacts, "That every satisfied term of years which, either by express declaration or by construction of law, shall, upon the 31st Dec. 1845, be attendant upon the inheritance or reversion of any lands, shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid; except that every such term which shall be so attendant as aforesaid by express declaration, although thereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand, as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with after the 31st Dec. 1845, and shall, for the purpose of such protection, be considered in every court of law and equity to be a subsisting term."—§ 1.

"And that every term of years subsisting at the passing of the act, or thereafter to be created, becoming satisfied after the 31st Dec. 1845, and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall, immediately upon the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid." § 2.

Of other estates less than freehold, namely, ESTATES AT WILL, and ESTATES BY SUFFERANCE, which include the estate of a mortgagor in possession, of a *cestui que trust* in possession, and of purchasers entering under a contract afterwards become inoperative, we have already made a few observations.

CHAPTER VII.

Of Estates on Condition.

ESTATES upon condition are either implied or expressed, or those in pledge (such as mortgages), or held under statute merchant or staple (modes now almost totally disused), or by elegit.

An *implied* conditional estate is dependent on the performance of a condition inseparably connected with the possession. As if a man grants an office to another, it is always on an implied condition that he shall duly execute the duties thereof; and the estate therein may be forfeited either by non-user or misuser.

These conditions are attached to life estates or estates for years; and if a man attempt to give to another a larger estate than he himself has therein, it is by common law a forfeiture. The forfeitures to the crown for felony or the like are of a similar nature.

Conditions *expressed* are either precedent or subsequent. The former may be exemplified thus: if a man grants an estate to A upon his marriage, A has no estate till the marriage takes place; but if a

man grants to another an estate to hold upon payment of a certain rent, with liberty to re-enter upon non-payment, this is a condition subsequent, and he shall hold until he omit to pay the rent.

Express conditions, if they are impossible at the time of their creation, or afterwards become so by the act of God or of the party creating them, or if they are contrary to law, or are repugnant to nature, are void. Under these circumstances, if the condition to be performed be subsequent, the estate becomes absolute in the grantee; but if precedent, then both condition and estate are void and fall together.

But the kind of estate on condition which requires our principal attention is that arising out of mortgage, of which we shall proceed to treat briefly.

MORTGAGES.—A mortgage is the pledge of land for the repayment of money borrowed: the party pledging is called the *mortgagor*; and the party lending the money and taking the security is denominated the *mortgagee*. The mortgagor sometimes retains possession, paying the interest of the money lent, by agreement between the parties. Of his estate we have taken occasion to make a few remarks already.¹ When the mortgagee takes possession, he holds the property *in equity* (for, after the condition broken as to repayment in a certain time, the estate of the mortgagor is gone absolutely *at law*) till such time as out of the rents and profits he has repaid himself, or until he is repaid by other means; whence his also is an estate upon condition.

The striking distinction between the mortgage of lands or goods and a pawn of goods is, that in the former case the mortgagee has, after the condition forfeited, an absolute interest in the thing mortgaged; whereas the pawnee has but a special property in the goods, to detain them for his security. We are here only speaking of pawns in general; for, as we have already seen,² pawnbrokers under act of parliament may, after a year and a day, sell the property pawned, unless interest on the money advanced be paid in the meantime.

A modern mortgage may be described to be a conveyance of land by a debtor to his creditor, as a pledge and security for the repayment of a sum of money borrowed, with a provision that such conveyance shall be void on repayment of the money borrowed and interest thereon at a certain day (usually six months); and in all mortgages, although the money be not paid at the time appointed, by which the conveyance of the lands becomes absolute at law, yet the mortgagor has still an *equity of redemption*, that is, a right in equity, on payment of the principal, interest, and costs within a reasonable time, to call for a reconveyance of the lands.

Equity of Redemption.—The equity of redemption continues open for twenty years after the *last acknowledgment* of the property being held on mortgage, either expressed or implied, but after that time the mortgagor is for ever barred. At law he has lost the estate by non-performance of the condition. So in equity, by allowing the mortgagee to remain in possession twenty years without demanding an acknowledgment of the existence of the mortgage. "The lapse of twenty

¹ See *ante*, 359.

² *Ante*, 474.

years," says Sir Thomas Plomer, "affords a substantive insuperable plea in bar; it is the fixed limit to the remedy,—the *tempus constitutum*; one day beyond is as much too late as one hundred years, if there has been adverse possession; and no disability or fraud, no plea of poverty, ignorance, or mistake can be of avail, however clear and indisputable the title, if the merits *could* be inquired into, however demonstratively tortious and wrongful the adverse possession, the fact of such possession and the time preclude all investigation of the title; the door of justice is shut."

The equity of redemption may be released to the mortgagee, or it may be assigned, granted, or demised. It cannot pass by feoffment, bargain and sale, lease and release, it being a mere equitable right, and the legal title being in the mortgagor.

Dower is not allowed out of the equity of redemption on a mortgage in fee made before marriage; though it is otherwise if the mortgage be after marriage, unless the wife concurred by fine or recovery in the mortgage.

As to a mortgage in fee made before marriage, the wife cannot redeem; but as to one by demise only, she has one third of the rent and reversion. But a doweress, like an heir or devisee, has a right to have the personal estate of her husband, as far as it will extend, applied in discharge of mortgages and other debts contracted by her husband, which are charges on the land whereof she is dowerable.

With respect to the subjects of mortgage, it may be laid down that every species of property real or personal, corporeal or incorporeal, moveable or immoveable, in possession or expectancy, or even a chose in action, may be mortgaged. If the property be freehold and by the form of conveyance the estate is covenanted to be re-conveyed on payment of the money due, though the money be repaid within the time provided in the agreement, yet the necessity for a formal re-conveyance by deed cannot be avoided.

An ingenious mode of mortgage has been suggested in cases where two persons are advancing money at the same time on one estate, and preference is not wished to be given to either, but each is desirous of having a lien on the whole estate, and yet of avoiding the intervention of a mutual trustee, viz., limiting one moiety of the estate for a long term of years to one mortgagee, with remainder in fee to the other mortgagee, and *vice versa* as to the other moiety. Thus each is first mortgagee for a long term of one moiety and second mortgagee in fee of the other.

Copyhold is usually mortgaged by a conditional surrender in the manor court by the mortgagor to the mortgagee and his heirs. By the condition the surrender is made void on repayment of the money due, which condition is entered on the court rolls immediately following the surrender. On the performance of the condition by payment of the money due, the surrender is at an end, and the surrenderor is in possession *in statu quo*, without any fine or re-admission. But if the condition is broken, and the mortgagee is admitted, the mortgagor on redemption must be re-admitted and pay the fine. Unless there be a

¹ Cholmondeley v. Clinton, 2 J. & W. 180.

custom to the contrary, the surrenderee cannot be compelled, even after condition broken, to come in and be admitted. If he has not been admitted, the practice is, on repayment of the money, for the mortgagee to give a warrant to the steward to vacate the surrender, and thereupon the mortgage is at an end.

Where leaseholds are made a mortgage security, it is usual, in order to avoid the liability of rent and covenants in the original lease, to take an *underlease* at a peppercorn or merely nominal rent, reserving a few days of the original term, and the mortgagor covenants to pay the rent and perform the covenants in the original lease; otherwise, if the mortgagee takes an assignment of the original lease, he becomes liable to all the covenants for rent &c., and that, it seems, whether he takes possession or not.

If the mortgagee of a leasehold estate obtain a renewal of the lease, although there subsisted only a tenant right, the renewed lease will be held subject to the like equity as subsisted in the old lease, and will be redeemable accordingly. The mortgagee is not bound to renew; but if he do, he will be entitled to his costs attendant on the renewal, with interest.

Mortgages with Power of Sale.—Though formerly questioned, it is now established, that a mortgagee may have a power of sale given to him in case of default of payment of the mortgage money beyond a time limited. The better way of doing it is this:—the estate is limited to the mortgagee in fee, with the usual proviso for redemption, attended with a declaration that if default is made in payment of the money at the appointed time, it shall be lawful for the mortgagee, his heirs or assigns, after notice in writing requiring payment, to sell &c.' with a proviso that such power of sale shall not prejudice his right to foreclosure. In this case, if the sale take place, the mortgagor is not a necessary party to the conveyance.

Of Equitable Mortgages.—To constitute a valid mortgage at law, and such are those we have been considering, all the formalities of strictly legal deeds are requisite. But there are mortgages which are as effectual in equity without any of these formalities, except that these latter, which are termed equitable mortgages, require the aid and interposition of a court of equity to make them so, while a legal mortgage is complete in itself, and requires no such extraneous assistance.

The doctrine of equitable mortgage, it has been said, has been carried already to a sufficient extent, so that the inclination of some of the courts of equity is to limit rather than extend it.²

An equitable mortgage is, in general, constituted by a deposit of the title deeds or other documents, whatever they may be, by which the title to the property, be it real or personal, is held; sometimes the deposit is accompanied by a memorandum expressing the terms and the nature of the deposit, and sometimes without even a verbal communication of any kind passing between the parties, and it is regarded as evidence of itself of an agreement *executed* within the 4th section or the Statute of Frauds (29 Car. II. c. 3) for a mortgage of the estate. And upon the mere deposit the mortgagee may file a bill for

¹ And that it shall not be necessary for the mortgagor to join in any conveyance which is a contract for the exclusive benefit of the mortgagee, and is usually adopted in practice. *Corder v. Morgan*, 18 Ves. 347.

² *Exp. Cooper*, 9 Ves. 477.

completing the security; or, in bankruptcy, he may petition that the estate so incumbered may be sold and his debt paid out of the proceeds, if sufficient, with power to prove against the estate of the bankrupt mortgagor for the difference. It may as well be here intimated, that in cases of bankruptcy it is a fixed rule, that if there be no memorandum in writing accompanying the deposit, the costs of the petition for the sale must be paid out of the mortgagee's own pocket; but otherwise they are allowed out of the proceeds of the sale.¹

As to an equitable mortgage being constituted by mere delivery of the deeds without any kind of communication, written or verbal, between the parties, it was decided, in the late case of *Bozon v. Williams*,² that it can only occur as against strangers, in cases where the possession of the title deeds can be accounted for in no other manner than from their having been deposited by way of equitable mortgage, or the holder being otherwise a stranger to the title and the lands. Thus, though a solicitor may have deeds in his possession, and may have a lien on such deeds for any bill of costs due to him, and may retain them till the same is discharged, yet he has no equitable mortgage, so as to give him any interest in the property to which such deeds relate, because the deeds will be *prima facie* presumed to be in his hands in his character of solicitor, and to have been placed there for other purposes.

It has been laid down, 1st, That it is requisite that the deposit shall be made with the view and intent of an immediate security, and not *diverso intuitu*. But in the case of *Hockley v. Banlock*,³ where executors, who were also trustees, agreed to give one of the residuary legatees, as a security for his share of the real estate, part of the testator's residuary assets, and, for the purpose of having the mortgage prepared, delivered the title deeds to his agents, it was held that this gave him an equitable lien on the property against the executors, though not as against the other residuary legatees.

2dly, If nothing passes between the parties but the mere delivery of the deeds, it will only extend to the debt then actually due.

3dly, If an agreement of any kind, express or implied, can be established in evidence, it may extend as a security for future advances; though the courts are averse to this extension of the security.

4thly, The deposit may be made with the creditor himself, or with a third person as agent to receive it for the creditor alone, provided the depositor has no further controul over it. The wife of the debtor, or the debtor himself, cannot properly be such agent. Nor will such deposit in the hands of one person be extended to an advance made by another person, unless the party holding the deeds be a mere trustee, and not a creditor.

5thly, It is good without any stamp affixed to the memorandum.¹

6thly, An equitable mortgage by deposit has preference over a purchaser or legal mortgagee with notice; which notice is implied from the nature of the transaction, as where he is told that the deeds are in the equitable mortgagee's hands.

¹ A memorandum or agreement of this nature must be stamped with the proper *ad valorem* duty for a mortgage or it cannot be received in evidence, but when the

agreement is not stamped, parol evidence will be admitted to establish the equitable mortgage. *Allen v. Mill*, 13 Ves. 114.—
Editor.

7thly, If a *bond fide* deposit be made, and the mortgagor afterwards, though in anticipation of immediate bankruptcy, execute a legal mortgage to the depositor, it will be good against the assignees.

8thly, The security may be extended to a larger sum than that for which the equitable mortgage was first made, merely by agreement between the parties, or (as in case of a change of the partners of either mortgagors or mortgagees) it may be in like manner extended to other parties.

9thly, It seems that all the deeds must be deposited in order to constitute a good equitable mortgage, and that where one part of them is deposited with one person, and the remainder with another person, neither of them, conjunctively or separately, has a valid security.

10thly, In copyholds the equitable mortgage is effected by deposit of a *copy* of the court roll.

11thly, If there be a memorandum expressing the terms of the deposit, that is not to be contradicted by any other species of evidence contained in affidavits alone. It is always desirable to have a written memorandum; otherwise, in case of bankruptcy, the mortgagee will be put to costs he might have thus avoided.

An *equity of redemption* (which we have already endeavoured to explain) being something more than a mere right, may itself be mortgaged; and if several mortgages of this description are made, they in general take priority according to their date. For this and several other reasons, this is a very disadvantageous kind of security.¹

Bearing very closely upon the subject of equitable mortgages is that of *equitable liens*. If a vendor convey his estate to the vendee without receiving payment, even although the conveyance expresses and acknowledges the receipt of the payment as having been made, the vendee is considered as a trustee of the estate for the vendor, and the latter has a continuous lien thereon. So if the vendee has paid a deposit and the bargain is broken off, he has a lien for the deposit. Such lien binds the land in the hands of himself, his heirs, or volunteers, as they are termed, (that is, persons taking by gift, or by devise or voluntary conveyance of any kind), and even of purchasers *with notice*. However, this lien may, by implied contract that it shall not continue, be rebutted; but it is now settled, that a mere personal security taken, whether by bond, bill, note, or the like, will not be implied to take the lien away. A mortgage of other lands may, and at all events a mortgage of the same lands for part of the purchase money, leaving the remainder on personal security, will raise the presumption.

It must be recollected that this doctrine of equitable lien does not apply to personal estate; for as soon as the vendee has possession, actual or constructive, the lien is gone; and, after the delivery of part, there can be no stoppage *in transitu* of the remainder.

Mortgage of Personals.—Personal chattels may be mortgaged, like real property; but possession should, in general, always accompany the transaction; for if the mortgagor remain in possession, it is generally considered a badge of fraud, and may render the transaction void as against creditors. Where the possession cannot be given, as in the

¹ As to these, see Coote on Mortgages, 240.

case of a ship at sea, or wines in the London Docks, &c., the delivery of the muniments of the title to such property will be sufficient, as, in the case of wines, the delivery of the dock warrants.¹

Where goods are bulky, and lie in a warehouse separate from others of the mortgagor, the delivery of the key has been held to be sufficient. So where the delivery has been contracted for, but is refused by the mortgagor; or where the possession is consistent with the deed of assignment, as in the case of goods *bonâ fide* settled on marriage.

Of the effect of *reputed ownership in bankruptcy*, we shall have occasion to make a few observations hereafter. In the mortgage of ships and their freight the greatest care and attention are required, it being a transaction attended with much nicety.²

In the case of an assignment of the mortgage by the mortgagee, if the mortgagor is not a party thereto, the assignee is bound by all the equities and settlements of accounts which subsisted between the mortgagor and the mortgagee; and therefore if the mortgagor, after the assignment, pays off part of the debt, or the interest thereon, the assignee is thereby bound; nor will any agreement between the mortgagee and the assignee to turn the interest due into principal bind the mortgagor; nor, even if the latter acquiesced, would such an agreement bind other creditors who had intermediate securities on the property. In these cases the mortgagee should always obtain the consent of the mortgagor. One evil of the contrary is, that the mortgagee is otherwise a necessary party to a bill for redemption; and moreover, if the mortgagor has given up possession to him, he is considered a trustee for the mortgagor's benefit, and accountable for all profits. At law, a mortgage being a mere *chase in action*, the debt is not assignable; so that it is necessary for the assignee to obtain from the mortgagee a power of attorney to sue in his name, &c.

We have already endeavoured shortly to describe the nature of the estate of the mortgagor in possession³ and we have seen that he is in general regarded as the mere tenant at will of the mortgagee. The mortgagee, by virtue of his mortgage, is the legal owner of the land, and entitled to immediate possession, and to the receipt of the rent if the land be let. He may evict the mortgagor without notice, and is entitled to the emblements on the land. But it is an invariable rule, that he can have no account from the mortgagor of any profits he has received; and therefore if, even after notice by the mortgagee not to do so, a tenant pay his rent to the mortgagor, the mortgagee cannot recover the same back from the mortgagor. He may, however, after such notice, distrain on the tenant, just as an ordinary landlord may. The mortgagee is entitled, out of the profits, to repay himself all the necessary expences attending the collection of the rents, and, under some circumstances is entitled to the expences of a bailiff or receiver; but he can make no charge for his personal trouble, nor appoint himself receiver.

The mortgagee in possession is bound to keep the premises in repair, and will be allowed the charge of permanent improvements, with interest, from the time of advancing the necessary funds, as also the

¹ Exp. Davenport, in re Leech, 1 Dea. & Chit. 337.

² See Coote, 276, and *ante*, 259, 392.

³ *Ante*, p. 359; but his real character has never yet been ascertained; see Birch v. Wright, 1 Term Rep. 382.

expences on renewal of leases or maintaining the title. To prevent forfeiture for waste, he may pull down ruinous houses, and build others on their site; and if the security be defective, he may fell timber, and apply the proceeds in liquidation of his debt. But he is not bound to do other than necessary repairs. He cannot compel the mortgagor to advance money for the renewal of leases, without an express agreement to that effect. If he has been in possession seven years prior to the election, he may qualify to sit in parliament. So, if in possession, he might, before the Reform Act, have voted as an elector; and he may now gain a settlement under the poor laws.

He is bound to account to the mortgagor for such value of the land as he has received, or for so much as he might have received except for any wilful default or neglect of which he has been guilty.

As regards the provisions relating to infant mortgagees, we need only refer to page 330, in the former part of this work.

To guard against undue advantage being taken by reason of his controul over the necessities of the mortgagor, a mortgagee is unable, it is said, to accept a lease, even at a fair rent, from the mortgagor; but this has been questioned. Neither can he in equity make a valid or binding lease, unless it seems there is an absolute necessity for it. And because courts of equity are fearful of opening a door to fraud and usury, they will not permit any charge to be made on the estate for any personal trouble the mortgagee may be put to. If the mortgagee assign his mortgage without the concurrence of the mortgagor, and the assignee turn out insolvent, the mortgagee continues liable to account to the mortgagor.

The mortgagee cannot bar the mortgagor's right of redemption by fine and recovery or otherwise; and if the mortgagee is disseised, the mortgagor, on payment or tender of the mortgage money, will have five years to prosecute his right, even though the mortgagee had been barred by fine and nonclaim for five years. If a mortgagee renews a lease, the property mortgaged being leasehold, such renewal enures to the benefit of the mortgagor in redemption.

If the mortgagee presents to an advowson on a vacancy, and his clerk be admitted, the mortgagor may, by bill in equity, compel him to resign, if he proceeds within six months of the death of the last incumbent. He may be restrained from committing waste, and cannot fell timber even, unless his security is clearly scanty. If the mortgagor commit any act whereby he forfeits his estate, the mortgagee must abide by it, and can only have recourse to his collateral remedies, such as the mortgage bond; and lastly, as we have before shown, he can have no account against the mortgagor for any part of the profits which the mortgagor has at any time received.

* *Of Notice as affecting Mortgages.*—Notice is either express and actual; or it is implied and constructive, as arising from a presumption of law brought about by the peculiar state of facts; or else such as arises from statutory enactments, as an instance of which we may mention notice of bankruptcy, from the insertion of the issuing of the fiat in the London Gazette.¹

If a party having notice convey for a valuable consideration to one

¹ 6 Geo. IV. c. 16, § 83.

who has not notice, or if a party not having notice convey to one who has, the latter in either case will not be affected by the notice; for he may in the first case defend himself by his own want of notice, and in the second by the want of notice to the party conveying to him. And if A has notice and sells to B without notice, who again sells to C who has notice, C nevertheless protects his purchase by B's want of notice. If there be fraud in the original creation of the mortgage, as, for example, if no money actually passed between the parties, and if the mortgagee afterwards assign to a third person for valuable consideration without notice of the fraud in the original transaction, and the mortgagor convey his equitable interest to a stranger for valuable consideration without notice of mortgage, the money paid on the assignment will make good the original transaction and purge the fraud.

Notice is not to be inferred from vague rumours proceeding from strangers to the estate; for to these no regard need be paid; and, in fact, it is expected that there should be some degree of precision as to the nature of the supposed right, which should not consist of mere general and undefined claims. It is right, however, that purchasers should always inquire as far as possible even into the most vague report on the subject of the title.

Implied or constructive notice, in general, is to be inferred where a party has such a clue to the fact, whatever it may be, that he might, by diligently following it up, have arrived at the true state of affairs. Thus, notice that a party is in possession as tenant is sufficient to set the purchaser on the inquiry as to all the particulars of the tenancy; and knowledge that the deeds are in another person's keeping is sufficient notice of any title or right under which they are so held. Notice to an agent is notice to the principal. Hence arise the danger and inconvenience of both vendor and purchaser, or mortgagor and mortgagee, employing the same agent or attorney to transact their business; for whatever knowledge such third party acquires on behalf of one of his clients is sufficient notice, through him, to the other principal. But the notice, even in this case, must be connected with the particular affair then in hand. The recital of a deed is always a sufficient notice of its contents, provided it be all one transaction; but it is different if the deed is referred to in one transaction, and the consequences of notice are sought to be attached on a subsequent purchase unconnected with the deed making the reference or recital.

The registration of a deed is not of itself notice; and consequently if a mortgagee having the legal estate under a deed duly registered make further advances, he will have preference over an immediate incumbrancer or purchaser, of whose title he had not notice, although the intermediate deed of sale or charge be duly registered; and if a subsequent mortgagee obtains the legal estate, he will have preference over a prior equitable incumbrancer duly registered, of which he had not notice. So a registered deed shall not prevail against a prior unregistered deed, of which the party registering had notice.

An act of bankruptcy is not notice; nor is it clear that a fiat of bankruptcy is notice, by the general law of the land. Neither is the docketing of a judgment. On the other hand, if the party docketing have notice of a prior undocketed judgment, he will in equity be bound

by it. A decree is not constructive notice of the determination of a suit to persons not parties to it; and a purchaser *pendente lite*, although for valuable consideration and without notice, will be bound by the decree, if there has been a close and continuous prosecution of the suit. It was once held, that a witness to a deed was affected with all the consequences of notice of its contents, and that if a mortgagee witnessed a second deed without giving notice to the second incumbrancer of his prior mortgage, that he would be postponed: but this doctrine has long been exploded, since in practice a mere witness scarcely ever knows the contents of a deed he signs, and it might be extremely easy for a party to be cheated out of his right by getting him to act as a witness.

Of Tacking, and of the Priority of Incumbrances.—The doctrine of tacking is founded on an application of equitable maxims, that he who seeks equity shall do equity to the person from whom he requires it; and that where equities are equal, the law shall prevail. It is equitable that the creditor shall not be deprived of his pledge without payment of all sums of money due to him from his debtor which form a general or specific lien on the land; and therefore if the mortgagee advance other sums of money to the mortgagor expressly by way of further charge (forming a specific lien, or on judgment or statute forming a general lien) neither the mortgagor nor (generally speaking) any one claiming under him shall be allowed to redeem without a settlement to the full amount. But this doctrine will not apply if the security could not form a lien on the estate, either specifically or generally; and therefore as copyholds are not at law liable to an extent, a judgment debt cannot be tacked to a mortgage of copyhold lands.

How far a *bond fide* debt may be tacked to a mortgage has excited a good deal of discussion; the point appears to be now settled, and the cases on this head in the books are numerous. It will be here sufficient to state the results; premising only, that it makes no difference in the right of tacking, whether the bond debt is prior or subsequent to the mortgage, or whether the mortgage be made to the bond creditor originally or be taken by assignment. The point may be considered as settled, that, as against the mortgagor himself, the mortgagee cannot insist on tacking a bond debt. The cases are uniform, that the heir, and also the beneficial devisee, must redeem both; but if the devise be for payment of debts generally, the mortgagor must, as to his bond debt, come in rateably with the other creditors; and the result is the same, whether there be an express trust or only a charge for the payment of debts.

If a mortgage be made of a chattel real, and the mortgagor die indebted to the mortgagee by simple contract, and the executor of the mortgagor bring his bill to redeem, he must pay both debts. The bond creditor also cannot tack against the assignee of the heir, or of the beneficial devisee, or of the executor.

An assignee from the mortgagor may of course redeem without payment of the bond debt. On the principle, that he who seeks equity shall do equity, and that equity will not deprive a creditor of the advantage of the legal estate, if obtained without fraud; it has been held, that if one estate is mortgaged for the payment of a debt, and another

estate is mortgaged between the same parties for the payment of another debt, and the title to one estate proves defective, the mortgagor or his assigns shall not redeem without payment of both. It may be necessary to add, that, to apply this doctrine, the transaction must be between the same parties, or those claiming under them: for if A concur with B in a mortgage of Whiteacre to C, and afterwards B mortgage Blackacre to C for a different sum, nevertheless A and those claiming under him may redeem Whiteacre without also redeeming Blackacre.

It is laid down that if a sum of money be secured by mortgage, the mortgagor will not be admitted to redeem after the day of payment has elapsed, without paying likewise all that was due to the mortgagee on notes or simple contract. The same doctrine is stated in the *Treatise on Equity*. Notwithstanding these authorities, a mortgagee cannot, it seems, tack a mere simple contract debt against a mortgagor. A mortgagee of a lease or other chattel interest may, however, tack a simple contract debt against the executor, but not against creditors coming to redeem, or purchasers for a valuable consideration, or creditors for whose benefit the equity of redemption has been assigned by the executor.

The next rule to be noticed in the doctrine of tacking applies to the rights of mesne or intermediate incumbrancers, and is of great importance to be well understood. It is thus stated in Mr. Fonblanque's edition of the *Treatise on Equity*:—"In *æquali jure melior est conditio possidentis*; where equity is equal, the law shall prevail; and he who hath only a title in equity shall not prevail against both law and equity. As if a purchaser or mortgagee coming in upon a valuable consideration without notice, purchase a preceding incumbrance, it shall protect his estate against any person who hath a mortgage subsequent to the first and before the last mortgage, though he purchased the incumbrance after he had notice of the second mortgage; for he has both law and equity."

An exception to the rule, however, prevails, if the first mortgagee takes the assignment as a trustee for another person; in which case he shall not be allowed to tack the mortgages; for if he might, then a mere stranger purchasing a third mortgage, and declaring he had bought it in trust only for the first mortgagee, might tack both together, and defeat all the other incumbrancers.

The right of priority may be lost by fraud. In an able note by Mr. Fonblanque, in the *Treatise on Equity*, the principle is thus stated: "If a man, by suppression of a truth which he was bound to communicate, or by the wilful suggestion of a falsehood, be the cause of prejudice to another who had a right to a full and correct representation of the fact, it is certainly agreeable to the dictates of a good conscience that his claim should be postponed to that of the person whose confidence was induced by his representation."

If A, being about to lend money to B, informs C of his intention, and asks C whether he has any incumbrance on B's estate, and C denies that he has any, whereby A is induced to lend his money to B, and it proves that C had at the time an existing mortgage or judgment on B's estate; this is fraud on the part of C, and his security shall be post-

poned to that of A. But, to fix C with the fraud, it is necessary he should be informed of A's intention to lend the money; for otherwise the fraudulent intention is wanting on which the relief is to proceed, and the mere falsehood is not sufficient for such purpose. If a prior incumbrancer is a party or privy to the subsequent transaction, and fraudulently conceals his incumbrance, this is also a ground for postponement, and more especially if the prior incumbrancer is professionally employed in the second transaction, and does not divulge his mortgage.

It was formerly held, that if a first mortgagee was a witness to the second incumbrance, this was sufficient evidence of concealment to postpone his mortgage; but this was subsequently questioned by Lord Thurlow, and does not seem to be law.

Equity is not scrupulous by what means a *bonâ fide* incumbrancer, without notice at the time of advancing his money, obtains a legal protection for his security; for if he get in a judgment or statute which is satisfied, yet if he can make use of it at law for his protection, equity will not interfere to prevent him.

Of the Interest.—The usury laws of this country allow no more than five per cent interest to be received by the mortgage deed; though in regard to lands in our colonies and in Ireland a higher rate is allowed by a special act of parliament.

If at the time of creating a mortgage an agreement is entered into, that as soon as interest falls due it shall be converted into principal and carry interest, so as to give compound interest (of which equity is very jealous), such an agreement is held to be unjust and oppressive, and tending to usury, and consequently void. But when any portion of the interest is actually due, the mortgagor and mortgagee, as between themselves, may at all events agree to that effect:—I say, between themselves; for if a mortgagee has notice of any subsequent incumbrance, the interest so converted into principal by agreement is looked on as a further advance, and therefore postponed to the intermediate incumbrance. The agreement to convert the interest in this manner should always properly (in regard to evidence of it) be signed by the mortgagor, for the mere statement of an account will not do. If a suit is instituted for an account of what is due on a mortgage, interest upon interest will be given from the time of the confirmation of the master's report, except, as before observed, as against intervening mortgagees. If the court allows time to the mortgagor or mesne incumbrancer to redeem, it is but just and reasonable that they should pay interest on the interest then due.

As regards particular tenants and remainder-men or reversioners, the tenant for life of an equity of redemption is, during his tenure, bound to keep down the mortgage interest. But if any arrear has accrued before his possession, the remainder-man must bear the burthen of it.

A tenant in tail cannot, however, be so compelled, because he has the reversioner or remainder-man wholly in his power, so as to bar them if he pleases. If, however, he be an infant, the guardian or trustee (from the infant's liability to destroy the entail) is bound to keep down the interest.

There is one thing in relation to the interest on mortgages which

ought to be carefully borne in mind, which is this, that if at any time the mortgagor becomes desirous of paying off the mortgage *after* the day named in the deed for the payment thereof has elapsed, he must, in order to stop interest, give the mortgagee six months notice of his intention, and at the expiration of the six months, on the very day, must actually tender the whole money due to the mortgagee, personally. How far this is requisite in case the day of payment named in the deed is *not* gone by, does not seem decided; though in principle it would seem that no such notice is requisite, as the party is entitled to a reconveyance at law without recourse to equity, where notice was, in this particular, first deemed to be necessary.

Out of what Fund the Mortgage Debt shall be discharged.—The personal estate of the mortgagor is *prima facie* liable to this payment, and where it has been held otherwise, it is a mere exception to the general rule; and though, to render the general rule applicable, it is necessary that the debt should be that of the deceased, yet it is optional in him, and he may be considered to have so adopted the debt as to have rendered it his own: this depends entirely on evidence deduced from the party's will or other sources.

..In applying the principle of the primary liability of the personal estate for the payment of debts to the particular case of mortgage, it is necessary to remark, that it will not prevail to the prejudice of legatees whether specific or pecuniary, and much less to the prejudice of creditors, and it is decided that the paraphernalia of the widow is also exempted. The rule is, in fact, applicable between the heir and devisee on the one hand, and the executor or administrator and the residuary legatees or next of kin on the other, but not as between other parties; and therefore if a mortgage creditor resorts to the personal estate, and thereby exhausts the fund, the other creditors and the legatees will have relief in equity on the real estate in mortgage, or, in other words, equity will marshal the assets for their benefit.

There are four classes of estates to be applied in discharge of mortgage debts: 1st. The general personal estate, unless specially exempted; 2dly, Estates particularly devised for payment of debts; 3dly, Estates descended, whether purchased before or after the date of the will; and 4thly, Estates specially devised charged with the payment of debts.

On the question of the fund liable to discharge a mortgage, a distinction from ordinary cases exists in that of husband and wife, where the latter's estate is mortgaged. The question is decided by general principles: 1st, That if the money be raised for the husband's benefit, the wife or her heir will be a creditor in the place of the mortgagee of the husband, in preference of his legatees, but not of his creditors; 2dly, Parol evidence is admitted to contradict the deed, and to show for whose benefit the money was really raised; 3dly, If raised by the husband to pay off the wife's debts *dum sola*, the wife's estate shall bear the burthen, even although a small portion were applied for the husband's uses; 4thly, If the wife or her heir promise to relinquish her claim, parol evidence is admissible of such agreement; 5thly, The wife will not waive her claim by a covenant that the estate shall, after the husband's death, stand charged with the original debt, and also

with a farther sum advanced to her; and *Gibby*, The Defendant will have a right to be indemnified out of the wife's estate, if, as a condition of the mortgage charged on the wife's estate, he enter into a covenant or give bond for its payment; and if at the time of the original mortgage of his wife's estate he made a provision out of his own estate for the wife's benefit, he may, under circumstances, be considered as a purchaser of the money raised by the mortgage.

In the case of bankruptcy, the mortgagee is empowered to go before the commissioner and have a sale directed of the property, and if the purchase money is not sufficient to pay off the debt, principal, interest, and costs, he is entitled to prove for the residue against the mortgagee's effects.

Of Foreclosures.—Equity having determined that the mortgaged debt shall be considered the principal, and the land a pledge, and, as a consequence, that the mortgagor, notwithstanding his breach of condition and subsequent forfeiture *at law* of his estate, shall be relievable in equity on payment of principal, interest, and costs, and the mortgagee in possession be accountable for the rents and profits, it became, on the other hand, just, that the mortgagee should not be subject to a perpetual account, nor converted into a perpetual bailiff, but that, after a fair and reasonable time given to the mortgagor to discharge the debt, he should lose his equity, or, in other words, be *foreclosed* of his right of redemption. On this principle rests the doctrine of foreclosure; and, in the application of it, the forbearance of equity on behalf of the mortgagor seems to have been carried to its utmost limits, even so far as in some instances to work a serious detriment to the mortgagee. For equity is ever ready to receive the excuses of the mortgagor, as well for the purpose of giving him time to procure the money previously to the foreclosure (which has been extended to four enlargements of the time), as also for the purpose of opening the foreclosure even after many years quiet possession by the mortgagee under an absolute decree of foreclosure confirmed, and even signed and enrolled.

The usual course to pursue to obtain a decree for foreclosure is for the mortgagee to file a bill in equity, calling on the mortgagor to redeem within a specified time, and praying that in the alternative he may stand foreclosed. After the answer is put in, the cause is referred to a master to take an account of what is due to the mortgagee for principal, interest, and costs; upon which a decree is made, ordering payment within six months, or in default that the mortgagor shall stand foreclosed; in which latter case the decree is confirmed, signed and enrolled, and becomes absolute, subject to the foregoing observations as to re-opening it.¹

ESTATES BY STATUTE MERCHANT AND STATUTE STAPLE are very similar to that of mortgage. In these the creditor holds possession till he has repaid himself his debt. The main distinction between them and mortgages consisted in the form in which they were created, into which however it would be useless now to inquire, as they may be considered obsolete modes of securing debts.

The *ESTATE BY ELIGIT* is subject to the same observations.

¹ See *Coots on Mortgages, passim*; whence the foregoing observations on mortgages have been principally extracted.

CHAPTER VIII.

Of Estates in Possession, Remainder, and Reversion.

WE have hitherto considered estates solely with respect to their duration, or the *quantity of interest* which their owners have in them. We are now to regard them as to the *time of their enjoyment*, in which view they are either estates in possession or in expectancy; and of expectant estates there are two kinds: the first created by the act of the parties, called a *remainder*; the other by the operation of law, and called a *reversion*.

I. OF ESTATES **IN POSSESSION**, or, as they are sometimes called, estates *executed* (in contradistinction to *executory* estates, which depend on some subsequent circumstance or contingency), we have nothing particular to say in this place; because, in treating of estates, we have all along laid down the rules as applicable to estates actually in the tenant's possession.

II. AN ESTATE **IN REMAINDER** is that portion of an estate which, on the creation of a particular or immediate estate, is limited over to another, to take effect or be enjoyed when the other is determined.

• Remainders are—1. Vested; or 2. Contingent.

1. A *vested* remainder is that which is limited or transmitted to a person capable of receiving the possession should the particular estate happen to determine immediately; as, to A for life, remainder to B and his heirs; here B being in existence, he or his heirs will take the moment A dies.

2. A *contingent* remainder is where the particular estate may happen to determine before the person to whom the remainder is limited can take possession; as, to A for life, remainder to the heirs of B. Now B can have no heir till his death; A may die before B; and then no one would be in existence to take the estate under the limitation.

Contingent remainders were destroyed by the destruction of the particular estate on which they depend; and this might be by the *merger, surrender, or forfeiture* of the particular estate. In the creation of remainders, the following rules were required to be observed.

1. There must be a present immediate or particular estate created, which, if the remainder be vested, may be for years; but if the remainder be contingent, it must be an estate of freehold; though it need not be in the actual possession or seisin of the particular tenant, it being enough if it confer a *right* to the possession. An estate at will, however, cannot support a freehold remainder; because entry to deliver seisin to the remainder-man would be a determination of the estate at will.

2. The particular estate and the remainder must be created by the same deed. It is to be remembered, that a will and codicil are but one instrument.

3. The remainder must vest in the grantee during the particular estate, or at the very instant it determines.

4. If the remainder be contingent, it must be limited to some one that may by common possibility be *in esse* at or before the determination of the particular estate.

5. If a condition be annexed to a particular estate, making it void on a given event, and a remainder be limited to take effect, "not only on the *determination* of the particular estate, but on its destruction by operation of the condition, the remainder is void from its creation, because it does not come within the third rule, "to vest the moment the particular estate is determined," and because only the grantor and his heirs can take advantage of a breach of the condition.

But now the 8 & 9 Vic. c. 106, § 8, enacts, that a contingent remainder existing at any time after the 31st December, 1844, shall be, and if created before the passing of this act, shall be deemed to have been, capable of taking effect notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened.

This kind of remainder, in conveyances to uses and in wills, is known by the names of *conditional limitations* and *executory devises*; of which we shall say a few words presently.

Cross Remainders.—Gifts with cross remainders are founded on a tenancy in common. As, under a gift to A, B, and C, tenants in tail in common, and in default of the issue of either of them, then to the other or others of them as tenants in common in tail, and in default of issue of them all, then to X in fee; here A, B, and C are tenants in common of one third each in possession, with remainder as to A to B and C as tenants in common in tail, with remainder as to B to C in tail, and with remainder as to C to B in tail, and so reciprocally as to the other two thirds.

In *deeds*, cross remainders cannot arise without express words; but in wills, marriage settlements, and executory trusts, they may be *implied*. Between *two*, the presumption is in favour of cross remainders; but between more than two, against them. A tenant in tail with cross remainders over might, by common recovery, convey his own property of the estate in fee.

We shall now say a few words of conditional limitations and executory devises.

1. *Conditional Limitations.*—The difference between them and remainders is, that a *remainder* is, as it were, a continuation of the same estate, while a *conditional limitation* is entirely a different and separate estate.

There are these distinctions between a condition and a conditional limitation. A condition brings the estate back to the grantor or his heirs, while a conditional limitation carries it over to a stranger. The breach of a condition gives a *right*, but the happening of the event whereon the conditional limitation depends gives an *estate*. Some act must be done by the grantor or his heir to reduce the estate into possession on breach of a condition,—he must enter, or claim; but a conditional limitation destroys the prior estate without any act to be done by the successor. In fact, an executory devise is a contingent limitation by will, and a shifting use is the same by deed. If there

be no preceding estate, the future isolated gift assumes the character of a contingent use if by deed, or an executory devise if by will; if there be a preceding estate, then the subsequent interest is, in strictness, a conditional limitation. But this distinction is not always attended to in practice. If these conditional limitations be limited after an estate tail, they might have been barred by recovery. As to barring them by estoppel, assignment in equity, or devise, the law is the same as with respect to an executory fee by devise.¹

2. *Executory Devises*.—An executory devise differs from a remainder (amongst other things) in this, that a remainder must have a particular estate to support it, while it is essential to an executory devise, that no particular estate be in existence; it being a rule, that that shall never be construed an executory devise which can be supported as a remainder. In short an executory devise differs from a contingent remainder in the following points:—1. It is admitted only in wills and testaments; 2. It respects *personal* as well as *real* property; 3. It requires no preceding estate to support it; 4. Where any estate precedes, it is not necessary that the executory devise should vest when that determines; 5. It cannot be prevented or destroyed by any alteration whatsoever in the estate out of or after which it is limited, *except it be limited on an estate tail*. But though admitted in wills and testaments only, yet in deeds taking effect by the Statute of Uses, limitations tantamount are permitted, under the names of *conditional limitations* and *springing* or *contingent uses*.

By executory devise a fee or less estate may be limited after a fee, so that it take effect within a life or lives in being and twenty-one years afterwards; or a fee may be limited to commence in *futuro*. *Quasi* remainders in chattels real or personal may be limited by executory devise, if to a person or persons in being, or to vest within twenty-one years after the death of a person or persons in being. But if the remainder be such, that if it were freehold property it would amount to an express entail, it rests in the person in whom it vests, and will be at his disposal, or go to his representatives on his death. An executory devise cannot be barred or destroyed by any act of the person taking the preceding fee, though by feoffment or matter of record; except the preceding estate be a fee tail, and then the tenant in tail could have destroyed it by suffering a recovery. But the person entitled may bar his own executory estate by release to the first taker in possession, or he may assign it in equity for a valuable consideration, or devise it by will; or if he was vouchee, or levied a fine, he was barred by estoppel.

The utmost length that has hitherto been allowed for the contingency of an executory devise of either kind to happen in is that of a *life or lives in being and twenty-one years after*. As, when lands are devised to such unborn son of a feme covert as shall first attain the age of twenty-one and his heirs, the utmost length of time that can happen before the estate can vest is the life of the mother and the subsequent infancy of her son; and this has been decreed to be a *good* executory devise.

¹ The recent cases of construction of limitations are, *Doe dem. Burne & Martyn*, 8 Barn & Cress 497; *Doe dem. Littledale v. Smeddle*, 2 Barn. & Ald. 126; and *Wheeler v. Duke*, 1 Crom. & Mee. 210.

III. REVERSIONS.—When a person grants a *portion* of his interest in lands, the possession returns or reverts to him on the determination of the granted portion of interest, and during the existence of the grant an interest remains in the grantee, called his *reversion*, or more properly, his right of *reverter*.

It is an actual estate, bearing the fruits of seignory. It can only arise by act of law. Being an immediate interest, it may be conveyed to any one. The proper mode is by grant, though it is usually passed by lease and release; it passes also by bargain and sale enrolled, or by a covenant to stand seised. It cannot be granted over, so as to commence *in futuro*; but it may be charged by the reversioner.

During the particular estate the reversioner continues tenant to the lord, and the tenant of the particular estate is tenant to the reversioner; so that rent, fealty, &c. belong to and follow the reversion. The moment the particular estate determines, the reversion must come into possession.

By 8 & 9 Vic. c. 106, § 9, when the reversion expectant on a lease (made either before or after the passing of that act) of tenements or hereditaments, of any tenure, shall, after the 1st of October, 1845, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion, expectant on the same lease.

CHAPTER IX.

Of Estates in Severalty, Joint Tenancy, Coparcenary, and in Common.

WE now come to treat of estates with respect to the number and connexion of their owners, the tenants who occupy and hold them; and, considered in this view, estates of any quantity or length of duration, and whether they are in actual possession or in expectancy, may be held in four different ways, *viz.* in severalty, in joint-tenancy, in coparcenary, or in common.

I. AN ESTATE IN SEVERALTY needs scarcely any comment, it being where only one person is possessed of the estate, without any other person being joined or connected with him in point of interest during his estate therein.

II. AN ESTATE IN JOINT TENANCY is where lands or tenements are granted to two or more persons, to hold in fee simple, fee tail, for life, for years, or at will. Joint-tenants always take by purchase, and cannot, from the nature and attributes of the estate, take by descent or mere act of law.

The mode whereby this kind of estate is created is, if for life, "to A and B and their assigns; if in fee, "to A and B and their heirs,"

The properties of a joint estate are derived from its unity, which is four-fold,—the unity of interest, of title, of time, and of possession; or, in other words, joint tenants have one and the same interest, derived by one and the same title or deed, commencing at one and the same time, and held by one and the same undivided possession. The estate must be created by the same deed, and vest at the same time. It may be for life or in fee, but not in tail, unless the donees may lawfully marry. Whenever lands are conveyed to two or more, without modifying or disjunctive words, they take as joint tenants. Joint tenants are seised *per mie et per tout*; therefore they cannot grant, bargain and sell, surrender, enfeoff, exchange, or devise to each other, but can only release. On the death of one joint tenant his interest survives to the other, and does not go to the heirs, executors, or administrators of the deceased; and therefore all charges by a joint tenant are void against his surviving companion, since without a severance the party charging has no power over the estate after the event of his own death.

Joint estates are not subject to dower or curtesy.

Each tenant may sever at pleasure by granting his portion to a stranger, either to the use of a stranger or of himself; or they may compel a partition, by statute. A mortgage is a severance at law; and an equitable mortgage is an equitable severance.

Joint tenants may exchange with a stranger, or surrender to an immediate reversioner. Having unity of seisin and possession, the entry and seisin of one enures to all the joint tenants. A joint tenant cannot grant his *chance* of survivorship to a stranger, so as to bind himself by estoppel. A covenant or agreement to sell has been held to create an equitable severance. Judgments, and crown debts even, against the deceased joint tenant do not affect the estate in the hands of the surviving joint tenant. But if he aliene so as to sever, and *he* become survivor, or sole owner by release, prior judgments become available. The surviving joint tenant is entitled to emblements, if the joint estate continues up to the death of one of the tenants.

III. AN ESTATE IN COPARCENARY arises where lands of inheritance descend, by common law or by custom, to two or more persons: by common law, as where the next heirs of a party dying seised are two or more females, his daughters, aunts, sisters, or cousins; by custom, such as that of gavelkind, where all the males of equal degree, as all the sons, uncles, or brothers, inherit equally. Coparceners always take by descent, and compose, in fact, but one heir to the party from whom they derive the estate. They have a *several* seisin as regards themselves, though it is *joint* as regards strangers. They have a unity but not an entirety of interest. They may sue and be sued jointly in all matters relating to their own lands. They cannot sue each other as trespassers, but may stop the committal of any waste by resorting to a partition of the estate. They are properly entitled each to the whole of a distinct moiety. Hence it is that they convey *to each other* by deed of grant, release, and feoffment, and to *strangers* by any conveyance sufficient to pass a freehold, as deed of grant, feoffment, release, bargain and sale enrolled, or they may covenant to stand seised. Unlike the estate of joint tenancy, there is no survivorship; for on the death of the coparcener her share descends

to her heir, subject to her husband's curtesy; in which case the heir or the husband holds that share with the other coparceners in coparcenary. If the heir male dies leaving a widow, she is entitled to dower out of such share.

In *gavelkind* the estate descends to all the sons, who hold in coparcenary.

This tenancy is destroyed by alienation or devise to a stranger, and is thereby converted into a tenancy in common.

The possession of one coparcener is that of the others, so as to create a seisin by all and carry their shares by descent to their heirs, though they never individually entered. So entry by one, when not adverse, enures to all. In advowsons, they present according to seniority, the eldest taking the first turn.

Coparcenary relates to the estate, as joint tenancy does to the person. Hence there is this singularity, that one may be coparcener with himself; as, for instance, if two moieties descend to one person, one from his father, another from his mother, on his death without lineal descendants, one share goes to his heirs on the father's side, and the other to those on the mother's side.

The seisin of coparceners is both joint and several. That it is *joint* is shown by a release being good from one to another without a bargain and sale to vest the seisin; yet it is *several*, inasmuch as one may enfeoff the other. But they cannot exchange till after partition has been made.

This estate may be dissolved, either by partition, which disunites the possession: by alienation of one partner, which disunites the title, and may disunite the interest; or by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty.

Partition may be made in several ways—four by consent, and one by compulsion. The first is by a simple written agreement among themselves, allotting to each her portion.¹ The second is, where they choose a common friend to make partition, and then the sisters shall choose each of them her part according to their seniority in age or otherwise as shall be agreed. The third is, where the eldest divides, and she shall choose her part last. The fourth is, by casting lots after a division. The fifth, and that by compulsion, is where one or more sue out a writ of partition against the others; whereupon the sheriff, to whom the writ is directed, goes to the lands and makes partition thereof by the verdict of a jury there impanelled, and assigns to each her part in severalty. If there be things which cannot be divided, (as a mansion house, or incorporeal rights, such as common of estovers or of piscary, and the like), the eldest may at her option enjoy them, making compensation in money or other parts of the property to the others; or if that cannot be, they shall take the property by turns, in the same manner as they take advowsons, commencing with the eldest.

IV. TENANCY IN COMMON.—Tenants in common, like joint tenants, take by *purchase*, in the legal acceptation of the word. They may hold

¹ But by 8 & 9 Vic. c. 106, a partition of any tenements or hereditaments not being copyhold, after the 1st October, 1845, is void at law, unless made by deed. If the lands &c. be copyhold, the law remains as before the passing of that act, and the partition may be evidenced by a written agreement.

by distinct titles or by entire disunion of interest, but must have unity of possession. They have separate freeholds and separate inheritances; therefore a lease by two operates as two distinct leases; and if two join to give a rent-charge of 20s., the grantee will have two rent-charges of 20s.

In a *deed*, the best way to create this tenancy is to limit a moiety to one and a moiety to the other, or to use the words "to hold as tenants in common, and not as joint tenants."

In a *will*, the following expressions have been held to create this tenancy: "equally to be divided;" "equally *between* or *to* them;" "equally;" "respectively;" "rateably;" "share and share alike." These last words, in a deed operating under the Statute of Uses, give an estate in common, though it is otherwise in a deed at common law. But this distinction is far from settled; and the courts seem inclined to construe "equally to be divided" as a tenancy in common *in all cases*.

Real estate bought with partnership property is, in equity, always held in common, even if the words in the purchase deed give to the co-partner a joint estate.

Tenants in common cannot exchange with each other, though they may with a stranger, *the possession being undivided*. But one may enfeoff the other; or if one have a greater estate, the other may surrender to him. One may devise his interest to his companion. But they cannot *release* to each other, because such release must operate by way of enlargement, and there is no estate of the companion in the share of the releasor to be enlarged.

Like coparceners, they may compel partition. Compulsory partitions are usually by commissioners from chancery; the commission is granted of right, and the partition is perfected by mutual conveyances. An agreement for partition is enough in equity. When one of the parties is an infant, the only effectual way of making partition is by an act of parliament.

Formerly partition of lands of copyhold or customary tenure could not be obtained in a court of equity; but the 4 & 5 Vict. c. 35 enacts, "that it shall be lawful for any court of equity, in a suit instituted for the partition of lands of copyhold or customary tenure, to make the like decree for ascertaining the rights of the respective parties to the suit, and for the issue of a commission for the partition of the lands and the allotment in severalty of the respective shares therein, as, according to the practice of the court, may now be made with respect to lands of freehold tenure."

TENANCY BY ENTIRETIES.—When an estate is conveyed or devised to a man and his wife *during coverture*, they are called *tenants by entireties*. Each is seised of the whole, and neither of a part; consequently the husband's conveyance alone has no effect on the surviving wife. To pass the estate, a fine ~~with~~ the wife's acknowledgment, under 3 & 4 Wm. IV. c. 74, is necessary; so that it could not be conveyed without such acknowledgment, if freehold; but if an estate for years, the husband alone may assign the term, so as to bar his wife surviving, it being a chattel interest.

A gift to a man and woman, who *afterwards* marry, does not make them tenants by entireties.

CHAPTER X.

Of Title to Real Property in General.

TITLE signifies the foundation of the right or claim which a man has to his property, and is of several degrees.

1. The first and lowest species is that of mere *naked possession*, or actual occupation, without any apparent right, or shadow or pretence of right, to continue such possession. Thus, if because I find a house without any person occupying it, I enter and possess myself of it, my title is simply that of a naked possession. There are, of course, various ways whereby it may be derived, but this is sufficient to show its nature. A party thus possessed is so far protected, that *prima facie* he has a title to that of which he is in possession, and no one can legally divest him of such possession, except by proving a better and more perfect title in himself. By length of time, also, this title may become good to all intents and purposes. We ought here to observe, however, that in the case of a party having entered under a lease or agreement from the true owner, the owner is not therefore to be called on to prove his title.

2. The next step is the *right to possession*, which may reside in one man while the actual possession is in another. Thus, if a man is unlawfully turned or kept out of possession of his property, he has still the right of possession, and may exercise it whenever he thinks proper, by entering upon the disseisor, and determining his occupancy. This right of possession, again, is of two sorts, *viz.* an *apparent right*, which may be defeated by proving a better and *actual right*. Thus, if the disseisor dies in possession of the land whereof he so became possessed by his own unlawful act, and the same descends to his heir, now, by the common law, the heir hath obtained the *apparent* though not the *actual right*, which remains in the party turned out of his property. But, to divest the heir of his possession, the other must now resort to an action at law, and cannot do so by mere entry or other act of his own. If, however, he who has the actual right of possession puts in his claim, and brings his action within the proper time, and can prove by what unlawful means the ancestor became seised, he will then by a sentence of law recover the possession to which he has such actual right; yet if he omit to bring this his possessory action (as it is termed) within a competent time, his adversary will gain an *actual right* of possession in consequence of the other's negligence.

A *right of entry*, according to modern notions, may be defined "a right to bring an action of ejectment." This right is not grantable, but it may be extinguished; it cannot even be surrendered; nor would it have passed to another by fine, though a fine would have been a *bar* to the right, the cognizor being estopped. Neither is it devisable. The proper mode of extinguishment is by release to the person in actual possession of the lands. It is, however, descendible in its nature.

3. The third degree of title is that of a mere *right to the property*, without possession or even the right of possession. In this case the

party is put to a right. He may have the true ultimate property of the lands in himself, but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumption is strongly in favour of his antagonist, who has thereby obtained the absolute right of possession.

4. A complete title to lands can only exist where the *right of possession* and the *right of property* are united; and this is sufficient to give an *equitable* title: but to constitute a strictly *legal* title, there must also be the *actual possession* added to the foregoing.

Limitation of Actions and Suits.—Upon the subject of the time within which it is competent to a party to avail himself of his right of possession, it becomes necessary to advert to the recent act of parliament, 3 & 4 Wm. IV. c. 27, whereby the law, which had previously been in this respect in a very unsatisfactory state, has been greatly altered and simplified. The first section points out the extent and operation of the act, by defining the interpretation to be applied to certain expressions used in it. The word *land* extends to all corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and to any interest or estate therein, whether freehold or chattel, and whether the same be of freehold, copyhold, or any other tenure. The word *rent* extends to all heriots, and to all services and suits for which a distress may be made, and to annuities and periodical sums of money charged upon or payable out of land, except moduses or compositions belonging to a spiritual or eleemosynary corporation sole. It then enacts as follows:—

After the 31st December, 1833, no person shall make an entry or distress, or bring an action, to recover any land or rent, but *within twenty years* next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right shall have first accrued to the person making or bringing the same.

In the construction of this act, *the right to make an entry or distress or bring an action* to recover any land or rent shall be deemed to have *first accrued* as follows:—

When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, *have been in possession* or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were so received;

And when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death;

And when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by an instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument;

And when the estate or interest claimed shall have been an estate or interest *in reversion* or *remainder* or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession;

And when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.

When any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition shall have accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

A right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.

For the purposes of this act, an *administrator* claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.

When any person shall be in possession, or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the deter-

mination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined. But no mortgagor or cestuique trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

And when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received, which-ever shall last happen.

When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid: and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

No person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon.

And no continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action.

When any one or more of several coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than their undivided share of any land or of the profits thereof, or of the rent, for their own benefit, or for the benefit of any persons other than the persons entitled to the other shares, such possession or receipt shall not be deemed to have been the possession or receipt of such last-mentioned persons.

When a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

When any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the per-

son by whom such acknowledgment shall have been given shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agents such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or of any person claiming through him, to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments (if more than one), was given.

When no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of this act.

As to Disabilities.—If at the time at which the right of any person to make an entry or distress or bring an action to recover any land or rent shall have first accrued as aforesaid such person shall have been under any of the disabilities of infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or rent at any time within *ten years* next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under any such disability, or shall have died, whichever shall have first happened.

But no entry, distress, or action shall be brought by any person who, at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within *forty years* next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

When any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any islands adjacent to any of them (being part of the dominions of his majesty), shall be deemed to be *beyond seas* within the meaning of this act.

When the right of any person to make an entry or distress or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the mean time such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or have taken effect after or in defeasance of such estate or interest in possession.

When the right of a tenant in tail of any land or rent to make an entry or distress or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred.

When a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case for making an entry or distress or bringing an action to recover such land or rent, no person claiming any estate, interest, or right which such tenant in tail might lawfully have barred shall make an entry or distress or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar an estate to take effect after or in defeasance of his estate tail, and any person shall, by virtue of such assurance, at the time of the execution thereof or at any other time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue in such possession or receipt for twenty years next after the commencement of the time at which such assurance, if it had been then executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate as aforesaid, then at the expiration of such period of twenty years such assurance shall be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

Suits in Equity.—And after the said 31st December, 1833, no person claiming any land or rent *in equity* shall bring any suit to recover the same but within the period during which by virtue of the provisions hereinbefore contained he might have made an entry or distress or brought an action to recover the same respectively, if he had been entitled at law to such estate or right in or to the same as he shall claim therein in equity.

But when any land or rent shall be vested in a trustee upon any express trust, the right of the cestuique trust, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him.

And in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered. Provided, that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents on account of fraud, against any *bona fide* purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any fraud had been committed.

But nothing in this act shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief on the ground of acquiescence or otherwise to any person whose right to bring a suit may not be barred by virtue of this act.

Mortgages.—When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor or any person claiming through him shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given. And when there shall be more than one mortgagor, or more than one person claiming through the mortgagor, such acknowledgment, if given to any of such mortgagors or persons, or his agents, shall be as effectual as if given to all. But where there shall be more than one mortgagee or person claiming the estate or interest, such acknowledgment signed by one or more of such mortgagees or persons shall be effectual only as against the parties signing and the persons claiming under them, and

any persons entitled to any estate or interest to take effect after or in defeasance of their estate or interest, and shall not operate to give to the mortgagor a right to redeem the mortgage as against the persons entitled to any other undivided or divided part of the money or land or rent. And where such of the mortgagees or persons as shall have given such acknowledgment shall be entitled to a divided part of the land or rent, or some estate or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor shall be entitled to redeem the same on payment with interest of the part of the mortgaged money which shall bear the same proportion to the whole as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent.

Ecclesiastical Owners.—It shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress or bring such action or suit shall first have accrued; that is to say,—the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will with the time of the holding of such two persons and such six years make up the full period of sixty years; and after the said 31st December, 1833, no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period.

Advowsons.—After the 31st December, 1833, no person shall bring any *quare impedit* or other action, or any suit, to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; that is to say,—the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if they shall not together amount to the full period of sixty years, then after the expiration of such further time as will make up the full period of sixty years.

When on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his majesty or the ordinary by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of

this act, be deemed a continuance of the incumbency of the clerk so made bishop.

In the construction of this act, every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any *quare impedit*, action, or suit shall be limited accordingly.

After the said 31st December, 1833, no person shall bring any *quare impedit* or other action, or any suit, to enforce a right to present to or bestow any ecclesiastical benefice as the patron thereof, after the expiration of one hundred years from the time at which the clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest or undivided share or alternate right of presentation or gift held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right held or derived under the same title.

At the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished.

The receipt of the rent payable by any tenant from year to year or other lessee shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act.

Abolition of Real and Mixed Actions.—Although perhaps not applying strictly to the matter at present before us, it is as well, in relation to the beforementioned act, to say, that by its other clauses no action real or mixed (except a writ of *right of dower*, or writ of *dower unde nihil habet*, or a *quare impedit*, or an *ejectment*), and no plaint in the nature of any such writ or action (except a plaint for *freebench* or *dower*), shall be brought after the 31st December, 1834.

But when on the said 31st December, 1834, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the 1st June, 1835, in case the same might have been brought if this act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired.

And when, on the said 1st June, 1835, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said 1st June, 1835, but only within the period during which by virtue of this act an entry might have been made upon the same

land by the person bringing such writ or action if his right of entry had not been so taken away.

No descent cast, discontinuance, or warranty which may happen or be made after the said 31st December, 1833, shall toll (take away) or defeat any right of entry or action for the recovery of land.

After the said 31st December, 1833, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment (or the last, if more than one) was given.

After the said 31st December, 1833, no *arrears of dower*, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than *six years* next before the commencement of such action or suit.

After the said 31st December, 1833, no *arrears of rent*, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within *six years* next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent. Provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance of the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgage or incumbrance was in such possession or receipt, although such time may have exceeded the term of six years.

After the said 31st December, 1833, no person claiming any tithes, legacy, or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any *spiritual court* to recover the same but within the period during which he might bring an action or suit at law or in equity.

This act shall not extend to Scotland, nor, so far as it relates to any right to present to or bestow any church, vicarage, or other ecclesiastical benefice, to Ireland.

CHAPTER XI.

Of Title by Descent.

WE are now to consider the several modes by which titles may be reciprocally lost and acquired, or whereby the property of things real is either continued or transferred. *Acquisition* and *loss* are here used as terms of relation and of a reciprocal nature, for by the same method that one man gains an estate another loses it; as, for instance, if an heir takes by descent, the ancestor loses it by his death, and the like with all others.

By our law, the modes of acquiring on the one hand and of losing on the other a title to real property are reduced to two: *descent*, where the title is vested in a man by the single operation of the law on the decease of the person through whom he derives his title; and *purchase*, where the title is vested in him by his own act or agreement, and which includes every other mode of coming to an estate whatever besides descent, whether by devise, gift, or grant of any kind.

The principal distinctions between these two modes of acquiring estates are these:—1st. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not confined to the blood of some particular ancestor; and 2dly, An estate acquired by purchase does not render the owner responsible for the acts of the ancestor, as an estate by descent does.

It is a rule, that where the heir takes any thing which vested or *might* have vested in the ancestor, the heir shall be in by descent; but otherwise he shall take by purchase. As if a man buy an estate, and take a conveyance to him and his heirs; or if a remainder be limited by a stranger to the right heirs of A, who has no estate in the premises, this will be an estate by purchase.

Formerly, where an ancestor devised his estate to his heir at law, so that the heir took the same estate, and neither more nor less than he would have had by descent, he was in by descent; but now, by the recent act for the amendment of the law of inheritance, 3 & 4 Wm. IV. c. 106, which we shall notice more particularly presently, he takes in such case by purchase.

We shall reserve the consideration of who are and who are not capable of taking as heirs till we come to the subject of *escheat*, and confine ourselves for the present to the common law doctrine of inheritances; referring to what has been already advanced for the exceptions thereto, whether by *custom*, such as gavelkind, borough English, &c., or by *statute*, as in the case of fees tail, which, as we have seen, are restrained and regulated by the words of the original donation, and do not therefore entirely pursue the course of descent by the common law. For the better elucidation of the subject, it will be necessary briefly to state the true notion of kindred and the several degrees of consanguinity.

Consanguinity is the connexion or relation of persons descended from the same stock or common ancestor, and is either lineal or collateral.

Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between A and his father, grandfather, and so forth, in the direct ascending line; or between A and his son, grandson, great grandson, &c., in the direct descending line.

Collateral consanguinity is the relation subsisting between those who are descended from one common stock, but are not descended from or through one another, as brothers, nephews, uncles, cousins, &c.

In *lineal* consanguinity, every generation constitutes a degree, reckoning either upwards or downwards. Thus A is related to his father and to his son in the first degree, to his grandfather and to his grandson in the second degree, to his great grandfather and to his great grandson in the third degree, and so on. This mode of reckoning obtains equally in the canon, civil, and common law. But with regard to *collateral* consanguinity, there are two modes of reckoning the degrees, one adopted by the *canon* law, with which also the common law of England agrees, and the other by the *civil* law. The former, in reckoning the degree of consanguinity between collateral relations, count upwards from the most remote of the two persons to the common ancestor; and in whatever degree he is distant from the common ancestor, that is the degree in which they are said to be related. But the *civil* law counts upwards from either of the persons related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending. Thus, to give an instance from English history, Henry VII. was a collateral relation of Richard III. both being descended from their common ancestor Edward III. in the following manner:

EDWARD III.

Edmund, Duke of York, fifth son.

Richard, Earl of Cambridge.

Richard, Duke of York.

Richard III.

John of Gaunt, fourth son.

John, Earl of Somerset.

John, Duke of Somerset.

Margaret, Countess of Richmona.

Henry VII.

By the *canon* and *common* law they are considered as related in the fifth degree, that being the degree in which the farthest of them (Henry VII.) is removed from the common ancestor. But by the *civil* computation we must count up from Richard III. to Edward III., the common stock or ancestor, four degrees, and then down again from the said Edward to Henry VII., five more, making in the whole nine degrees; so that Henry VII. and Richard III. were related in the ninth degree according to the civilians.

We shall now proceed to state the principal rules or canons of inheritance, some of which have lately undergone considerable alteration by recent statutory enactments, that have set at rest long pending disputes, and thus tended in those particular points to a more perfect elucidation of the law of descent.

The *first* rule was, that inheritances shall lineally *descend* to the issue of the person who last died actually seised *in infinitum*, but should never lineally *ascend*.

The latter part of this rule, namely, "that inheritances shall never lineally ascend," is now entirely abrogated by the 3 & 4 Wm. IV. c. 106; and, on failure of the lineal descending line, the ancestor in the lineal ascending line is in every case admitted, in the order of inheritance, before his descendants. Thus the father will take before brothers or sisters; and if there be neither father nor brothers or sisters, or their descendants, a surviving grandfather will take before uncles or aunts.

Seisin, also, (or in incorporeal hereditaments that which is equivalent thereto) was necessary in order to make a party an ancestor from whom an estate of inheritance could be derived. A bare right to enter or be otherwise seised was not sufficient; for in such case *his* heir would not have been entitled at his death, but the heir of the person who *was* actually last seised. But this part of the rule also is now altered by the same act, which enacts, that "the person last *entitled* to the land" shall be considered to have been the purchaser thereof, unless it be proved that he inherited the same, and by the first section the expression "the person last entitled to the land," is to be construed to extend to the last person who had a right thereto, whether he did or did not obtain the possession, or the receipt of the rents or profits thereof.

In explanation of so much of the rule as still exists, we must observe, that till the death of the ancestor no person can be complete heir to him; he may have an heir apparent or presumptive, but *nemo est hæres viventis*. Heirs *apparent* are those whose right of inheritance is indefeasible, provided they outlive the ancestor, as the eldest son or his issue. Heirs *presumptive* are fathers, brothers, daughters, or the like, who under present circumstances are presumed likely to come to the inheritance, but may be prevented by the birth of a son.

The *second* general rule is, that the male issue shall be admitted in preference to the female; and this rule is so absolute, that the son of a second marriage shall succeed in preference to the daughters of the first.

The *third* rule is, that where there are two or more males in equal degree, as brothers, the elder shall inherit; but if there be only females, they all inherit as coparceners. In the latter case, however, where the succession to the crown is in question, the right of primogeniture subsists; and the succession to dignities and honours shall not fall on all, but shall rest in abeyance till the crown confers them on such female heirs or heiresses as it pleases.

The *fourth* canon is, that the lineal descendants *in infinitum* of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done had he been living. Thus the child, grandchild, or great grandchild, either male or female, of the eldest son, succeeds before the younger son, and so on *in infinitum*. And these representatives shall take neither more nor less, but just so much as the principals would have done. As if there be two sisters, Margaret and Charlotte, and Margaret dies leaving six daughters, and then the father of the two sisters dies without other issue, these six daughters shall take among them exactly the same

as their mother Margaret would have done had she been living, that is, a moiety of the father's lands between them in coparcenary; so that if his land were divided into twelve parts, Charlotte would have six parts, and the six daughters of Margaret one apiece. This is called succession *per stirpes*.

The *fifth* rule is, that, on failure of lineal descendants or issue of the person last seized, the inheritance shall descend to his collateral relations being of the blood of the first purchaser, and subject to the last preceding rules. Thus, if G. S. acquires land either by sale or gift, or by any other method except descent, and it descends to J. S. his son, and J. S. dies seized thereof without issue, whoever succeeds to this inheritance must be of the blood of G. S. The great principle upon which the law of collateral inheritances depends is, that, upon failure of issue of the last proprietor, the estate shall descend to the blood of the first purchaser; or, that it shall result back to the heirs of the body of that ancestor from whom it either really had or is supposed by legal fiction to have descended, according to the rule laid down, that he who would have been heir to the father of the deceased shall also be heir to the son,—a maxim that will hold universally.

The *sixth* canon was, that the collateral heir of the person last seized must be his next collateral kinsman of the *whole blood*. As to this rule, as regards the exclusion of the half blood, we need only refer to the recent statute to show that it no longer exists. (See *post*, 560.)

The *seventh* and last canon is, that in collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near), unless where the lands have in fact descended from the female.

We shall now detail more particularly the provisions of the recent act for the amendment of the law of inheritance, 3 & 4 Wm. IV. c. 106; and, in order to understand the full extent of its operation, it is necessary to observe, that by the first section the word *land* is declared to extend throughout to all manors, advowsons, messuages, and all other hereditaments, corporeal or incorporeal, whether of freehold, copyhold, or any other tenure, and whether descendible according to the common law, or the custom of gavelkind, borough English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and to any possibility, right, or title of entry or action, or other interest capable of being inherited, and whether in possession, reversion, remainder, or contingency.

The act then proceeds to enact, That in every case descent shall be traced from the purchaser; and, to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title require, the person *last entitled* to the land shall, for the purposes of this act, be considered to have been the *purchaser* thereof unless it be proved that he inherited the same, in which case the person from whom he inherited it shall be considered to have been the purchaser unless it be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be

considered to have been the purchaser, unless it be proved that he inherited the same.

When any land shall have been devised, by any testator who shall die after the 31st December, 1833, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land *as a devisee, and not by descent*; and when any land shall have been limited, by any assurance executed after the said 31st December, 1833, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a *purchaser* by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.

When any person shall have acquired any land by purchase under a limitation "to the heirs," or "to the heirs of the body," of any of his ancestors, contained in an assurance executed after the said 31st December, 1833, or under a limitation "to the heirs" or "to the heirs of the body" of any of his ancestors (or under any limitation having the same effect) contained in a will of any testator who shall depart this life after the said 31st December, 1833, then and in any of such cases such land shall descend, and the descent thereof shall be traced, as if the ancestor named in such limitation had been the *purchaser* of such land.

No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent.

Every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue.

None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

Where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor or her descendants shall be the heir or heirs of such person in preference to the mother of a less remote male paternal ancestor or her descendants; and where there shall be a failure of male paternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor and her descendants shall be the heir or heirs of such person in preference to the mother of a less remote male maternal ancestor and her descendants.

Any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood and his issue where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother.

When the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the 1st January, 1834.

This act shall not extend to any descent which shall take place on the death of any person who shall die before the 1st January, 1834.

Where any assurance executed before the 1st January, 1834, or the will of any person who shall die before the same 1st January, 1834, shall contain any limitation or gift to the heir or heirs of any person, under which the persons answering the description of heir shall be entitled to an estate by purchase, then the persons who would have answered such description of heir if this act had not been made shall be entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said 1st January, 1834.

In establishing a claim by descent, it must first be shown who was last legally seised, or, in other words, in actual possession, or in the receipt of the rents of the property sought to be recovered (technically termed, in real actions, the *esplees*), and then to prove his death; and next, all the different links in the chain, which will show that the claimant is the next and proper heir of the person so last actually seised, and the times of each death, or at least to show successively through whom the right from time to time descended, or, had they been living, would have descended from the person last seised to the claimant. If the claimant insists that he is lineal heir, he must prove the death of the person who so died seised, his marriage, and the birth of his son, then the marriage and death of such son, and the birth of his son, his marriage and death, and the birth of the claimant. If he claim by collateral descent, then the marriages, births, and deaths, and the identities of each relative through whom the pedigree is to be established must be shown, so as to prove that the claimant is the nearest and oldest surviving collateral heir. If in any part of the pedigree the claim be through the younger brother of several, then the deaths of the elder brothers or other elder collateral relations must be shown; and it is usual and prudent to be prepared to prove affirmatively that each of them died unmarried, or at least without issue, so as to avoid any doubt upon the trial. It has even

been supposed, and stated in a very valuable work, that this latter evidence is essential even in the first instance; but that supposition has been recently refuted; and it suffices in a trial of ejectment (at least in the first instance) to prove the death of every elder relative; and then, if the opponent should prove his marriage, and the birth of a child, the claimant may prove in reply that he died at such a time, at such an age, or under such circumstances, as not to impede the course of descent relied upon. Thus it was held, that proof by an old member of the family, that many years before a younger brother of the person last seised had gone abroad, and that the repute of the family was that he had died there, and that the witness had never heard in the family of his having been married, is *prima facie* evidence that the party was dead without lawful issue, so as to entitle the next claimant by descent to recover in ejectment. Lord Ellenborough observed, the evidence was sufficient to call upon the defendant to give *prima facie* evidence at least that the younger brother was married; for what other evidence could the lessee of the plaintiff be expected to produce that he was not married, than that none of the family had ever heard that he was. But, in deducing a title to a purchaser, it is usual (unless where the facts may happen to be disclosed by recitals in old deeds executed twenty or thirty years back) to require some satisfactory evidence of the death and failure of issue capable of inheriting of every person through whom the title must be deduced.

It is usual on the trial to produce a pedigree, at least to assist the judge; and perhaps the jury, in following the evidence. There are two modes of establishing a pedigree: the first, by the testimony of old witnesses well acquainted with every member of the family and the events respecting them; and the second, by copies of registries, and proof of identity of the parties therein referred to. Hearsay and reputation are admitted in evidence in cases of pedigree. It is usually found that the evidence of perhaps one old intelligent witness (especially if a female) will dispense with the necessity of any other proof, though it is certainly advisable to have in court copies of the registries of marriages, births, and burials, ready to be proved by a person who has examined the same with the originals, so as to assist or corroborate the witnesses as to dates and other facts.¹

CHAPTER XII.

Of Title by Purchase.

TITLE by *purchase* may be defined to be the right to lands and tenements which a man acquires by any means other than by descent. It is not necessary that something should be given in return for that which is thus acquired; for, in the legal sense of the term *purchase*,

¹ Chit. Gen. Prac. 276.

if a man freely give me an estate by will or otherwise, I am a purchaser. An estate tail is an estate by purchase, since its properties, as to enjoyment and otherwise, are at variance with those of an estate by descent.

Estates by purchase are acquired by—1. Escheat; 2. Occupancy; 3. Prescription; 4. Forfeiture; and 5. Alienation; which last admits of many branches and ramifications.

I. ESCHSAT.

Escheat is the reverting back of an estate to the lord of the fee, or original grantor, upon an obstruction in the course of descent and consequent determination of the tenure; but in order, in this event, to complete the lord's title, he must enter upon the estate, or sue out his writ of escheat, or else his title is barred, as it may also be by any other act of waiver.

Escheats are divided into those arising from a failure of heirs capable of inheriting, and those from attainder. As to failure of heirs, the former chapter on *Title by Descent* must be referred to. Under this division falls the case where the being who would otherwise be entitled to inherit is a monster which hath not the shape of mankind, but in any part evidently bears a resemblance of the brute creation. Such a one cannot be heir, although born in wedlock. But mere deformity does not constitute a monster. So bastards cannot inherit; neither can they have any heirs, except such as are descended immediately from them. Thus, if a bastard acquires an estate, and marries, and dies without issue, although his mother and father, and their several children (nominally his brothers, as descending from the same common parents), be then living, yet he has no heir, and the estate must escheat. So if a man's only relations are aliens, the estate shall escheat, as they cannot inherit; neither can they have heirs, as they can hold no property here of a heritable quality. If a man be made a *denizen* by letters patent, his sons born thereafter may inherit, though one born before denization cannot; but if the father be *naturalized*, then indeed his eldest son shall inherit, though born before such naturalization, as this has a retrospective effect.

By attainder, ~~until~~ the recent alteration in the law of inheritance, the blood of the person attainted became so corrupt as to be no longer inheritable. He was thereby rendered not only incapable himself of inheriting or of transmitting his own property by heirship, but he also obstructed the descent of lands to his posterity in all cases where they were obliged to derive their title through him from any remote ancestor. But now the 2 & 3 Wm. IV. c. 106, § 20, enacts, That when the person from whom the descent of any lands is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the 1st Jan. 1834.

If a copyholder be attainted of treason or felony, his copyhold is forfeited to the lord, yet, by the custom of some manors, the

son may inherit from his father notwithstanding the attainder of the latter. A copyhold of inheritance was held not to be forfeited by a conviction for felony without attainder, where there was no special custom to that effect.¹ Where a copyholder was convicted of a capital felony, but pardoned on condition of remaining two years in prison, and the lord did not take any steps for seizing the copyhold, it was held that at the expiration of two years the copyholder might maintain an ejectment for the land against one who had ousted him, inasmuch as the pardon restored his competency to hold lands,² and the estate did not vest in the lord without some act done by him.

By the statute 54 Geo. III. c. 145, it is enacted, that no attainder for felony, after the 27th July, 1814, (except in cases of the crime of high treason or of the crime of petit treason or murder, or of abetting, procuring, or counselling the same), shall extend to the disinheriting of an heir, nor to the prejudice of the right or title of any person or persons other than the right or title of the offender or offenders during his, her, or their natural lives only; and that it shall be lawful for every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained if no such attainder had been, to enter into the same.

In regard to estates in the hands of trustees, by the 4 & 5 Wm. IV. c. 23, it is enacted, that where any person seised of any land upon any trust or by way of mortgage dies without an heir, it shall be lawful for the Court of Chancery to appoint a person to convey such land, in like manner as is provided by the 11 Geo. IV. & 1 Wm. IV. c. 60 in case such trustee or mortgagee had left an heir and it was not known who was such heir; and such conveyance shall be as effectual as if there was such heir.

And no land, chattels, or stock vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to his majesty, his heirs or successors, or to any corporation, lord of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his co-trustee, or descend or vest in his representative, as if no such attainder or conviction had taken place.

The several provisions of this act shall extend to every case of a trustee having some beneficial estate or interest in the same subject, or some duty as trustee to perform, and also to every case of a trust arising or resulting by implication of law or by construction of equity.

Provided, that nothing in this act shall prevent the escheat or forfeiture of any land, chattels, or stock vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such land, chattels, stock, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this act had not passed.

And whereas it is expedient to relieve persons beneficially entitled to real or personal property which has already escheated or become forfeited to his majesty, to corporations, to lords of manors, or others,

¹ *Rex v. Willis*, 5 B. & A. 510.

² 6 Geo. IV. c. 25.

by any of the means aforesaid, it is enacted, That in all cases where before the passing of this act any person possessed of or entitled to any land, chattels, or stock, or any right to or interest therein, as a trustee thereof, either in whole or in part, or jointly with some other trustee or trustees, shall have died without an heir, or shall have been convicted of any offence whereby the said land, chattels, or stock have escheated or been forfeited, or become subject to any escheat or forfeiture, then and in every such case the said land, chattels, or stock, or the right thereto or interest therein which hath become subject to escheat or forfeiture by reason thereof, shall be subject to the order and disposition of the Court of Chancery, for the use of the party beneficially interested therein, in such manner and subject in all respects to such rights and incidents and to such orders and regulations of the said court, under the provisions of the said act of 11 Geo. IV. & 1 Wm. IV. as if such person so dead without an heir, or so convicted as aforesaid, were out of the jurisdiction of or not amenable to the process of the court, without having been so convicted. Provided, that nothing in this clause shall extend to any land, chattels, or stock now vested in any person by virtue of any grant made subsequently to the time when such escheat or forfeiture first occurred, or to any land, chattels, or stock which more than twenty years prior to the passing of this act shall have been actually vested in possession or reduced into possession by the party entitled thereto by virtue of any such escheat or forfeiture.

Before concluding the head of escheat, we will mention one singular instance in which lands held in fee simple are not liable to escheat to the lord, even when their owner is no more, and has left no heirs to inherit them. This is in the case of a corporation. If the corporation is dissolved, the donor and his heirs shall have the land again in reversion, and not the lord by escheat; and this is upon an implied tacit agreement, which the law annexes to the gift or grant, that such shall be the case.

II. OCCUPANCY.

Occupancy is the taking possession of those things which before belonged to nobody. This, as we have seen, was the true ground and foundation of all property, and of holding those things in severalty which by the law of nature, unqualified by that of society, were common to all mankind. This right, as far as real property is in question, is very much narrowed by our laws, and exists but in one solitary instance. It is where a man has an estate granted to him alone (without mention of heirs &c.) for and during the life of another. Here the question is, if the grantee die during the life of the *cestuique vie*, since the estate was to continue in some one till the *cestuique vie's* death, what is to become of it? who is to enjoy this estate? For several reasons, neither the grantor nor the heir, nor the executors or administrators, could formerly take possession of such estate by right, and the law allowed the first occupier to continue the enjoyment as long as he could, except the reversion of the fee were in the crown. He was called the common occupant. If an estate of such a nature be granted to a man and his heirs, then the heir is entitled to it as *special occupant*.

However, common occupancy is now abolished; for where there is no special occupant appointed by the deed or grant, by the 29 Car. II. c. 3, the tenant *pur autre vie* may devise it by will, or it shall go to the executors or administrators, and be assets in their hands for payment of debts; and by the 14 Geo. II. c. 20, the surplus of such estate, after payment of debts shall go in the course of distribution like any chattel.

III. PRESCRIPTION.

When a person can show no other title to property than that he and those under whom he claims have immemorially used to enjoy it, he is said to claim it by *prescription*. The subject of this kind of title must be some *incorporeal* hereditament, as a right of way, right of common, or the like; for no prescription can give a title to *lands* or other corporeal substances, of which more certain evidence may be had. Neither can it be for a thing which cannot be raised by grant; for prescription presupposes the loss of a once existing grant. That which is to arise by matter of record cannot be prescribed for, but must be claimed by grant entered of record. And of things incorporeal which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; whether a man shall prescribe in the *que* estate (that is, in himself and those whose estate he holds), or in himself and his ancestors. For if a man prescribes in the *que* estate, nothing is claimable by this prescription but such things as are appendant, incident, or appurtenant to lands; but if he prescribes for himself and his ancestors, he may prescribe for any thing that lies in grant, whether appurtenant or in gross. That which is in common right, and which the law gives, ought not to be prescribed for.

Estates acquired by prescription are not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule; for if a man prescribe for a right in himself and his ancestors, it will descend only to the blood of that line of ancestors in which he so prescribes; but if in a *que* estate, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether it were acquired by descent or purchase.

All that need be stated further on this subject is contained in the recent act, 2 & 3 Wm. IV. c. 71, which, after reciting, that whereas the expression "time immemorial," or "time whereof the memory of man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of king Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice, enacts, That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any *right of common* or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the king, his heirs or successors, or any land being parcel of the duchy of Lancaster or of the duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, (except such matters and things as are herein specially provided for, and except tithes, rent, and services) shall, where such

right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of *thirty* years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years; but nevertheless the claim may be defeated in any other way by which the same is now liable to be defeated. And when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of *sixty* years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

And no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any *way* or other *easement*, or to any *watercourse*, or the use of any *water*, to be enjoyed or derived upon, over, or from any land or water of our said lord the king, his heirs or successors, or being parcel of the duchy of Lancaster or of the duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of *twenty* years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated. And where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of *forty* years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

And when the access and use of *light* to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of *twenty* years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Each of the respective periods of years herein-before mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof and of the person making or authorizing the same to be made.

In all actions upon the case and other pleadings wherein the party claiming may now by law allege his rights generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters in this case mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sus-

tain or rebut such allegation. And in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exemption, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

In the several cases mentioned in and provided for by this act, no presumption shall be allowed and made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim.

The time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted or abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

When any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned during the continuance of such term shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

IV. FORFEITURE.

Forfeiture, says Blackstone, is a punishment annexed by law to some illegal act or negligence in the owner of the lands, tenements, or hereditaments, whereby he loses all his interest therein, and they go to the party injured as a recompence for the wrong which either he alone or the public together with him hath sustained; and it occurs, 1. By certain crimes and misdemeanors; 2. By alienation contrary to law; 3. By non-presentation to a benefice, when, as we have already seen, the forfeiture is denominated a lapse; 4. By simony; 5. By non-performance of conditions; 6. By waste; 7. By breach of copyhold customs; and 8. By bankruptcy.

1. The first of these subjects, namely, that forfeiture which emanates from crimes and misdemeanors, we shall leave for a subsequent page, referring also to a former page (562 &c.), where we have already pointed out some of the alterations lately made in the law relating thereto.

2. Lands may be forfeited by alienating or conveying them to another contrary to law; as against the mortmain acts; or to an alien; or by particular tenants, as they are termed, that is, those who have only a limited interest in property, as tenants for life or for years.

The law of forfeiture for alienation in mortmain arose (we may briefly state) from that grasping desire which was shown, prior to the revolution, by the catholic clergy, to get into their hands, as far as they could, all the landed property in the kingdom, and which they endeavoured to effect by the influence they had over the minds of men in a dying state. To remedy this growing evil, among other acts, the 9 Geo. II. c. 36 was passed, whereby it is enacted, That no manors, lands, tenements, rents, advowsons, or other hereditaments corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, security for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, signed, or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust for the benefit of any charitable uses whatsoever, unless such gift, conveyance, appointment, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stock in the public funds), be and be made by deed indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor (including the days of execution and death), and be enrolled in the high court of chancery within six calendar months next after the execution thereof, and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar months before the death of the donor or grantor (including the days of the transfer and death), and unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him.

Provided always, that nothing herein before mentioned relating to the sealing and delivering of any deed or deeds twelve calendar months at least before the death of the grantor, or to the transfer of any stock six calendar months before the death of the grantor or person making such transfer, shall extend or be construed to extend to any purchase of an estate or interest in lands, tenements, or hereditaments, or any transfer of any stock, to be made really and *bonâ fide* for a full and valuable consideration actually paid at or before the making such conveyance or transfer, without fraud or collusion.

And it was further enacted, that all gifts, grants, conveyance, ap-

pointments, assurances, transfers, and settlements of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting them, or of any stock, money, goods, chattels, or other personal estate, or securities for money to be laid out in the purchase thereof, to or in trust for any charitable uses whatsoever, which shall at any time after the 24th June, 1736, be made in any other manner or form than is by this act directed, shall be absolutely null and void.

Provided, that the act shall not extend to make void the disposition of any lands, tenements, or hereditaments, or of any personal estate to be laid out in the purchase thereof, made in any other manner or form, to or in trust for either of the two universities in England, or any of the colleges or houses of learning therein, or to or in trust for the colleges of Eton, Winchester, or Westminster.

By the 5th section it was provided, that no such college or house of learning should hold a greater number of advowsons than should be equal to a moiety of the fellows, or, where there were no fellows, to a moiety of the students on the foundation of such college; but by the 45 Geo. III. c. 101, this section of the statute is repealed, so that they may now hold any number of advowsons. But, it is said, a licence from the crown is still necessary when a college purchases an advowson. Many colleges are provided with licences to purchase to a specified extent, and they have been held valid.

It has been determined that this statute (9 Geo. II.) extends to the devise of lands to trustees to be sold and the produce of the sale converted to charitable uses. Money secured upon mortgage of turnpike tolls, poor rates, and county rates, and the residue of lands and personalty disposable by will in trust for the benefit of any charitable use, are likewise within the scope of the act. And under this statute a grant of land to a charity, where there is a resulting trust for the grantor during his life, is void, as it is not an interest to take effect in possession immediately; but a reservation to the grantor of a power for regulating the charity would not in any way invalidate it. A conveyance bad only in part under the statute is not wholly void, but may pass so much of the estate as is not demised in mortmain.¹

Alienation of lands to an alien is likewise a forfeiture; for, as we have already stated, though the conveyance is good, yet the alien can only hold for the queen's benefit. In such a case the vendor, having received the consideration for the purchase, has no equity to set it aside.²

Alienations by particular tenants, when they are greater than the law allows, and divest the remainder or reversion, are forfeitures to him whose right is attacked thereby. As if tenant for life alienes *pur autre vie*, in tail, or in fee, here his own particular estate is forfeited to the remainder man or reversioner. The same holds with respect to all tenants of the mere freehold (or of an estate not of inheritance) and of chattel interests. There are many species of conveyance, however, which, though purporting to convey a greater estate than the tenant may have, do not occasion a forfeiture: these are therefore called *innocent*

¹ See the numerous cases upon this subject in Chit. Eq. Ind., tit. *Charity*, II. 1; also Highmore on Mortmain, *passim*.

² See *ante*, 227.

conveyances. By grant, lease for years, bargain and sale, lease and release, the grantor, lessor, &c. can pass no interest beyond the compass of his own estate, and therefore by these no forfeiture is incurred. But a feoffment, if purporting to exceed the bounds of the estate, formerly divested the remainders and reversion, and created a new and wrongful fee simple: hence this was termed a *tortious* conveyance; and in this case the person who had the immediate remainder or reversion was entitled to *enter*, and thus restore all the estates except that of the feoffor, which was thereby absolutely forfeited. If, however, the reversioner or remainder-man by deed *confirmed* the estate so granted, it became as valid as if the confirming party had joined in the original grant. But now the 8 & 9 Vic. c. 106, § 4, declares that a feoffment, made after the 1st October, 1845, shall not have a *tortious* operation.

Equivalent, both in its nature and consequences, to an illegal alienation by the particular tenant, is the civil crime of *disclaimer*. If a tenant set his landlord at defiance and do any act disclaiming to hold of him as a tenant (as, for instance, if he attorn to some other person), no notice to quit will be necessary, for in such case the landlord may treat him as a trespasser. It has, however, been held, that a refusal to pay rent to a devisee under a contested will, accompanied with a declaration that he (the tenant) was ready to pay the rent to any person who was entitled to receive it, was not a disavowal sufficient to dispense with the necessity of a regular notice. If it be known to a landlord that his tenant has disclaimed, though he may compel the performance of covenants by an action of covenant, yet he should do so promptly, or take advantage of the disclaimer and proceed for the forfeiture; for otherwise, as to third persons coming into possession under the tenant, it will be adverse, and the Statute of Limitations will begin to run. A devisee in fee may by deed without notice of record disclaim the estate devised, and it seems that thereupon the estate would vest by such disclaimer in the heir.

3. Of the forfeiture occasioned by *lapse* we have already said sufficiently under the head of *advowsons*.

4. By *simony*, also, the right of presentation to a living is forfeited, and vested *pro hac vice* in the crown. This subject we have already introduced to our readers, and the former pages alone need be referred to.

5. The next kind of forfeitures are those occasioned by *breach or non-performance of a condition* annexed to the estate, either expressly by deed at its original creation, or impliedly by law; which we have also considered at large in a former chapter.

6. *Waste* is another cause of forfeiture, and it consists of a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion. It is either voluntary or permissive; the one being a commission of damage, and the other an omission of reparation. A removal of those things which the law regards as fixtures, though they were put up by the tenant in possession, constitutes waste. But damage arising by the act of providence can never constitute waste in a legal sense; and though a house be damaged or destroyed by fire arising from carelessness, yet (by 6 Ann. c. 31) no action will lie against the tenant.

Waste may be committed in ponds, warrens, dove-cotes, and the like, by such an excessive destruction of the creatures belonging thereto as to deteriorate the reversioner's interest therein. So cutting unfit (and in some cases, any) timber. The conversion, too, of land from one species of culture to another, as wood, meadow, or pasture, into arable, and the like; and in such cases the improvement that the property undergoes will not render the tenant less liable to its consequences. Therefore to open new mines is waste; though the working of old mines is not. In treating of the different kinds of estates we have already shown what tenants are, and what are not, liable to the consequences of waste.

The punishment for waste committed was, by common law and the Statute of Marlbridge, only single damages, except in the case of a guardian in chivalry, who also forfeited his wardship by the provision of the Great Charter. But the Statute of Gloucester directs that the tenant (whether tenant in dower, by curtesy, for life, or for years) shall lose and forfeit the place wherein the waste is committed, and also treble damages to him that hath the inheritance.

7. A seventh species of forfeiture is that of copyhold estates for *breach of the custom of the manor*. Copyhold estates are not only liable to the same forfeitures as those which are held in socage, for treason, felony, alienation, and waste, whereupon the lord may seize them without any presentment by the homage; but also to peculiar forfeitures annexed to this species of tenure, which are incurred by the breach of either the general customs of all copyholds, or the peculiar local customs of certain particular manors. And we may observe, that, as these estates were originally holden by the lowest and most abject species of tenure, the marks of feudal dominion still continue much the strongest upon this kind of property. Most of the offences which occasioned a resumption of the fief by the feudal law still continue to be causes of forfeiture in many of our modern copyholds; as, subtraction of suit and service, disclaiming to hold of the lord, or swearing himself not his copyholder, or refusing, when sworn of the homage, to present the truth according to his oath. In these and a variety of other cases the forfeiture does not accrue to the lord till after the offences are presented by the homage, or jury of the lord's court baron.

8. By *bankruptcy* and *insolvency* the debtor forfeits all his real as well as personal property, to be divided among his creditors, till their debts are fully paid, when the surplus (if any exists) of the produce of such property will belong to him. Of these subjects we shall say no more in this place, as we shall be required to devote considerable attention to each in our future pages.

V. TITLE BY ALIENATION.

This is the most common means of acquiring a title to real estates; and under it may be comprised any method whereby estates are voluntarily resigned by one man and accepted by another, whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties.

In examining the nature of alienation, let us inquire, 1st, *Who* may

aliene, and to whom; and 2dly, *How* a man may aliene; or the usual modes of conveyance.

1. *Who may aliene*.—As all persons in possession of property are *prima facie* capable both of conveying and purchasing, unless the law has laid them under any particular disabilities, it will be better rather to consider the *incapacity* than the *capacity* to alienate.

A man who had only the bare *right* either of possession or of property could not formerly convey it to another. Reversions and remainders might be granted, because the possession of the particular tenant is considered as the possession of him in reversion or remainder; but *contingencies* and mere *possibilities*, though they might be released, or devised by will, or would pass to the heir or executor, yet could not (it was said) be assigned at law to a stranger, unless coupled with some present interest. But now the 8 & 9 Vic. c. 106 enacts, that after the 1st day of October, 1845, a *contingent*, an *executory*, and a *future* interest, and a *possibility coupled with an interest*, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained,—also a *right of entry*, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure,—may be disposed of by deed; but that no such disposition shall, by force only of this act, defeat or enlarge an estate tail; and that every such disposition by a married woman must be made conformably to the provisions of the 3 & 4 Wm. IV. c. 74 (Abolition of Fines and Recoveries Act.)

Persons attainted of treason, felony, and *præmunire*, cannot convey from the time of the offence committed, provided attainder follows. They may purchase, but such purchase would be for the crown's benefit, not for their own. So corporations may purchase lands; but, unless they have a licence to hold lands in mortmain, their purchase is forfeited to the lord of the fee.

Idiots and persons of nonsane memory and infants (as we have already shown), and persons under duress, can neither purchase nor convey effectually. Their acts are not indeed actually void, but voidable, though, as regards a person *non compos*, not by himself; for it is a maxim, that no man can stultify himself, or plead his own disability. With respect to a lunatic, the conveyance must be clearly shown not to have been during a lucid interval.

How far aliens may convey has been already shown.

As to married women: before the 3 & 4 Wm. IV. c. 74, the *conveyance* or other contract of a married woman (except by some matter of record, as a fine or recovery) was absolutely *void* at law, and not merely *voidable*, and could not be affirmed or made good by any subsequent agreement. By that act, however, fines and recoveries were abolished, and a married woman has been enabled by it, since the 31st December 1833, with the concurrence of her husband, in every case (except that of being a tenant in tail, for which special provision is made) to dispose of lands of any tenure by deed, and also by deed to release or surrender or extinguish any estate or power that she alone, or she and her husband in her right, may have in lands of any tenure, as fully and effectually as if she were a *feme sole*.

The preceding observations apply only to the *legal* estates of a married woman. Where property is settled to her *separate* use without any restraint or alienation, she is in *equity* considered as a *feme sole*, and may convey or deal with it as such, and her conveyances and contracts will be supported in equity; and this rule existed before, and is quite independent of, the above-mentioned statute.

By the 8 & 9 Vic. c. 106, § 7, after the 1st October, 1845, an estate or interest in any tenements or hereditaments in England, of any tenure, may be *disclaimed* by a married woman by deed; every such disclaimer to be made conformably to the 3 & 4 Wm. IV. c. 74.

2. We shall next consider *how* a man may convey, or the several modes of conveyance. Legal evidences of transfers of real property are called the common assurances of the kingdom, being such whereby every man's estate is assured or confirmed to him. They are of four kinds: 1. By deed; 2. By matter of record, or assurance transacted in the queen's courts of record; 3. By special custom, obtaining only in particular places and relating to a particular species of property; and 4. By devise. We shall treat of each kind separately.

CHAPTER XIII.

Of Alienation by Deed.

In treating of deeds, we shall consider, first, their general nature; and secondly, their several sorts or kinds, with their respective incidents.

I. With respect to the *general nature* of deeds, let us inquire, 1st, What a deed is; 2dly, Its requisites; and 3dly, How it may be avoided.

1. A deed is a writing sealed and delivered by the parties. It is the most solemn act a man can possibly perform with relation to the disposal of his property; and therefore a man is always estopped by his own deed, and cannot prove (in law) any thing in contradiction to what he has once so solemnly and deliberately avowed. If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties; and each copy should be cut or indented in a waving line on the top or side, to tally or correspond with the other; whence such a deed derived the name of *indenture*.¹ The late Transfer of Real Property Act, 7 & 8 Vic. c. 76, (now repealed) enacted, that it should not be necessary in any case to have a deed indented; and that any person not being a party to a deed might take an immediate benefit under it in the same manner as he might under a deed poll. And the 8 & 9 Vic. c. 106, which repealed that act, and is substituted in its room, contains a clause to the same effect, (sec. 5), "That a deed executed after the 1st day of October, 1845,

¹ Formerly, when deeds were more concise than at present, it was usual to write both parts or copies upon the same skin of parchment, and then to write between the two copies some word through which the

indented line was cut, leaving one half of the word on one part or copy, and the other half on the other, whereby any fraudulent substitution was prevented.

purporting to be an indenture, shall have the effect of an indenture, although not actually indented;¹ and that the benefit of a condition or covenant respecting any tenements or hereditaments may be taken, although the taker thereof be not named a party to the same indenture."

Requisites of Deeds.—The first requisite we must mention is, that all the parties to be bound by a deed must be of ability to contract; there must also be a thing to be contracted for; all which must be sufficiently expressed. Then there must be a good and sufficient consideration appearing upon the face of it. It must not be upon an usurious contract, nor upon fraud or collusion, either to deceive purchasers *bonâ fide* or just and lawful creditors; any of which bad considerations will vacate the deed, and subject such persons as put the same in ure to forfeitures, and often to imprisonment. A deed also, or other grant, made without any consideration is, as it were, of no effect; for it is construed to enure or be effectual only to the use of the grantor himself. This, it has been said, applies only to the case of a bargain and sale, which herein is said to differ from a gift, as the latter may be without any consideration or cause at all; but a bargain and sale must always have some meritorious cause moving it, and cannot be without it.

The consideration may be either a *good* or a *valuable* one. A *good* consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation, being founded on motives of generosity, prudence, or natural duty; and the circumstance of the donee being illegitimate does not invalidate it. A *valuable* consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant, and is therefore founded on motives of justice.

A *voluntary* conveyance is good, both in law and equity, against the party himself. It was originally considered that if a person made a voluntary grant of lands, although he could not resume them himself, yet if he afterwards made another conveyance of them for a valuable consideration, the first grant would be void with regard to this purchaser under 27 Eliz. c. 4; and though decided by Lord Mansfield and the court that there must be some circumstances of fraud to vacate the first conveyance, and that the want of consideration alone was not sufficient, yet it has been more recently determined, that a voluntary settlement of lands made even in consideration of mutual love and affection, and in favour of the nearest relations, as parents or children, is void as against a subsequent purchaser for a valuable consideration, though with notice of a prior settlement before all the purchase money was paid or the deeds executed, and there was no fraud in fact in the transaction;² for the law, which in all cases is the judge of fraud and covin arising out of facts and intents, infers fraud in this case upon the construction of the 27 Eliz. c. 4.

If a person is indebted at the time of making a voluntary grant, or becomes so soon afterwards, it will be held fraudulent and void with respect to creditors under the 13 Eliz. c. 5, and 6 Geo. IV. c. 16.

¹ But even before these acts, a judge in court would have supplied the omission by indenting the instrument; although Lord Coke considered that a deed must be indented to make it valid. (Co. Litt. 143.)

² Doe v. Manning, 9 East. 59.

Next, a deed must be either written or printed on paper or parchment; and the printing of the signatures, instead of writing them, would not render such signatures less available.

It must also be duly stamped.

The matter must be set forth legally and orderly, sufficient in law to bind the parties. It is not absolutely necessary to use all the formal parts and technicalities of the deed; but, as these are calculated to convey the meaning in the best manner, they should always, as far as possible, be adopted; for, however persons out of the profession may cavil at the lengthened verbosity of deeds, experience has taught us that the use of them is in general a preventative against litigation.

The next requisite to a complete deed is the *reading* of it. This is necessary when any of the parties desire it; and if not done at his request, the deed is void as to him. If he can, he should read it himself. False reading will render that part of it void.

Next, it should be *signed* and *scaled*; though the signing seems unnecessary, except in cases under the Statute of Frauds, and in deeds executed under powers.

Next is the *delivery*, the form of which is by placing the hand or a seal (as though in the act of sealing) upon the seal, and using the words, "I deliver this my act and deed," or words of a similar import.

Deeds may be avoided by the absence of any of the foregoing requisites, except as already mentioned. They may also be avoided by matter *ex post facto*, as by rasure, interlining, or altering any material part, unless a memorandum be made thereof at the time of the execution and attestation; also by breaking off or defacing the seal, if done intentionally by the parties. If several join in a deed, and be *separately* bound thereby, the breaking off the seal of one party with intent to discharge him from future liability will not alter the liability of the others. Also by *eviction*: though when property passes by a deed, this mode is insufficient to re-pass the property, a re-conveyance being requisite, or, in the case of a lease, a surrender. Also, by the disagreement of such whose concurrence is necessary; as a husband, where a feme covert is concerned, or in some cases where a wife after the death of a husband refuses to acknowledge the deed, or an infant on his coming of age, or a person under duress, when the disabilities are removed.

Lastly, a deed may be avoided by a judgment or decree of a court of law or equity, either where fraud, force, or foul practice of any kind were used in obtaining it, and *a fortiori* where it proves to be an absolute forgery.

II. *The kinds of deeds.*—There are several kinds of deeds or conveyances; some termed *original*, as feoffments, gifts, grants, leases, exchanges, and partitions; and others *derivative*, as releases, confirmations, surrenders, assignments, and defeasances.

1. **FEOFFMENTS.**—A feoffment is a conveyance operating by transmutation of possession, and it is essential to it that seisin be passed. Therefore it can only be used for the transfer of *freehold estates in possession*.

By the 8 & 9 Vic. c. 106, sec. 3, every feoffment made after the

1st day of October, 1845, other than a feoffment made under a custom by an infant, shall be void at law unless evidenced by deed.

And sec. 4 enacts, that a feoffment made after the 1st day of October, 1845, shall not have any *tortious* operation.

2. A *GIFT* is properly a *voluntary conveyance*, that is, without a consideration either of money or of blood; and it is void therefore against those who were creditors of the donor when it was made, though valid as to subsequent ones. There being no consideration, no use arises upon it; so that if it be of an estate of freehold in possession, it requires livery. The term *gift* is now generally restricted to an estate tail, the giver being called the *donor*, and the person taking the *donee*, &c. It differs little in form from a feoffment, except in the operative words, which are "give and grant."

3. *GRANTS* (*concessiones*) were the regular method by the common law of transferring the property of *incorporeal hereditaments*, or such things whereof *livery* could not be given. For which reason, all *corporeal hereditaments*, as lands and houses, were said to lie in *livery*, but *incorporeal hereditaments*, as advowsons, commons, rents, &c. were said to lie in *grant*. Now, however, by the 8 & 9 Vic. c. 106, all corporeal tenements and hereditaments, as regards the conveyance of the immediate freehold thereof, lie in *grant* as well as in *livery*.

4. *LEASES* form another kind of conveyance; but of these we have already treated under the head of *Landlord and Tenant*, see pages 332 &c. By the 8 & 9 Vic. c. 106, § 5, a lease required by law to be in writing, of any tenements or hereditaments, is void at law unless made by deed.

5. *EXCHANGES*.—An exchange is a mutual grant of *equal interests*, the one in consideration of the other. No *delivery* is necessary, but *entry* by each party is absolutely essential; so that if either die before entry, the exchange is void.

By *equal interests* is meant fee simple for fee simple, estate for life for estate for life, estate tail for estate tail, freehold for freehold, legal estate for legal estate, copyhold for copyhold of the same tenure. But exchanges under inclosure acts are not generally bound by these rules. Thus, exchanges may be between tenants for life and tenants in fee, freeholders and copyholders, and of legal for equitable estates.

An exchange can only be between *two parties*; the number of persons is immaterial.

By the Statute of Frauds, 29 Car. II. c. 3, a writing is in all cases necessary if the exchange be of freehold interests or of a term exceeding three years. And by the 8 & 9 Vic. c. 106, an exchange of any tenements or hereditaments not being copyhold is void at law unless made by deed.

The word "*exchange*" is indispensable, and implies a mutual warranty of title.

6. *PARTITIONS* (see *ante* 543), have already past under our consideration while treating of estates in coparcenary. By 8 & 9 Vic. c. 106, a partition of lands or tenements not being copyhold is void at law unless made by deed.

¹ The word "give" or the word "grant" except so far as the word "give" or the word "grant" may be not of parliament in a deed executed after the 1st October, 1845, will not imply any covenant in law, imply a covenant.—8 & 9 Vic. c. 106, § 4.

7. RELEASES.—A release is the relinquishment of a right or interest in lands or tenements to another who has an estate *in possession* in the same lands or tenements. There are five species:—1. By way of enlargement; as if he in remainder in fee release to particular tenant in possession. 2. By way of passing an estate; as if one coparcener or joint tenant release to the other. 3. By way of passing a right; as when the disseisee releases to the disseisor. 4. By way of extinguishment; as if my tenant for life make a greater estate than he is warranted, and I release to his grantee. 5. By way of entry and feoffment; as when the disseisee releases to one only of two disseisors.

There is a distinction between releases of *estates* and of *rights*. Releases of *estates* occur when there is privity between the releasing parties. A release of a *right* occurs where no privity exists; as in the case of discontinuance, disseisin, or abatement: here the disseisee may release his right to the disseisor, but then no estate passes, but only a bare right. The release of an estate admits of qualification (or reservation), as the lord may release his seignory in fee, in tail, for life, or for years. But a release of a right admits of no such qualification; for if released for a moment, it is gone for ever. A release to a remainder-man is a release to the particular tenant. A release of all demands extinguishes all actions, real and personal, and is the most ample which a person can make. To give operation to a release, the releasee must have the seisin or possession of, or a vested interest in the premises, either by livery, the Statute of Uses, or entry. It is the proper mode of extinguishing a right, an equity, a contingency, or a possibility; and the operative words of it are “release, remise, and for ever quit claim, and discharge.”

8. CONFIRMATIONS.—A confirmation differs from a release, as it validates and establishes that estate or interest which the confirmee already has. Void estates, therefore, cannot be confirmed. A confirmation to a tenant of the freehold or inheritance cannot be so worded as to confirm less than the whole estate. As a disseisor always acquires a tortious fee simple, a confirmation to him is of the whole fee. As to a term of years, it may be made of part.

9. SURRENDERS.—A surrender is the yielding up or returning or relinquishing of a smaller estate to him who has a greater estate in the same lands in remainder or reversion immediately expectant on such smaller estate. It differs from a release in that the smaller is conveyed to the greater estate. In a surrender the less estate is *merged*, in a release *extinguished*. As there is necessarily a privity of estate between the surrenderor and surrenderee, no livery of seisin is necessary.

By 8 & 9 Vic. c. 106, a surrender in writing of an interest in any tenements and hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the 1st day of October, 1845, shall be void at law unless made by deed.

10. ASSIGNMENT.—An assignment is the transfer of one's whole interest in any estate; it is now generally appropriated to the transfer of *chattels*, real or personal, and equitable interests. It differs from an underlease, being a parting with the whole, as that is of part only. By 8 & 9 Vic. c. 106, an assignment of a chattel interest (not being copyhold) in any tenements or hereditaments, is void at law unless made by deed. The operative words are, “assigned, trans-

ferred, and set over," though usually the word "granted" is inserted, and in the assignment of chattels the words "bargained and sold" also.

11. **DEFEASANCES.**—A defeasance is a collateral deed made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated or totally undone. In this manner mortgages were in former times usually made, the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. This, when executed at the same time with the original feoffment, was considered as part of it by the ancient law, and for that reason only allowed; as no subsequent secret revocation of a solemn conveyance executed by livery of seisin was permitted, though when uses were introduced, a revocation of such uses was allowed by a court of equity. Things that are merely executory, however, (as rents, of which no seisin can be had till the time of payment, annuities, conditions, warranties, &c.) were always capable of being revoked by defeasances made subsequent to their creation. Defeasances are now seldom resorted to as separate deeds, it being better to make the conditions apparent in the deed; for the conveyance being absolute, if the defeasance on a separate instrument be lost, the proof thereof might be difficult and often impossible.

Conveyances under the Statute of Uses.

There yet remain to be mentioned some few conveyances, which have their force and operation by virtue of the Statute of Uses.

Uses and trusts are, in their original, of a nature very similar, or rather the same, answering more to the *fidei commissum* than the *usus fructus* of the civil law; which latter was the temporary right of using a thing, without having the ultimate property or full dominion over the substance; but the former, which was usually created by will, was the disposal of an inheritance to one in confidence or trust, that he should convey it, or dispose of the profits, to or at the will of another. Thus, if a feoffment was made to A and his heirs, to the use of or in trust for B and his heirs; here, at common law, A (the terretenant) had the legal property and possession of the land, but B (the cestuique use, or cestuique trust) was in conscience and equity to have the profits and disposal of it.

Uses were first introduced by the clergy to evade the statutes of mortmain, and were afterwards applied to prevent forfeitures during the civil wars between the houses of York and Lancaster, till at last they became a common practice in order to protect the settlement of estates according to the will of their owners. Many inconveniences, however, arose from this plan of conveyance, till at last the statute 27 Hen. VIII. c. 10, reduced the use into possession, as it is termed, and thereby made the cestuique use complete owner of the lands and tenements as well at law as in equity.

To the execution of a use by the statute, it is necessary that there be—1. A person to stand seized of the use in hereditaments; 2. A person capable of taking the benefit of such use; 3. Privity of person; 4. Privity of estate.

1. It must be a *person*; a corporation cannot stand seised to a use. It must be of *hereditaments*; for chattels, whether real or personal, are not within the statute.

2. There must also be a person capable of taking the benefit of the use; a limitation to a *corporation* is not good without a licence, as it would be within the statute of mortmain.

3. There must be privity of person; for a purchaser without notice and for a valuable consideration is not liable to the use.

4. Privity of estate; for he who comes in the post, or paramount the person limiting, is not liable to the use.

There cannot be a use upon a use. Hence also a use cannot be limited on a bargain and sale to any but the bargainee; for, till enrolment, the bargainee himself has but a use.

A use may commence *in futuro*; but the contingency on which it is to arise must be within a life or lives in being or twenty-one years afterwards, so as not to savour of a perpetuity. Uses so limited are called *springing uses*, and liable to destruction by destroying the estate out of which they are to spring.

A use may be limited to change, after execution, to another; as, to B for life, remainder to his first and other sons in tail, provided that if there be no issue living at the death of B to C in fee. This is a *shifting* or *secondary* use. If limited on an estate in fee, it cannot be barred or destroyed by the previous taker; but it is otherwise of an estate in tail.

Where a use is wholly or partially undisposed of, it *results* to the grantor.

With respect to *Trusts*:¹—1. Some take effect immediately by the deed which conveys the estate to the trustees; these are trusts *executed*. 2. If they are to be carried into execution by some future act to be done by the trustee, they are trusts *executory*.

The first have the same construction as legal estates; the latter are carried into execution so as best to answer the intention of the person creating them. Of the latter class are covenants to assign or surrender leasehold or copyhold lands to trustees upon trusts, to correspond to uses previously limited of freehold. Trusts *executed* cannot be afterwards varied by the interference of equity; but *executory* trusts may be altered or modified whenever they do not technically carry into execution the presumed object of the parties.

Cestuique trust may convey his interest to a stranger, and, if tenant in tail, might have suffered a common recovery or fine, though there were no legal tenant to the præcipe. Sometimes the cestuique trust may call in the legal estate, and by a bill in equity oblige the trustees to convey. If a trust and the legal estate become united in the same person, they, generally speaking, unite; the trust merging.

Trusts for Accumulation.—By an act known by the name of The Accumulation Act, 39 & 40 Geo. III. c. 98, no person thereafter (28th July, 1800) shall, by deed or will, settle real or personal property, so that the rents, issues, and profits, or produce, shall be wholly or partially accumulated for any longer term than the life or lives of such grantor,

¹ See tit. TRUSTEE AND CESTUIQUE TRUST, ante 412.

settlor, deviser, or testator, or the term of twenty-one years after his death, or during the minority of any person living or *en ventre sa mère* at the time of his death, or during the minority of any person who, under the uses and trusts of the deed or will, would, if of full age, be entitled to the rents &c. so directed to be accumulated. Every other direction for accumulation shall be void, and the rents &c., so long as the same shall be directed to be accumulated contrary to the act, shall go to such persons as would have been entitled thereto if no such accumulation had been ordered. It has been decided, that a disposition longer than allowed is valid for the time allowed, and void for the excess only. But such excess must be clearly distinguishable; and the excess need not follow, it may precede the valid disposition.

Perpetuities.—A perpetuity is a future limitation, restraining the owner of the estate from aliening the fee simple, discharged of such future use or estate, before the event is determined or the period arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity.

The rule against perpetuities does not apply to remainders: 1st, Because every *contingent* remainder must vest during the continuance of the particular estate, or the very moment it determines; 2dly, Because the owner of every *vested* remainder has power, when in possession, of barring all subsequent remainders. In the instance of a limitation to A for life, with remainder to the first son of B and the heirs of his body, and after failure of such issue to C for life, with remainder to his first son and the heirs of his body; this does not create a perpetuity, although in the event there may not be a failure of issue of the first tenant in tail for 100 years, because each successive tenant in tail, when of age, may bar the estate tail and remainders over at any time, so that the estate cannot be *certainly* unalienable for more than twenty-one years after the death of a life in being.¹

POWERS.—A power is an authority expressly reserved to the grantor, or given to another, to be exercised over lands &c. conveyed at the time of creating the power. They are divided into powers at common law, and powers under the Statute of Uses.

1. *Powers at common law are*—(1). An authority to sell lands given to executors to whom no estate in them is devised. (2). The powers conferred by particular statutes, as the land-tax acts, the act enabling the Deputy Remembrancer of the Exchequer to convey, &c.

2. *Powers under the Statute of Uses* are either *collateral*, or *relating to the land*; and the latter are again subdivided into powers appendant, or annexed to the estate, and powers in gross, or annexed to the person.

Collateral powers are those given to strangers who have neither a present nor future interest in the lands; they are by some called “simply collateral;” “powers not coupled with an interest,” and “powers not being interests.” These terms are used to avoid a confusion between them and powers in gross relating to the land.

Powers relating to the land are those reserved or given to persons

¹ See on this subject 2 Ves. & Bea. 61; 2 Taunt. 393, S. C.; 5 Barn & Ald. 801; 4 Ves 337

who have either a present or future estate or interest in the lands. Of these some are *appendant*, or annexed to the estate, which are where a person has an estate in the land, and the estate to be created by the power is to take effect in possession during the continuance of the estate to which the power is annexed; as, to make leases. Others are *in gross*, or annexed to the person, which are when the person to whom they are given has an estate in the land, but the estate to be created under or by virtue of the power is not to take effect till after the determination of the estate to which it relates; as, to jointure an after-taken wife.

No particular ceremonies are prescribed by law for the valid execution of powers; but the donor may impose any ceremonies his caprice may dictate. Limitations made by virtue of an appointment are in effect springing uses, dependent on the seisin created by the deed reserving the power. A power conveys no estate; it merely designates a use and the person to take it, in exercise of a right reserved by the grantor to himself or to another; which use, when raised, the statute immediately executes.

The appointee takes no estate from the appointor, but from the grantor, by the deed giving the appointor his power. In appointments at common law, the appointee takes a legal estate under the appointment, on which a use may be declared.

Equity will supply the *defective* execution of a power in favour of a purchaser, creditor, wife, or child, but gives no relief in case of *non-execution*. The *excess* only in the execution of an appointment is bad, but a defective execution cannot be extended.

Powers *appendant* may be destroyed by lease and release, bargain and sale, feoffment, and formerly by fine or recovery. Powers *in gross* may be destroyed by feoffment, and formerly by the two latter modes, or they may be released. Powers *collateral* cannot be destroyed by the person to whom they are given.

In a conveyance to A and to such uses as he shall appoint, he may delegate his power to B by conveying to such uses as B shall appoint; and so on.

COVENANT TO STAND SEISED TO USES.—This is a conveyance by which a man seised of lands covenants, in consideration of blood or marriage, that he will stand seised of the same to the use of his child, wife, or kinsman, for life, in tail, or in fee. Here the statute executes at once the estate; for the party intended to be benefited having thus acquired the use is thereby put at once into corporeal possession of the land without even seeing it.

A covenant to stand seised to the use of another must be by deed; it cannot be by parol. It must be by one seised of lands or tenements, and consequently it cannot be of an equity, right, or contingency; though it may be of a reversion or vested remainder. It cannot be by tenant in tail, except for his own life.

It must be *in consideration of marriage or blood*, and cannot be in consideration of money, as that would be a bargain and sale. It may be of a use *in futuro*.

It is not exactly settled what degree of relationship is enough; second cousins will do; but friendship and acquaintance &c. will not.

If seised in fee simple, a man may covenant that his heirs shall stand seised after his decease. It is quite voluntary, so that equity will not decree specific performance. The proper word is "covenant," but other words may be tantamount; as if a person "bargain and sell" in consideration of blood or marriage. As soon as the use is raised, it is executed by the statute without enrolment.

BARGAIN AND SALE.—This is a kind of real contract, whereby the bargainor, for some pecuniary consideration, bargains and sells, that is, contracts to convey the land to the bargainee. It must be in consideration of money, though that be, in fact, merely nominal. If the use to be raised be of a freehold interest, it must be *enrolled*. The bargainor must be seised of a freehold in possession, reversion, or remainder; not of a right, contingency, or possibility only. A use cannot be limited to *any but the bargainee*; the words are "bargain and sell."

Before the Statute of Uses, a contract for sale of land raised a *use*, as now a *trust*; and to convert that use into a legal estate, an actual conveyance was requisite. But now the statute supplies that conveyance, and transfers the seisin of the vendor to the use of the vendee, who thus has the legal estate. Then came the Statute of Enrolments, 27 Hen. VIII. c. 16, requiring every bargain and sale of a *freehold* interest to be enrolled in Chancery within six lunar months after date. So that if the common *agreement* for purchase were on a sufficient stamp, and enrolled, it would be a valid bargain and sale. The legal estate vests on execution; but the statute obstructs its operation till enrolment. It is termed an *innocent conveyance*, and can only pass that which the bargainor may lawfully convey; therefore it cannot work a discontinuance or a forfeiture.

LEASE AND RELEASE.—In order to convey a freehold interest to a stranger without the formality of livery, a lease for a year or other definite time was made to him in order to give him possession, and so make him capable of receiving a release, for a release can only be made to a person in possession. The 4 & 5 Vic. c. 21, now dispenses with the formality of the lease, and renders the release, if expressed to be made in pursuance of that act, as effectual in all respects, both at law and in equity, as if a bargain and sale, or a lease for a year, had been executed.

This conveyance may be either at common law or under the Statute of Uses.

If an estate for a year be granted by a common law conveyance, the lessee must *enter* before he can release; and this must always be done in the case of a corporation, which cannot be seised to a use.

But if the grantor can stand seised to a use, he may, to avoid giving the grantee the trouble of actual entry, make a bargain and sale in consideration of 5s. for a year to the purchaser; a use then arises, which the statute executes without enrolment (that being only wanted when a *freehold* interest passes). Then, being in possession under the statute, a release may be made to him. The proper words on a lease *with entry* are, "demised, leased, and to farm let;" if *without entry*, "bargained and sold."

The difference between conveyances at common law and under the Statute of Uses is thus stated by Mr. Butler. A *feoffment*, *fine*, and *recovery*,¹ are conveyances at common law, so far as they convey the land to the feoffee, conusee, and recoveror; and if they are directed to operate to his use, they only operate as common law conveyances; but if they operate to the use of any *other* person, then, though conveyances at common law as to the feoffee &c., they act under the Statute of Uses so far as the use is limited to any such other person. A *lease and release* has a mixed operation: the lease operates as a bargain and sale under the statute, but the release operates at common law, and enlarges the lessee's estate to one of inheritance. If the release be directed to operate to, or to the use of the releasee, he is in by common law; but if the use be limited to *another*, the statute again intervenes, and executes the use in such other. A *bargain and sale* enrolled, and *covenant to stand seised*, wholly derive their effect from the statute. Neither have any effect at common law; they would be mere declarations of trust, and only binding in equity, but that the statute vests the land in the person to whose use it is limited.

Before we conclude the subject of alienation by deed, it will be proper to notice such deeds as are intended not to convey but to charge, or incumber lands, and to discharge them again; such as obligations or bonds, recognizances, and defeasances on both. To mortgages and statutes staple and merchant we have already briefly given our attention.

A **BOND, OR OBLIGATION**, is a deed whereby the obligor obliges himself, his heir, executors, and administrators, to pay a certain sum of money to another at a day appointed. If this be all, the bond is called a *single* one; but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force; as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money borrowed of the obligee with interest, which principal sum is usually one half of the penal sum specified in the bond. In case this condition is not performed, the bond becomes forfeited or absolute at law, and charges the obligor while living; and after his death the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompence. So that it may be called, though not a direct, yet a collateral charge upon the lands. If in a bond the obligor binds himself, without adding "his heirs, executors, and administrators," the executors and administrators are bound, but not the heir; for the law will not imply the obligation upon the heir.² A bond does not seem to be properly called an incumbrance upon land; for it does not follow the land, like a recognizance or a judgment; or even if the heir at law aliene the land, the obligee in a bond by which the heir is bound can have his remedy only against the person of the heir to the amount of the value of the land, but he cannot follow it in the possession of a *bona fide* purchaser.³ How it effects the personal property of the obligor will be more properly considered hereafter.

¹ Fines and recoveries are abolished by the 3 & 4 Wm. IV. c. 74, and other more simple modes of assurance are substituted in lieu thereof.—See ante.

² Bla. Com. 240.

³ 2 Chit. Bla. Com. 341. n. 71.

If the condition of a bond be impossible at the time of making, or it be to do a thing contrary to some rule of law that is merely positive, or be uncertain or insensible, the condition alone is void, and the bond shall stand single and unconditional; for it was the folly of the obligor to enter into such an obligation from which he can never be released. If it be to do a thing that is *malum in se*, the obligation itself is void; for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and it afterwards become impossible by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved; for no prudence or foresight of the obligor could guard against such a contingency. On the forfeiture of a bond or its becoming single, the whole penalty was formerly recoverable at law; but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought, viz. his principal, interest, and expences in case the forfeiture accrued by non-payment of money borrowed, or the damages sustained upon non-performance of covenants, and the like. And the like practice having gained some footing in the courts of law, the statute 4 & 5 Ann. c. 16 enacted, in the same spirit of equity, that in case of a bond conditioned for the payment of money, tender of the principal sum due with interest and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge.

A RECOGNIZANCE is an obligation of record, which a man enters into before some court of record, or magistrate duly authorized, with condition to do some particular act; as, to appear at the assizes, to keep the peace, to pay a debt, or the like. It is in most respects like another bond; the difference being chiefly this, that the bond is the creation of a fresh debt, or obligation *de novo*; the recognizance is an acknowledgment of a former debt upon record, the form whereof is, "that A B doth acknowledge to owe to our lady the queen, to the plaintiff, to C D, or the like, the sum of ten pounds," with condition to be void on performance of the thing stipulated; in which case the queen, the plaintiff, or C D, is called the *cognizee*, as he that enters into the recognizance is called the *cognizor*. This being either certified to or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal; so that it is not in strict propriety a deed, though the effect of it is greater than a common obligation, being allowed a priority in point of payment, and binding the lands of the cognizor from the time of enrolment on record.

There are also other recognizances of a private kind, in nature of a statute staple, by virtue of the statute 23 Hen. VIII. c. 6, which have been already explained, and shown to be a charge upon real property.

A DEFEASANCE on a bond, recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it, in the same manner as a defeasance of an estate before mentioned. It differs only from the common condition of a bond in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently a subsequent deed. This, like the condition of a bond, when performed, discharges and disencumbers the estate of the obligor.

CHAPTER XIV.

Of Alienation by Matter of Record.

ASSURANCES by matter of record are such as do not entirely depend on the act or consent of the parties themselves, but require the sanction of a court of record to substantiate, preserve, and evidence the transfer of the property, or its establishment when transferred. Of this nature are—1. Private acts of parliament; 2. The queen's grants; 3. Fines; 4. Common recoveries.

I. PRIVATE ACTS OF PARLIAMENT have lately become a very common mode of assurance. For an estate may become so entangled by a multitude of contingent remainders, resulting trusts, springing uses, executory devises, &c. (owing to the ingenuity of some, and the errors of other practitioners), that neither the courts of law nor of equity can relieve the owner. Or sometimes, by the strictness or omissions of family settlements, the tenant is abridged of some reasonable power (as letting leases, making a jointure on his wife, &c.), which cannot be given him by the ordinary judges. Or it may be necessary, in settling an estate, to secure it against the claims of infants or others under legal disabilities. In these and other cases of the like kind, the transcendent power of parliament is called in to cut the Gordian knot, and by a particular law to unfetter the estate; to give its tenant reasonable powers; or to assure it to a purchaser against the remote or latent claims of infants or disabled persons, by settling upon them an equivalent to the interest barred.

Acts of this kind are carried on with great caution; particularly, in the House of Lords, they are usually referred to two judges to examine the facts alleged, and settle technical forms. Nothing also is done without the consent, expressly given, of all parties *in esse* and capable of consent, who have the remotest interest in the matter, except such consent shall appear perversely and unreasonably withheld; and an equivalent in money or other estate is usually settled on persons not *in esse*, infants, or persons disabled, who are to be concluded by the act. Lastly, a general saving is constantly added, at the close of the bill, of the right and interest of all persons whatsoever except those whose interest is thus barred by consent or purchased. Even if such saving be omitted, the act will bind none but the parties.

A law thus made is a mere private statute, not printed or published; hath been relieved against when obtained on fraudulent suggestions; is holden void if contrary to law or reason; and no judge or jury is bound to notice the same unless specially pleaded. It remains, however, enrolled among the public records of the nation, as a perpetual testimony of the conveyance or assurance so made or established.

II. THE QUEEN'S GRANTS are also matters of public record. These grants (whether of lands, honours, liberties, franchises, or ought beside)

are contained in letters patent, *literæ patentēs*, (a term of contradistinction to the *literæ clausæ* or writs close,) and are recorded in the patent rolls, as the latter are in the close rolls.

Grants, or letters patent, must first pass by *bill*, which is prepared by the attorney or solicitor general in consequence of a warrant from the crown, and is inscribed at the top with the royal *sign manual*, and sealed with the *privy signet*, which is always in the custody of the principal secretary of state. It then sometimes immediately passes under the great seal, in which case the patent is subscribed "*per ipsum regem*" or "*per ipsam reginam*;" otherwise it is usual to carry an extract of the bill to the keeper of the privy seal, who makes out a writ or warrant thereupon to the chancellor; so that the sign manual is a warrant to the privy seal, the privy seal to the great seal, and then the patent is subscribed "*per breve de privato sigillo*," by writ of privy seal. But some grants pass only through certain offices, as the admiralty or treasury, in consequence of a sign manual, without the confirmation of either seal.

The construction of the queen's grants differs essentially from that of a subject's. 1. A grant made by the queen *at the suit* of the grantee shall be construed *for* the queen and *against* the party; whereas the grant of a subject is construed most strongly against the grantor. It is usual therefore to insert in the queen's grants, not that they are made at the suit of the grantee, but that the queen, "of her special grace, certain knowledge, and mere motion, doth grant &c." and then they have a more liberal construction. 2. A subject's grant shall be *implied* to include many things, if necessary for the operation of the grant; therefore a feoffment of land to a villein by his lord operated as a manumission. But the queen's grant shall enure to no intent not precisely expressed; so that if she grants land to an alien, it operates nothing; such grant not enuring to make him a denizen, in order to his being capable of taking by the grant. 3. When it appears, from the face of the grant, that the queen is mistaken or deceived, either in point of fact or law; or if the grant be informal, or if she grants an estate contrary to the rules of law; in any of these cases the grant is absolutely void. For instance, if the queen grants to one and his *heirs male*, this is absolutely void: it is not an estate tail, for there are no words of procreation; it is not a fee simple (as in common grants it would be), for it may be reasonably supposed that the queen only meant to give an estate tail; the grantee is therefore (if any thing) only tenant at will. And by 1 Hen. IV. c. 6, no grant of estates from the crown shall be good, unless in the grantee's petition for them express mention be made of their *real value*.

III. & IV. FINES AND RECOVERIES.—It only remains to say a few words on the subject of fines and recoveries; a species of assurance by matter of record, and which, though now abolished by the 3 & 4 Wm. IV. c. 74, formerly served such important purposes in the transfer and settlement of real property, and have been necessarily so frequently referred to in our preceding pages, that some account of their nature and effects will naturally be expected in this place.

A FINE was, in its origin, an amicable composition or agreement, by leave of the king or his justices, of an *actual suit*, whereby the lands in question were acknowledged to be the right of one of the parties. The secure title acquired by this process afterwards led to

the practice of transferring lands by means of a *fiction* of the same nature. It was called a *fine*, because it put an end (*finis*) not only to the suit then commenced, but to all other suits and controversies concerning the same matter. The party levying the fine, or making the acknowledgment, was termed the *cognizor* or *conusor*; and the party to whom it was levied, the *cognizee* or *conusee*.

The manner of levying a fine was regulated by the 18 Edw. I. The party to whom the land was to be conveyed commenced an action against the other, usually an action of covenant, by suing out a *præcipe* or writ of covenant, on which was due to the crown a primer fine, or one tenth of the annual value of the lands. The other party then applied for leave to the court to make the matter up, *licentia concordandi*, which was granted on payment of another fine, called the king's silver or the post fine, which was as much as the prefine and half as much more, or three-twentieths of the annual value of the land. Next followed the *agreement*, which was an acknowledgment from the deforciant that the lands in question were the right of the complainant. This acknowledgment was made either openly in the court of Common Pleas, or before the lord chief justice, or else before one of the judges of the court, or two or more commissioners in the country empowered by a special authority called a *dedimus potestatem*; which judges and commissioners were bound to see that the conusors were of full age, sound memory, and out of prison; and if a feme covert were one of them, she was to be privately examined whether she acted freely or by compulsion of her husband. These were the essential parts of a fine; and if the conusor died the next moment after the fine was acknowledged, it was still carried on in its remaining parts. A *note* of the fine, which was an abstract of the writ of covenant and the concord, naming the parties, parcels, and the agreement, was enrolled in the proper office of record; and indentures of the *foot* of the fine, as it was termed, including the whole matter, reciting the parties, day, year, place, and before whom it was acknowledged, were then made or engrossed in the chirographer's office, and delivered to the parties.

There were four sorts of fine: 1. *Sur cognizance de droit comme ceo qu'il a de son done*, or a fine upon acknowledgment of the right of the conusee as that which he had of the gift of the conusor. 2. *Sur cognizance de droit tantum*, without the circumstance of a preceding gift. 3. *Sur concessit*, which was wherè the conusee, to settle disputes, though he acknowledged no precedent right in the conusee, yet granted him an estate *de novo*, usually for life or years, by way of supposed composition. 4. *Sur done, grant, et render*. The first and third kinds were those in general use; the second was sometimes used, though the same purposes could be answered by the first or third; but the fourth had long become obsolete.

As to the *force* and *effect* of a fine, all persons were, at common law, bound by a fine, who did not put in their claim within a year and a day. But this doctrine of barring the right by non-claim was abolished for a time by the 34 Edw. III. c. 16, which admitted persons to claim and falsify the fine at any distance of time. Afterwards the 1 Ric. III. c. 7, confirmed by the 4 Hen. VII. c. 24, declared that a fine proclaimed in four successive terms (the first proclamation being made

in the term in which the fine was engrossed) should operate as a bar by non-claim at the end of five years after the last proclamation, except as to persons under certain legal disabilities, who had five years allowed after such impediments were removed. This gave rise to a distinction between fines levied *with proclamation* and fines levied *without proclamation*; the latter being fines at common law, and having the same effect only which fines had immediately after the passing of the 34 Edw. III. By the 32 Hen. VIII. c. 36, the further effect of barring estates tail was given to fines levied with proclamation.

The persons bound by a fine were parties, privies, and strangers.

The *parties* were the conusors and conusees; and these were *immediately* concluded by the fine, even a feme covert. Indeed, this was almost the only act which a married woman could legally do; and it was therefore the only safe method whereby she could join to sell, settle, or incur her estates. Hence a fine has been called the married woman's conveyance.

Privies were those any way related to the parties, or who claimed under them by right of blood or other right of representation; such as the heir general of the conusor, the issue in tail, the vendee, devisee, and all who must claim through the parties who levied the fine. For the act of the ancestor bound the heir, and the act of the principal the substitute, or such as claimed under any conveyance made by him subsequent to the fine levied.

Strangers to a fine were all other persons except parties and privies; and these were also bound by a fine, unless they made claim, by action or lawful entry, within five years after proclamation made, except persons under legal disabilities, who had five years allowed after the removal of such disabilities, as already mentioned. Persons also having no present but a *future* interest, as those in remainder or reversion, had five years allowed them to claim in from the time when their right accrued. If within the respective times of limitation, therefore, no claim was made; or if, by the 4 Ann. c. 16, within a year after such claim no action to try the right was brought and effectually prosecuted, all persons whatever were bound by force of the statute of non-claim.

In order to render a fine of any avail, so far as strangers were concerned, it was necessary that some of the parties should have an estate of freehold in possession, remainder, or reversion, in the tenements at the time of levying the fine; otherwise it would have been void as to strangers, though it would have operated as between the parties themselves or their representatives by way of *estoppel*. It was immaterial, however, whether the freehold was in them by right or by wrong; and it was sufficient for the validity of the fine if the conusee had an estate of freehold, though the conusor had nothing. Between the parties themselves or their respective representatives (as grantees by conveyance subsequent to the fine, or heirs claiming an estate in fee simple by descent, all of whom are included under the denomination of *privies*) the effect of a fine was so strong, that though neither of them had an estate in the tenement at the time, yet the fine would for ever bind any estate in it which the conusor might afterwards acquire, and so give the conusee or his heirs a title to it.

If the conusor, at the time of the fine, had only a right or *contingent*

interest in the tenement not amounting to an actual vested estate, the fine, if it purported to convey the fee simple, would *extinguish* this right or contingent interest (for it is incapable of being transferred to a stranger); and this extinction would be for the advantage of any person who had an actual estate in the tenement. But a fine *sur concessit*, purporting to create a particular estate, as a term of years, instead of *extinguishing*, would *bind* the right or interest for the benefit of the conusee.

COMMON RECOVERIES.—As a fine was a compromise of a fictitious suit, so a recovery was one carried on to judgment, by which the lands were recovered against the tenant of the freehold; and such recovery, being a supposed adjudication of the right, bound all parties, and vested a free and absolute fee simple in the recoveror.

Common recoveries were originally inventions of the clergy to elude the statutes of mortmain, and were in constant use for the purpose until checked by the 13 Edw. I. c. 22. Afterwards, in consequence of the principles laid down by the judges in the 12th year of Edw. IV. they were applied to the purpose of evading the statute of West. II. (13 Edw. I. c. 1) commonly called the statute *De donis conditionalibus*, by virtue of which the old common law estate of fee simple conditional was abolished, and the modern estate tail introduced, with such restrictions that the tenant in tail could not alienate the lands entailed, nor make them subject to his debts in the hands of his successors, nor were they liable to forfeiture for felony or treason. In the long interval of nearly 200 years from the passing of that statute and the application of recoveries to the evading of it, there was no contrivance (except that of warranty in a few cases) by which lands entailed could be unfettered; and awkward as was the contrivance of a common recovery for effecting this purpose, yet it was considered a great boon to the public, because it removed the mischiefs which arose from the tendency of that statute to establish perpetuities.

The manner of suffering a recovery, in its simplest form, was this:—A writ of entry was brought against the tenant in tail, in which an act of disseisin was alleged, and that the tenant in tail had no entry into the tenement but after such disseisin. The tenant in tail, thus brought before the court, *vouched* (or called) a person appointed for the purpose, who he pretended had warranted the tenement to him, and was therefore bound, either to defend his title for him, or to give him other tenements of equal value. This vouchee appeared and confessed the warranty, and so took the whole burden of the action upon himself. The cause was then adjourned to another day, upon which the vouchee took care to absent himself. The consequence was, that judgment went by default, first, for the demandant against the tenant in tail, and secondly, for the tenant in tail against the vouchee. The first judgment gave the estate in fee simple to the demandant, and was attended with a writ to the sheriff, by virtue of which he was to be put into possession of the tenements. This writ was never actually executed, but was recorded with the other proceedings as having been executed, which amounted to the same thing; and thus the demandant became seised of the tenements in fee simple, so that the uses to which he was to be seised by agreement of the parties might be converted

into legal estates by the statute. The second judgment for ever established the first by precluding all future claims under the entail, and directed that the tenant in tail should be recompensed, to the value of what he had lost, out of the lands of the vouchee. This was called the recompence or recovery in value. But such vouchee having no lands (being usually the crier of the court, thence called the common vouchee), the tenant had only a nominal recompence, and the lands became absolutely vested in the recoveror by judgment of law. So that this collusive recovery operated merely in the nature of a conveyance in fee simple from the tenant in tail.

The recovery here described is with a single voucher; but it was usual to have a recovery with a double voucher at the least, by first conveying the freehold to an indifferent person against whom the action might be brought (called, in legal language, "making a tenant to the præcipe"); and then he vouched the tenant in tail, who vouched over the common vouchee. For a recovery had against a tenant in tail barred only that estate in the premises of which he was then actually seised; whereas if the recovery were had against another person, and the tenant in tail were vouched, it barred every *latent* right and interest which he might have in the lands recovered. This, therefore, for its superior efficacy, was the more usual form of the assurance.

Fines and recoveries of *equitable* estates were levied and suffered in the same manner, and in the same courts, and with a few exceptions had the same operation as if the estates had been legal; but neither a fine nor a recovery of an equitable estate produced a forfeiture of a particular interest, or destroyed contingent interests, except that a recovery suffered by an equitable tenant in tail barred the entail and all interests to take effect on the determination or in derogation thereof.

The principal uses to which fines were applied were, to bar estates tail, and thereby enable a tenant in tail to acquire or pass a base fee determinable on the failure of the issue in tail,—to gain a title by non-claim,—and to pass the estates and bar the rights of married women.

Recoveries were used only for one purpose, viz. to enlarge into a fee simple an estate tail in possession, or an estate tail in remainder with the concurrence of the person entitled to the freehold in possession. A recovery might be used, as well as a fine, to convey the estate of a married woman, or to bar contingent remainders, or to operate by estoppel, and such purposes were often included in a recovery suffered in order to bar an estate tail; but, in consequence of a fine being a more simple and less expensive mode of assurance, a recovery was never suffered unless it was intended to bar an estate tail. For this purpose, however, it was more effectual than a fine, as it converted the estate tail into a fee simple as absolute as that out of which it was at first derived, defeating not only the remainders and reversion expectant on its natural expiration, but also all shifting uses or executory devises to which it might have been subjected in its creation.

A recovery suffered by a tenant in tail after possibility of issue extinct, or by a tenant by the curtesy, or by any other tenant for life, without the assent of the remainder-man or the reversioneer, was void by the 14 Eliz. c. 8. So estates tail created by the crown as rewards for public services are, by the 34 & 35 Hen. VIII. c. 20, prevented

from being barred either by fine or recovery while the reversion remains in the crown; and there are some cases in which estates are entailed by particular acts of parliament, and the entails cannot be barred.

These restrictions are still continued. The 3 & 4 Wm. IV. c. 74 (Fines and Recoveries Abolition Act) declares that the absolute power of disposition which other tenants in tail are by that act enabled to make of their estates shall not extend to the tenants of estates tail who by the 34 & 35 Hen. VIII. or any other act are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct. In the following instance, however, a restraint on alienation which previously existed is now removed.

By the 11 Hen. VII. c. 20, a woman having an estate in dower, or for her life, or in tail jointly with her husband, or only to herself or her use, in any lands of the inheritance or purchase of her husband, or given to her husband and her in tail or for life by any of the ancestors of the husband, was prohibited from discontinuing or suffering a recovery (and by the 32 Hen. VIII. c. 36, from levying a fine) after the death of her husband, unless with the assent recorded or enrolled of the heirs next inheritable, or of those next having an estate of inheritance in the same lands. This statute of 11 Hen. VII. had been held not to extend to copyholds, and many questions had arisen upon it. It is, however, now repealed by the 3 & 4 Wm. IV. c. 74, §§ 16, 17, except as to settlements made before the passing of this act.

Thus have we endeavoured to explain the nature and effect of fines and recoveries; and from the whole it appears that they were no other than awkward contrivances to effect purposes with regard to real property for which the law had provided no means more simple and direct. The commissioners appointed to inquire into the law of real property, in their first report, after pointing out the many objections to which fines and recoveries were liable, expressed their opinion that the abolition of them would be highly beneficial to the owners of real property, and that it would relieve both counsel and solicitors from much useless learning and responsibility, if a substitute were adopted which should operate and take effect without reference to those fictitious processes or the laws relating to them, so that the whole of that branch of our laws might in course of time die away, as the substitute should be gradually introduced. Agreeably to this recommendation, the 3 & 4 Wm. IV. c. 74 was passed, which, after enacting that no fine should be levied or recovery suffered after the 31st Dec. 1833, unless where the writ had been already sued out on or before that day, provides for effectuating the objects for which fines and recoveries had been principally used by other and more simple modes of assurance. These objects were, as we have already shown, the barring of entails, and the passing and extinguishing the estates, rights, and interests of unmarried women. The manner in which the first of these objects is provided for by the act has been already pointed out when we were treating of estates tail (see *ante*, 508); it only remains therefore in this place to show what provisions are made with regard to the latter purpose. For as to the facility which fines and recoveries afforded of gaining a title by non-claim, however convenient or necessary they might be formerly considered for that end, now that the law as to

the limitation of actions has been amended and simplified, and one uniform period of twenty years prescribed as the limit within which all actions and suits for the recovery of real property must be brought, their existence for such purpose is no longer considered requisite or desirable.

The only utility of the fine, with regard to the alienation of her real estates by a married woman, consisted in providing for her separate examination, and placing this examination under the superintendence of a court of justice, so as to avoid all future question as to the fact of its having been properly taken. A similar mode of examination as to her free consent is provided by the present act, and the sanction of the court is still given to it, by the certificate of her acknowledgment being filed and enrolled in the Court of Common Pleas.

The 77th section of the act enacts, that it shall be lawful for any married woman, in every case (except as tenant in tail, for which provision is already made), by deed to dispose of lands of any tenure, and of money subject to be invested in lands, and also to dispose of, release, surrender, or extinguish any estate therein, which she alone or she and her husband in her right may have, or any power vested in or limited or reserved to her in regard thereto, as fully as if she were a feme sole, provided her husband concur in the deed, and it be *acknowledged* by her as thereafter directed. This acknowledgment is to be taken before a judge of one of the superior courts at Westminster or a master in chancery, or before any two of the standing commissioners directed to be appointed for this purpose in every county. Before taking such acknowledgment, the judge, master, or commissioner must examine her apart from her husband, and ascertain if she voluntarily consent; and, if satisfied thereof, is then to sign a memorandum on the deed, and also a certificate of such acknowledgment on a separate piece of parchment. This certificate, with an affidavit verifying the same, is to be lodged with the proper officer of the Court of Common Pleas, who, having examined the same and seen that all necessary requisites have been complied with, is to file them of record in the said court. When the certificate is filed, the deed takes effect from the time of the acknowledgment. In case of residence beyond seas, ill health, &c., the Court of Common Pleas, or any judge thereof, may issue a commission for taking such acknowledgment. The powers of disposition hereby given to a married woman are not to interfere with any powers otherwise vested in or limited or reserved to her, except as suspended or extinguished by such disposition.

The act does not extend to an estate at law in land held by copy of court roll, where the objects could have been before the passing of it affected by her in concurrence with her husband by surrender into the hands of the lord of the manor.

When husband and wife shall, either in or out of court, surrender lands held by copy of court roll, in which the wife alone, or she and her husband in her right, may have an *equitable estate*, the wife shall be separately examined by the person taking the surrender in the same manner as she would have been if the estate had been an estate at law.

CHAPTER XV.

Of Alienation by Custom.

THIS is a very narrow title, being confined to copyhold lands, or such customary estates as are holden in ancient demesne, or in manors of a similar nature. These estates being of a very peculiar kind, and originally no more than tenancies in pure or privileged villeinage, were never alienable by deed, such alienation being a forfeiture of the copyhold. Nor are they transferable by matter of record in the queen's courts, but only in the court baron of the lord; and the method of doing this is generally by surrender.

We have already addressed our attention to the subject of copyholds,¹ and little remains for consideration, save only as relates to surrender.

Surrender is the yielding up of the estate by the tenant into the hands of the lord for such purposes as in the surrender are expressed, as to the use of A and his heirs, or to the use of the will of the party surrendering. The process is generally as follows:—The tenant comes to the steward of the manor, either in or out of the manor court, or out of the manor even, or to two customary tenants of the same manor, provided the custom warrants it, and there, by delivering a rod or other symbol, according to custom, resigns into the hands of the lord all his title or interest in the estate, on trust to be granted out by the lord in the manner proposed by the surrender. If the surrender be made out of court, then at the next or some subsequent court the jury or homage must present and find it upon their oaths; which presentment is an information to the lord or his steward of what has been transacted out of court. Immediately on surrender in court, or upon presentment of a surrender made out of court, the lord, by his steward, grants the same lands to the *cestuique use* (who is sometimes, though rather improperly, called the *surrenderer*), to hold by the ancient rents and customary services; and thereupon admits him tenant to the copyhold, according to the form and effect of the surrender, which must be exactly pursued. This is done by delivering up to the new tenant the rod, or glove, or the like, in the name and as the symbol of corporal seisin of the lands and tenements; upon which admission he pays a fine to the lord according to the custom of the manor, and takes the oath of fealty.

By a surrender, no more of the tenant's estate in the copyhold will pass than will satisfy the uses declared, and the residue will continue in him as of his old estate. If the surrenderor die before admittance of the party for whose use he surrendered, the surrenderor's heir takes the estate, and nothing passes to the surrenderer till admittance; after which his title relates back to the date of the surrender. And where a devise was made by an unadmitted devisee, it was held that the second devisee, though admitted, had no legal estate as against the heir of the first devisor. We have before shown that no surrender to the use of the possessor's will is now necessary.²

¹ *Ante*, 501.

² See further 2 Chit. Bla. Com. 365—372, and notes.

CHAPTER XVI.

Of Alienation by Devise.

THE last method to be mentioned for conveying real property is by devise, that is, by a disposition contained in a man's last will. "Will" and "testament" are terms more properly applicable to instruments conveying *personal* estates; we shall therefore reserve the more particular consideration of them till we come to treat of personal property; confining ourselves, at present, to a few general observations on the origin and antiquity of devising real estates by will in this country.

Before the conquest it would seem sufficiently clear that lands were devisable by will in this country; but, on the introduction of the feudal system, a restraint was naturally placed upon the alienation of such property by this means, as a necessary branch of the feudal doctrine of non-alienation without the consent of the lord, and consequently no estate greater than a term of years could be thus disposed of, except only in Kent, some ancient boroughs, and a few particular manors, where the Saxon immunities, by special indulgence, still subsisted. But when ecclesiastical ingenuity had invented the doctrine of *uses*, such uses began to be devised very frequently, as the devisee could compel an execution of the use in chancery. The Statute of Uses, however, having annexed the possession to the use, these uses (being now the land itself) were no longer devisable. In consequence, the Statute of Wills, 32 Hen. VIII. c. 1, was passed about five years after, which (explained by the 34 & 35 Hen. VIII. c. 5) enacted, that all persons seised in fee simple (except *femes covert*, infants, idiots, and persons of nonsane memory) might, by will and testament in writing, devise to any other person (except bodies corporate, which were excepted in the Statute of Wills from taking by devise, to prevent the extension of gifts in mortmain) two-thirds of their lands, tenements, and hereditaments held in chivalry, and the whole of their lands held in socage; which, upon the alteration of tenures by the Statute of Charles II., amounted to the whole of their landed property except copyhold tenements. As copyholders and customary tenants, whose interest passed by surrender, were not seised in fee simple, and did not hold their lands in socage, it followed they could not make a devise *under these statutes*; but, after the surrender of a copyhold by the owner to the use of his last will, his will operated on this surrender as a declaration of the use, though not as a devise of the land itself, so that a testamentary power was thus exercisable indirectly over copyholds. And, by the 55 Geo. III. c. 192, where the power of devising existed, there was no necessity for a previous formal surrender. Nor, in the case of copyholds, was the same strictness required which was necessary in all other devises of *real estate*; for they, as well as terms for years, passed by any will sufficient to bequeath personalty.

With regard to devises in general, experience soon showed how dangerous it was to depart from the rules of the common law, and innu-

merable were the frauds attempted. To remedy which, the Statute of Frauds (29 Car. II. c. 3) directed, that all devises of lands and tenements should not only be in writing, but also be signed by the testator (or by some other person on his behalf, and by his express direction and in his presence), and witnessed and subscribed in his presence by three or more credible witnesses, or else the devise was entirely void, and the lands descended to the heir at law.

A will of lands made according to the requisites of the statute operated rather as a conveyance than as a testament; and on this notion was founded the distinction between a devise of lands and a testament of personal chattels: for the latter operated on whatever the testator might be possessed of at the time of his death, whereas the former affected only such real estates as were his at the time of executing and publishing his will. No after-purchased lands passed under such devise, unless, subsequent to the purchase or contract, the devisor re-published his will. Every codicil, however, unless confined in expression, was a republication of the will, if executed and attested according to the Statute of Frauds.

The law of devises has been much altered by the recent Wills Act, 1 Vict. c. 26; and, in order to avoid repetition, it will be more convenient if we reserve the consideration of it for the subsequent chapter on Wills and Testaments.

CHAPTER XVII.

Of Personal Property in general.

THINGS personal have been defined to be goods, money, and all other moveables, which may attend the owner's person wherever he thinks proper to go. This definition, however, does not appear to be sufficiently comprehensive; for we are told by Sir W. Blackstone,¹ that "things personal, by our law, include not only things moveable, but also something more, the whole of which is comprehended under the general name of *chattels*, which, Sir Edward Coke says, is a French word, signifying goods." According to an earlier writer, whatever was not a *feud* or *fief*, was accounted a chattel; and in this extended signification the term is used our law.

Chattels are again divided into two kinds: 1. Chattels real; and 2. Chattels personal. The former of these are described by Sir Edward Coke² to be such as savour of the realty, as terms for years of land, wardships in chivalry (now obsolete), the next presentation to a church, estates by statute merchant, statute staple, elegit, or the like; and these are called chattels *real*, because they are interests issuing out of or annexed to real estates. It is unnecessary to say more in this place upon chattels real, as they have been already fully

¹ 2 Bla. Com. 385.

² 1 Inst. 118.

considered in the foregoing chapters. Chattels *personal* have been defined to be things properly and strictly moveable; such as animals, household stuff, money, jewels, and every thing that may be properly put in motion and transferred from place to place.¹ Of this description of chattels it is our intention to treat in the following pages; and in so doing we propose to consider—1. The nature of the property or dominion to which they are subject; and 2. The title to that property, or how it may be lost and acquired.

Property in chattels, or things personal, may be either *in possession*, that is, where a man hath not only the right to enjoy, but also the actual enjoyment; or *in action*, where a man has merely a right to, but not the actual enjoyment of the thing.

The former, or property in possession, is again divided into two sorts, an *absolute* property and a *qualified* property.² An *absolute* property may be had in all chattels moveable, such as goods, plate, money, and things of that description; and also in all animals, excepting those *feræ naturæ*, or of a wild and untameable nature, in which it appears a man can have no absolute property. And the kind of property which a man may acquire, as well in animals of a tame as in those of a wild nature, admits of some distinction; but as at the present day questions upon this subject rarely if ever arise, it does not appear necessary to say more upon it at present.

A man may have a *qualified* property, and a qualified property *only*, in the air, in light, and in water.

The right to *light* is acquired by enjoyment, and it will endure so long as the party either continues that enjoyment, or shows an intention to continue it. Every man on his own land has a right to all the light and air which will come to him; and he may erect even on the extremity of his land buildings with as many windows as he pleases, without any consent from the owner of the adjoining lands. After he has erected his building, the owner of the adjoining land may within twenty years build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour; but if the light be suffered to pass without interruption during that period to the building so erected, the law implies, from the non-obstruction of the light for that period, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy his light without obstruction so long as he shall continue the specific mode of enjoyment which he had been used to have during that period.³ Blackstone states the law upon this subject in the following terms: "If I have an *ancient* window overlooking my neighbour's ground, he may not erect any blind to obstruct the light; but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him than in me."⁴ The building of a wall which merely intercepts the prospect of another, without obstructing his light, is not actionable. The right to the enjoyment of light may be lost by *non-user*, unless an

¹ 2 Bla. Com. 387.

² Id.

³ 3 Barn. & Cres. 340. See also Sutton v. Montfort, 4 Sim. 559.

⁴ That is, a window through which light has been enjoyed for a longer period than twenty years.

⁵ 2 Bla. Com. 402.

intention of resuming the right within a reasonable time were shown when it ceased to be used.

The right to *water*, like that to light, is acquired by enjoyment, and will continue so long as the party continues that enjoyment, or shows an intention to continue it. The principle of such right was explained by the late Master of the Rolls in the following terms: "*Primâ facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no one can have a right to use the water to the prejudice of any other proprietor, without the consent of the other proprietors who may be affected by his operations. No proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or licence from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years; which term of twenty years is now adopted upon a principal of general convenience, as affording conclusive presumption of a grant."¹ In conformity with the above principle it has been decided, that no proprietor of the banks of a stream has a right to diminish the quantity or injure the quality of the water to the detriment of similar possessors of the other parts of the banks, and that the owner of the banks of a stream has a right to the advantages of that stream flowing in its natural course, and is entitled to use it for any purpose not inconsistent with a similar enjoyment in the owners above or below.²

The period of twenty years uninterrupted enjoyment is now established by the 2 & 3 Wm. IV. c. 71, as giving, in the case of light, an absolute and indefeasible right, and in the case of water, a claim which cannot be defeated by merely showing its commencement at a time prior to such period, though it may be defeated by other means; but *forty* years enjoyment, in this case also, gives an absolute and indefeasible right; provided that such enjoyment of the light or of the water has not been by consent or agreement expressly given by deed or in writing. See *ante*, 566.

For the obstruction of light, or the improper diversion of water, there are remedies both legal and equitable: those, however, afforded by the common law are most usually resorted to. The general mode of obtaining relief at the common law is by an action on the case; and the Court of Chancery affords relief by granting an injunction to restrain the obstruction of the light, or diversion of the water. A reversioner may maintain an action for obstructing light, and the owner of the inheritance of a house may maintain action against his own lessee.

Another example of qualified property is afforded in the case of *bailment*, or the delivery of goods to a person for a particular use.³

¹ See *Wright v. Howard*, 1 Sim. & Stu. 203. See also *Mason v. Hill*, 3 Barn. & Adol. 304; and *Frankum v. Earl Falmouth*, 6 Car. and Payne, 529.

² *Mason v. Hill*, 2 Nev. & Man. 747. The judgment of the court in this case is recommended to the reader's perusal.

³ See *ante*, p. 293.

Here neither the bailor nor the bailee hath the absolute property in the thing delivered; for the bailor hath only the right, and not the immediate possession; and the bailee hath the possession, but only a temporary right. Each, however, is entitled to an action if the goods be damaged or taken away.

The case of *goods pledged or pawned upon condition* also affords an example of qualified property; neither the pawner nor the pawnee having in the first instance any thing more than a qualified property in the goods pledged. So also if goods are distrained for rent or other cause of distress, neither the party distraining nor the party distrained upon has in the first instance the absolute property of the goods taken. For in this case, and in the case of goods pledged, the goods may be redeemed or forfeited by the act of the distrainee or pawnee.

It now remains to notice that species of property which the law calls a *chose in action*, which is where the property and right of possession are in one man, but the possession is in another; and as such possession, if withheld, can only be obtained by an action or suit at law, the thing so recoverable is called a chose in action. Thus, if A buys of B a horse, and pays the price, but the horse is not delivered; or if B binds himself in an obligation to pay to A one hundred pounds on a certain day, and makes default; in these cases a property in the horse or in the hundred pounds is vested in A, which is called a chose in action. So if a man covenants with me to do any act, and fails, whereby I suffer damage, the recompence for this damage is a chose in action; a right to recompence vests in me at the time of the damage done, though the quantum of it must be ascertained by verdict, and the possession of it be given me by legal judgment and execution.

A chose in action is either legal or equitable. It is said to be *legal* when the remedy for its recovery is at law, as in the case of money secured by bond, damages for the breach or nonperformance of a contract; it is said to be *equitable*, when the remedy for its recovery is in a court of equity, as money in the hands of, or stock standing in the name of a trustee for any party, or an unpaid legacy.

As it was thought to have a strong tendency to encourage litigiousness to allow one man to sell his right of action to another, the old common law prohibited the assignment of a chose in action. But though the law in this particular still remains unaltered, the courts, considering that in a commercial country every facility should be afforded to the transfer of property, will so far notice an assignment of a chose in action as to permit an action to be brought by the assignee in the name of the assignor. The transfer of such an interest, therefore, is in the nature of a declaration of a trust, and an agreement to permit the assignee to use the assignor's name in order to recover the possession. And it has been held, where the assignee became a bankrupt after having made an assignment of a debt, and before the action brought, that the debt so assigned passed the property to the assignee, and that the assignees under the commission had no title to it, the bankrupt standing at the time of the bankruptcy in the situation of a trustee for the person substantially interested, and that the plea of bankruptcy could not defeat an action brought in the name of the assignor, the whole facts of the case being replied to such plea.

Bills of exchange, bills of lading, and promissory notes, are exceptions to the rule interdicting the transfer of choses in action; for these are assignable by indorsement and delivery, the two former by the custom of merchants, and the latter by statute 3 & 4 Ann. c. 9. Other instances arise in the cases of bankruptcy and insolvency, and of replevin and bail bonds. The crown also is an exception to the rule, for the crown by its prerogative might always either grant or receive a chose in action; and the crown's grantee may sue in his own name without any special authority.

And the courts of equity will protect the assignment of a chose in action as much as those of a chose in possession; and such assignment will be good against creditors under a fiat of bankruptcy.¹ But the assignee takes it subject to all the equities to which it was subject in the hands of the party making the assignment.

A chose in action was not subject to an execution at law; neither could it be attached in equity by creditors in the life-time of the debtor.² But this doctrine has recently been considerably affected by the act 1 & 2 Vict. c. 110. See *ante*, 174, 5.

Having thus considered the *property* to which things personal are subject, we shall add a word or two concerning the *time* of their enjoyment, and the *number* of their owners, in conformity to the method before observed in treating of the property of things real.

First, as to the *time of enjoyment*. By the old common law, there could be no future property, to take place in expectancy, created in personal goods and chattels. Yet, in wills, limitations of such in remainder, after a bequest for life, were permitted; though, originally, the use only of the goods was to be given to the first legatee, the property being supposed all along to continue in the executor of the deviser. But now that distinction is disregarded; for if a man, by deed or will, limits his books or furniture to A for life, remainder to B, this remainder is good. But an estate tail in things personal given to the first or any subsequent possessor vests in him the total property, and no remainder over is permitted on such limitation. For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail.

Next, as to the *number of owners*. Things personal are liable to joint tenancy and tenancy in common, as well as real estates; though not to coparcenary, because they do not descend from the ancestor to the heir. If a horse be given to two or more absolutely, they are joint tenants thereof; and, unless the jointure be severed, the doctrine of survivorship takes place. And so if one of them sells his share, the vendee and remaining part owner shall be tenants in common, without any *jus accrescendi*, or right of survivorship. So if 100*l.* be given by will to two or more to be equally divided between them, this makes them tenants in common; as the same words would have done with regard to real estates. But stock on a farm, though occupied jointly, and stock used in a joint undertaking by way of partnership in trade, are considered as common, not joint property, and there is no right of survivorship therein.

¹ Browne v. Heathcote, 1 Atk. 160.

² Grogan v. Cooke, 2 Ball & B. 228.

CHAPTER XVIII.

Of Title to Things Personal; and first, by Occupancy:

WHEREIN OF COPYRIGHT AND PATENTS.

THE title to things personal, or the various modes of *acquiring* and *losing* a property therein, may be reduced to the following heads:—

1. Occupancy; 2. Prerogative; 3. Forfeiture; 4. Custom; 5. Succession; 6. Marriage; 7. Judgment; 8. Gift or Grant; 9. Contract; 10. Testament; 11. Administration; 12. Bankruptcy; 13. Insolvency.

I. OCCUPANCY has been defined to be the taking possession of those things which before belonged to no one. Of the origin and nature of this right we have already spoken.¹ There are now but few instances in which it subsists in its original state as applied to personal chattels; for, generally, where things are found without an owner, they belong to the crown by virtue of its prerogative.

It has been said, that any one may seize to his own use such goods as belong to an alien enemy. This, however, applies to such persons only as are lawfully authorized so to do, and to such goods as are brought into this country by an alien enemy after a declaration of war, without a safe conduct or passport.²

To the principle of occupancy must be referred the mode of acquiring property in all moveables that are found upon the surface of the earth or on the sea, and unclaimed by any owner, which under such circumstances are considered to belong to the first occupant or the party who first obtained possession of them, unless they fall within the description of waifs, estrays, wrecks, or hidden treasure, which, as we have before seen, belong to the crown.³

In the same manner a personal property may be acquired in corn growing on the ground by a possessor of the land who has sown or planted it.⁴

To this principle has also been referred that species of property which an author has in his own original literary compositions, or, as it is termed, his *copyright*. As this is a subject of general importance, we shall here treat of it at some length; and afterwards, as analogous thereto, the law of *patents* for new inventions will naturally claim our attention.

Of COPYRIGHT.

Literary property, or copyright, may be defined to be the ownership or rightful possession to which an author, or the person to whom he assigns it, is entitled in the *copy* or original manuscript of his literary works; and it comprises the exclusive right of printing and publishing copies of any literary performance, including musical compositions, engravings, prints, &c.

¹ *Ante*, 564.

² *Ante*, 227.

³ *Ante*, 39.

⁴ As to emblements in general, and who are entitled thereto, see *ante*, 512.

It is only at a comparatively recent period that this property appears to have been the object of legislative protection. By the 8 Anne, c. 19, it was declared, that the author and his assigns should have the sole liberty of printing and reprinting his works for the term of fourteen years, and if at the end of that term the author himself were living the right should return to him for another period of the same duration. The term was afterwards extended by the 41 Geo. III. c. 107, and 54 Geo. III. c. 156, to twenty-eight years absolutely, and, if the author were living at the end of that period, for the residue of his natural life. But these acts have been recently repealed, and the duration of copyright is still further extended, by the 5 & 6 Vict. c. 45, to a period of *forty-two years* certain, and till *seven years* after the death of the author. Copyright is declared to be personal property transmissible by bequest, and, in case of intestacy, subject to the same law of distribution as other personal property; and the protection of it by the statute is extended to the whole of the British dominions. As this act consolidates the whole law upon the subject, we shall give its provisions in detail.

After reciting that it is expedient to afford greater encouragement to the production of literary works of lasting benefit to the world, and repealing the three before-mentioned statutes, the act proceeds to define the extent and meaning of the following terms as used in it:—

Book.—In the construction of this act the word “book” shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan, separately published.

Dramatic piece shall include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment.

Copyright shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied.

Personal representative shall include every executor, administrator, and next of kin entitled to administration.

Assigns shall include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law, or otherwise.

British dominions shall include all parts of the United Kingdom of Great Britain and Ireland, the islands of Jersey and Guernsey, all parts of the East and West Indies, and all the colonies, settlements, and possessions of the crown which now are or hereafter may be acquired.

The *duration of the term of copyright* is then established by the 3d section, which enacts, “That the copyright in every book which shall after the passing of this act be published in the life-time of its author shall endure for the *natural life of such author, and for the further term of seven years*, commencing at the time of his death, and shall be the property of such author and his assigns: provided, that if the said term of seven years shall expire before the end of *forty-two years* from the first publication of such book, the copyright shall in that case endure for such period of forty-two years. And the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author’s manuscript from which such book shall be first published, and his assigns.”

And as to books published before the passing of the act, and in which copyright was then subsisting, it is enacted by sect. 4, “That such copyright shall be extended and endure for the full term provided by this act in cases of books thereafter published, and shall be the property of the person who at the time of the passing of this act shall be the

proprietor of such copyright. Provided, that in all cases in which such copyright shall belong in whole or in part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this act, but shall endure for the term which shall subsist therein at the time of passing of this act, and no longer, unless the author of such book, if he be living, or the personal representative of such author, if he be dead, and the proprietor of such copyright, shall, before the expiration of such term, consent and agree to accept the benefits of this act in respect of such book, and shall cause a minute of such consent, in the form given in the schedule of the act, to be entered in the Book of Registry at Stationers Hall, in which case such copyright shall endure for the full term by this act provided in cases of books to be published after the passing thereof, and shall be the property of such person as in such minute shall be expressed."

And as to *encyclopædias, reviews, magazines, and works published in a series*, it is enacted by § 18, "That when any publisher or other person shall, before or at the time of the passing of this act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any person to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as parts of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by him, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this act; except only that, in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively, the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this act. Provided always, that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly, without the consent previously obtained of the author thereof or his assigns. Provided also, that nothing herein contained shall alter or affect the right of any person so employed as aforesaid to publish any such his composition in a separate form, who by any contract, express or implied, may have reserved to himself such right; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form according to this act, without prejudice to the right of such proprietor, projector, publisher or conductor as aforesaid."

To provide against the *suppression* of books of importance to the public, it is enacted by § 5, that it shall be lawful for the Judicial Committee of the Privy Council, on complaint made to them that the proprietor of the copyright in any book after the death of its author has refused to republish or to allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, to grant a licence to such complainant to publish such book, in such manner and subject to such conditions as they may think fit.

The *delivery of copies to certain public libraries* is provided for by sections 6 to 9, which enact, That a printed copy of the whole of every book which shall be published after the passing of this act, together with all maps, prints, or other engravings belonging thereto, finished and coloured in the same manner as the best copies, and also of any second or subsequent edition published with any additions or alterations, whether in the letter-press, or in the maps, prints, or other engravings, and whether the first edition shall have been published before or after the passing of this act, and also of any second or subsequent edition of every book of which the first or some preceding edition shall not have been delivered for the use of the British Museum, bound, sewed, or stitched together, and upon the best paper on which the same shall be printed, shall, within one calendar month after the day on which such book shall first be sold, published, or offered for sale within the bills of mortality, or within three calendar months if the same shall first be sold, published, or offered for sale in any part of the United Kingdom, or within twelve calendar months after the same shall first be sold, published, or offered for sale in any other part of the British dominions, be delivered, on behalf of the publisher thereof, at the British Museum. And every such copy shall be delivered between the hours of ten in the forenoon and four in the afternoon, on any day except Sunday, Ash Wednesday, Good Friday, and Christmas day, to one of the officers, or to some person authorized by the trustees to receive the same, who shall give a receipt in writing for the same.

And (§ 8) a copy of the whole of every book, and of any second or subsequent edition of every book containing additions and alterations, together with all maps and prints, which after the passing of this act shall be published, shall (on demand thereof in writing left at the place of abode of the publisher at any time within twelve months next after the publication thereof, under the hand of the officer of the Company of Stationers appointed by the said company for the purposes of this act, or under the hand of any other person thereto authorized by the proprietors and managers of the following libraries, *viz.* the Bodleian Library at Oxford, the Public Library at Cambridge, the Library of the Faculty of Advocates at Edinburgh, the Library of the College of the Holy and Undivided Trinity of Queen Elizabeth near Dublin) be delivered, upon the paper of which the largest number of copies shall be printed for sale, in the like condition as the copies prepared for sale by the publisher, within one month after demand made thereof in writing as aforesaid, to the said officer of the said Company of Stationers; which copies the said officer shall receive at the hall of the said company for the use of the library for which such demand shall be made, and shall give a receipt in writing for the same,

and within one month afterwards deliver the same for the use of such library. Provided, that if any publisher shall be desirous of delivering the copy of such book as shall be demanded on behalf of any of the said libraries at such library, it shall be lawful for him to deliver the same at such library, free of expence, to such librarian or other person authorized to receive the same, who shall in such case receive and give a receipt in writing for the same.

And (§ 10) if any publisher of any such book, or of any second or subsequent edition of any such book, shall neglect to deliver the same pursuant to this act, he shall for every such default forfeit, besides the value of such copy which he ought to have delivered, a sum not exceeding 5*l.*, to be recovered by the librarian or other officer properly authorized of the library for the use whereof such copy should have been delivered, in a summary way, on conviction before two justices of the peace for the county or place where such publisher shall reside, or by action of debt or other proceeding of the like nature at the suit of such librarian or other officer in any court of record in the United Kingdom; in which action if the plaintiff shall obtain a verdict, he shall recover his costs reasonably incurred, to be taxed as between attorney and client.

As to the *registry* of copyrights, and of assignments thereof, at Stationers Hall, it is enacted, (§ 11) "That a book of registry, wherein may be registered the proprietorship in the copyright of books, and assignments thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licences affecting such copyright, shall be kept at the hall of the Stationers Company, by the officer appointed by the said company for the purposes of this act, and shall at all convenient times be open to the inspection of any person on payment of one shilling for every entry which shall be searched for or inspected in the said book. And such officer shall, whenever thereunto reasonably required, give a copy of any entry in such book, certified under his hand, and impressed with the stamp of the said company, to any person requiring the same, on payment of the sum of 5*s.* And such copies so certified and impressed shall be received in evidence in all courts, and in all summary proceedings, and shall be *prima facie* proof of the proprietorship or assignment of copyright or licence as therein expressed, but subject to be rebutted by other evidence, and in the case of dramatic or musical pieces shall be *prima facie* proof of the right of representation or performance, subject to be rebutted as aforesaid.

And (§ 13) after the passing of this act, it shall be lawful for the proprietor of copyright in any book heretofore published, or in any book hereafter to be published, to make entry in the registry book of the Stationers Company, of the title of such book, at the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright, or of any portion of such copyright in the form given in the schedule to this act, upon payment of the sum of 5*s.* And it shall be lawful for every such registered proprietor to assign his interest, or any portion of his interest therein, by making entry in the said book of registry of such assignment, and of the name and place of abode of the assignee thereof, in the form given in the said schedule, on payment

of the like sum. And such assignment so entered shall be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and shall be of the same force and effect as if such assignment had been made by deed.

And (§ 19) the proprietor of the copyright in any encyclopædia, review magazine, periodical work, or other work published in a series of books or parts, shall be entitled to all the benefits of registration at Stationers Hall under this act, on entering in the said book of registry the title of such encyclopædia, review, periodical work, or other work published in a series of books or parts, the time of the first publication of the first volume, number, or part thereof, or of the first number or volume first published after the passing of this act in any such work which shall have been published heretofore, and the name and place of abode of the proprietor thereof, and of the publisher thereof when such publisher shall not also be the proprietor thereof.

And by § 24, no proprietor of copyright in any book first published after the passing of this act shall maintain any action or suit, at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made, in the book of registry of the Stationers Company, of such book, pursuant to this act. Provided always, that the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof as aforesaid.

By § 14, if any person shall deem himself aggrieved by any entry made under colour of this act in the said book of registry, it shall be lawful for such person to apply by motion to the Court of Queen's Bench, Court of Common Pleas, or Court of Exchequer, in term time, or to apply by summons to any judge of either of such courts in vacation, for an order that such entry may be expunged or varied. And upon any such application by motion or summons to either of the said courts, or to a judge as aforesaid, such court or judge shall make such order for expunging, varying, or confirming such entry, either with or without costs, as to such court or judge shall seem just; and the officer appointed by the Stationers Company for the purposes of this act shall, on the production to him of any such order for expunging or varying any such entry, expunge or vary the same according to the requisition of such order.

And by § 12, if any person shall wilfully make or cause to be made any *false entry* in the registry book of the Stationers Company, or shall wilfully produce or cause to be tendered in evidence any paper *falsely* purporting to be a copy of any entry in the said book, he shall be guilty of an indictable misdemeanor, and shall be punished accordingly.

For the *protection* of copyrights against pirated editions, it is provided, (§ 15) that if any person shall, in any part of the British dominions, after the passing of this act, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or, knowing such book to have been

so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought in any court of record in that part of the British dominions in which the offence shall be committed. Provided always, that in Scotland such offender shall be liable to an action in the Court of Session which may be brought and prosecuted in the same manner in which any other action of damages to the like amount may be brought and prosecuted there.

And (§ 16) in any action brought within the British dominions against any person for printing any such book for sale, hire, or exportation, or for importing, selling, publishing, or exposing to sale or hire, or causing to be imported, sold, published, or exposed to sale or hire, any such book, the defendant, on pleading thereto, shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of such action; and if the nature of his defence be, that the plaintiff in such action was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person whom he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when and the place where such book was first published, otherwise the defendant in such action shall not at the trial or hearing of such action be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein; and at such trial or hearing no other objection shall be allowed to be made on behalf of such defendant than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein, than the person specified in such notice, or give in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication, with the title, time, and place specified in such notice.

And (§ 17) after the passing of this act it shall not be lawful for any person, not being the proprietor of the copyright, or some person authorized by him, to import into any part of the United Kingdom, or into any other part of the British dominions, for sale or hire, any printed book first composed or written or printed and published in any part of the said United Kingdom, wherein there shall be copyright, and reprinted in any country or place whatsoever out of the British dominions. And if any person, not being such proprietor or person authorized as aforesaid, shall import or bring, or cause to be imported or brought, for sale or hire, any such printed book into any part of the British dominions, contrary to the true intent and meaning of this act, or shall knowingly sell, publish, or expose to sale, or let to hire, or have in

his possession for sale or hire, any such book, then every such book shall be forfeited, and shall be seized by any officer of customs or excise, and the same shall be destroyed by such officer; and every person so offending, being duly convicted thereof before two justices of the peace for the county or place in which such book shall be found, shall also for every such offence forfeit the sum of 10*l.* and double the value of every copy of such book which he shall so import or cause to be imported into any part of the British dominions, or shall knowingly sell, publish, or expose to sale or let to hire, or shall cause to be sold, published, or exposed to sale, or let to hire, or shall have in his possession for sale or hire, contrary to the true intent and meaning of this act, 5*l.* to the use of such officer of customs or excise, and the remainder of the penalty to the use of the proprietor of the copyright in such book.

And by § 23, all copies of any book wherein there shall be copyright, and of which entry shall have been made in the said registry book, and which shall have been unlawfully printed or imported without the consent of the registered proprietor of such copyright, in writing under his hand first obtained, shall be deemed to be the property of the proprietor of such copyright, who shall be registered as such; and such registered proprietor shall, after demand thereof in writing, be entitled to sue for and recover the same, or damages for the detention thereof, in an action of detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of trover.

So also, by 5 & 6 Vict. c. 47 (Customs Acts Amendment), §§ 24, 25, all books wherein the copyright shall be subsisting, first composed or written or printed in the United Kingdom, and printed or reprinted in any other country, are absolutely prohibited to be imported into the United Kingdom. Provided always, that no such book shall be prohibited to be imported unless the proprietor of such copyright or his agent shall give notice in writing to the commissioners of customs that such copyright subsists, and in such notice shall state when such copyright shall expire; and the said commissioners shall cause to be made, and publicly exposed at the several ports of the United Kingdom from time to time, printed lists of the works respecting which such notice shall have been duly given, and of which such copyright shall not have expired.

As to the *subjects* of copyright, we have seen, that under the term "book" is included every volume, part or division of a volume, pamphlet, &c. So, under the former statutes, according to their construction by the courts, it was held that every original work, however insignificant in extent, was included; that there is a property even in a single page. It has been held also that there is a copyright not only in original works, but in *translations*, whether from the ancient or modern languages;¹ also in *abridgments* and *compilations*, if fairly and *bonâ fide*, and not fraudulently or colourably, made.²

And after the time limited is expired, if the author or any other writer should reprint the work with original *notes* or *additions*, the latter are entitled to the same degree of protection as any other original composition.³

³ Ves. & Bea. 377.

² Amb. 403. Loft. Rep. 775.

¹ 1 East, 358.

The former statutes also further received a liberal interpretation in favour of *musical compositions*, which were held, as a branch of science, to be comprehended within the meaning of the acts, though not specially named.¹ In the present statute these are not only expressly declared to be within its protection under the general term "book;" but by a subsequent part of the act, as we shall presently see, the provisions of the 3 & 4 Wm. IV. c. 15, are applied to them, placing them on the same footing as *dramatic pieces*, and giving to the author and his assigns the sole liberty of authorizing a public performance of them.

The present statute also expressly extends to *maps, charts, and plans*, which now enjoy the same protection as books. These were previously protected only by the statutes made for the protection of engravings, prints, &c., which will be noticed hereafter.

Manuscripts were always protected by the common law as the property of the author, and have been also considered as comprised in the provisions made by the legislature. In the case *Donaldson v. Beckett*, eleven of the judges were decidedly of opinion, that by the common law the author of any literary composition has the sole right of printing and publishing the same for sale, and may bring an action against any person for publishing it without his consent; and on a decision of the Court of King's Bench, it was stated, that the 54 Geo. III. did not impose upon authors, as a condition precedent to their deriving any benefit under the act, that the composition should be *first printed*; and therefore that an author does not lose his copyright by selling his work in manuscript before it is printed.² The Court of Chancery also has frequently exercised its power in restraining the use of manuscripts surreptitiously obtained.

The unpublished manuscripts of an author cannot, it seems, be taken in execution at the suit of creditors;³ neither are the assignees, under a fiat of bankruptcy, entitled to the manuscripts of an author, although the copyright of a book which has been printed and published will legally pass for the benefit of the creditors.⁴

With respect to the publication of *letters* by the party to whom they are addressed, there seems to be a distinction taken between *literary* and *general* letters. The former are protected as the subject of copyright in the party by whom they were written; the publication of the latter also may be restrained on the ground of breach of contract or confidence, or when they tend to the injury of private character, or are calculated to wound private feelings.⁵

With respect to *lectures*, a distinction was formerly made between lectures read from a written composition or delivered from the recollection of it, and lectures given *extempore*, of which no manuscript existed. But the 5 & 6 Wm. IV. c. 65, reciting that whereas printers, publishers, and other persons have frequently taken the liberty of printing and publishing lectures delivered upon divers subjects, without the consent of the authors or persons delivering the same, to the great detriment of such authors and lecturers, enacts, That after the 1st September, 1835, the author of any lectures, or the person to whom he

¹ *Bach v. Longman*, Cowp. 623.

² *Barn & Ald*. 298.

³ *4 Burr*. 2311.

⁴ *Longman v. Tripp*, 3 New Rep. 67.

⁵ *Gee v. Pritchard*, 2 Swans. 402.

hath sold or otherwise conveyed the copy thereof, shall have the sole right and liberty of printing and publishing such lecture or lectures; and that if any person shall obtain or make a copy of such lectures, and shall print or lithograph or otherwise copy and publish the same, or cause the same to be printed, lithographed, or otherwise copied and published, without leave of the author, or of the person to whom the author hath sold or otherwise conveyed the same, and every person who, knowing the same to have been printed or copied and published without such consent, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such lectures, shall forfeit such printed or otherwise copied lecture or lectures, or parts thereof, together with one penny for every sheet found in his custody, the one moiety thereof to her majesty and the other to any person who shall sue for the same, to be recovered in any court of record in Westminster, by action of debt, bill, plaint, or information, in which no wager of law, essoin, privilege, or protection, or more than one imparlance, shall be allowed.

By sect. 2, the prohibition is extended to newspapers, the printers and publishers of which are made liable to the same forfeitures and penalties for the publication of such lectures without leave as aforesaid.

And by sect 3, no person shall be deemed to be licensed or to have leave to print and publish such lecture, because of having leave to attend and be present at the delivery, whether by reason of any fee or reward or otherwise.

But sect. 4 provides, that nothing in this act shall extend to prohibit any person from publishing any lectures which shall have been printed and published with leave of the authors or their assignees and whereof the time shall have expired within which the sole right to print and publish the same is given by the 8 Anne and 54 Geo. III., or to any lectures printed or published before the passing of this act.

And by sect. 6, nothing herein shall extend to any lectures, of the delivering of which notice in writing shall not have been given to two justices living within five miles from the place where they shall be delivered two days at least before delivering the same, or to any lectures delivered in any university or public school or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment, or foundation; but the law relating thereto shall remain the same as if this act had not passed.

It is not necessary for an author to put his name to the title page in order to preserve the copyright.¹ Lord Eldon, however, on one occasion, doubted how far he could relieve the publisher of a work with a fictitious name;² but he granted an injunction until answer or further order, to restrain the publication of a work in the name of Lord Byron, who was abroad, upon an affidavit by his lordship's agent of circumstances making it highly improbable that it was a work by his lordship, and on the refusal of the defendant to swear as to his belief that it was written by him.³

Every *assignment* of copyright, to be valid, must be in writing; no assignment by parol is sufficient, not even of a single song or sheet.⁴

¹ 4 Burr. 2367.

² 8 Vesey, 226.

³ Power v. Walker, 3 M. & S. 7. See also Randall v. Murree, 1 Jac. 311.

The construction of the statute is so strict, that though the author of a musical composition acquiesced for six years in the defendant's publication of it, this was held insufficient evidence of the transfer of his interest in the copyright. Nor will a receipt given by him as the price of the copyright preclude him from maintaining the action.

As to the modes of procedure in obtaining redress for injuries to copyrights, we have already seen the remedies provided by the 15th, 16th, and 17th sections of the statute. With respect to these it is only necessary here further to observe, that, by § 26, all actions, suits, bills, indictments, or informations, for any offence committed against the act must be commenced within twelve calendar months; though this limitation does not extend to any proceedings in respect of the delivery of copies to the public libraries.

But the most usual and expeditious means of obtaining redress for piracy, and preventing the continuance of the injury, is by application to a court of equity, where, by the preliminary process of injunction, justice is more readily administered than in a court of law. In order to obtain this relief, the title of the plaintiff must be founded on a legal copyright, or, at all events, there must be a strong *prima facie* case of legal title. Where the plaintiff's right is doubtful, a court of equity will not interfere in the first instance, but leave the party to establish his right by an action at law; after which he will be entitled to the additional aid of an injunction in equity.

When the protection of the Court of Chancery is sought in cases of alleged piracy, it appears to be the practice of that court to direct a reference to the master, in order that he may determine, by a comparison of the works, whether they are of the same composition or not, though the court will sometimes itself make the comparison.

Where the character of the publication is such that no damages could be received in respect thereof at law, on account of the immoral or illegal tendency of the work, equity will not interpose.

Laches, or neglect, on the part of the party seeking the remedy will also be a ground for the court refusing to interpose, at least until his right is established at law. Thus, in a case where the party moved for an injunction to restrain the defendant from publishing some music, and it appeared that various persons had published the music for fifteen years without the plaintiff having ever during that time asserted his copyright, the court refused to interfere, and left the plaintiff to bring his action.¹ So also, where the application was made nine years after the publication of the work complained of, the court refused to grant an injunction, and left the plaintiff to seek his remedy at law.²

Works of an immoral or illegal nature are not protected either by the courts of law or equity. So strong is the objection to an immoral work, that Lord Ellenborough held that the apprehension of a prosecution for the immorality or illegality of a work would justify a person for refusing to supply a bookseller with the remainder of the manuscript agreeably to a contract.³ Works which deny the truth of or vilify the sacred Scriptures, or which tend to bring them in to contempt, or which lead to a disbelief in revelation, are strictly excluded

¹ Platt v. Button, 19 Ves. 44.

² Gale v. Leckie, 2 Stark. 109.

³ Bailey v. Taylor, 1 Rus. & Myl. 78.

from legal protection in the courts of justice in this country, all of which acknowledge Christianity as part of the law of the land.¹ So publications which are calculated to disturb the public peace, or to be injurious to the good government of the state, or which tend to bring into contempt the administration of justice, are all shut out of the pale of the law. There can be no right of property in such compositions.²

The courts of equity will not assist an author whose work contains a libel on private character.³ The criterion of exclusion may be stated to be the liability of the writer to an action for damages or a prosecution for the libel.

As the law will not protect works which are immoral and unlawful, so also it refuses its aid in preserving the exclusive use of books which have been *pirated* from previous publications. And it not only withholds its protection from books which are *wholly* pirated, but from those which are in substance merely copies or *imitations*, or which although in some parts different, yet are in general the same. A *bonâ fide* abridgment or compilation is considered in the nature of an original work; but whole passages must not be transcribed, nor the work abridged in a merely colourable manner. In such a case the law would not interfere between the first and subsequent pirates, or lend itself to the protection of property thus fraudulently obtained.

Prerogative Copyrights.—An exclusive right to the printing of certain matters relating to the state and church is claimed as the prerogative of the crown. This right was formerly supposed to be more extensive than it is held to be at present; all law books, almanacks, and the Latin grammar, having been among the works anciently monopolized under the charters and patents granted by the crown.

The queen is said to have the exclusive privilege of printing at her own press, or that of her grantees, all proclamations, acts of parliament, and orders in council, also the liturgy and other books of divine service, with all forms of prayer used on particular occasions; and by her prerogative, and also by purchase, the exclusive right of printing the translation of the bible. The persons to whom this exclusive privilege is granted are called the Queen's Printers: the grant is in the nature of a patent. The queen's printers, however, do not enjoy the *sole* privilege of printing bibles and prayer-books, that privilege being also claimed and exercised by the universities of Oxford and Cambridge.

As to *acts of parliament &c.*, there appears to be but one case of any attempt made to infringe upon this branch of the prerogative; and that was where a person published some matters in the privy council, when the court of chancery interfered and restrained the publication.⁴

As to *bibles*, the right of the universities of Oxford and Cambridge to print bibles and prayer books has been admitted on several occasions; it is claimed by virtue of letters patent granted in the 13th year of Elizabeth. The most recent case upon this point, and one in which all the previous authorities are referred to, and the law upon the subject most ably laid down, is the case of the Universities of Oxford

¹ Murray v. Benbow, 6 Petersdorff's Abr. 558. Lawrence v. Smith, ib. 559.

² Southey v. Sherwood, 2 Meriv. 438.

³ Walcott v. Walker, 7 Ves. 1. 6 Petersdorff's Abr. 557.

⁴ See 2 Ves. & Bea. 21.

and *Cambridge v. Richardson*.¹ The universities have also the right, concurrently with the queen's printer, of printing and publishing the statutes, or abridgments of them, within the university. This was decided in the case of *Basket v. University of Cambridge*.

With regard to the right which the crown has been said to have by purchase in certain other publications, namely, in all *law books*, and in the *Latin grammar*, in whatever light it may have formerly been considered, it is now perfectly clear that it has no foundation. Mr. Justice Yates, in the case of *Millar v. Taylor*, observed, "It is mentioned as one ground of the king's right to print them, that some of these prerogative books were composed at his expence; but, in fact, it was no private disbursement of the king, but done at the public charge, and as part of the expences of government. It can hardly be contended that the produce of expences of a public sort are the private property of the king, when purchased with the public money. He cannot dispose of or sell one of these compositions. How, then, can they be his private property, like the private property claimed by an author in his own compositions?"

Upon the whole, then, it appears that the queen's printers have the exclusive right of printing all *proclamations* and *state papers*; and that they have, concurrently with the two universities of Oxford and Cambridge, the right of printing all *acts of parliament*, *bibles*, and *books of common prayer*.

The universities, as well as the colleges of Eton, Westminster, and Winchester, are enabled to hold certain copyrights in *perpetuity* by express act of parliament. For as soon as the celebrated decision was made by the House of Lords, in the case of *Donaldson v. Beckett*, that an action at law could not be maintained for pirating a work beyond the time limited by the statute, the universities immediately applied to parliament, and in the same year (1757) obtained an act (15 Geo. III. c. 53) "for enabling the two universities in England, the four universities in Scotland, and the several colleges of Eton, Westminster, and Winchester, to hold in *perpetuity* their copyrights in books given or bequeathed to them for the advancement of useful learning and other purposes of education." This act secures to such universities and colleges respectively *for ever* the sole liberty of printing all such books as had been or should be bequeathed to them or in trust for them (unless given only for a limited time), so long as such books shall be printed at the presses of the said universities or colleges; and all their rights are expressly reserved to them by the present Copyright Act. They may, however, sell their copyrights, in the same manner as an individual author; and all books given or bequeathed to them must be registered at Stationers' Hall within two months after the gift &c. shall come to the knowledge of the officers of the said universities or colleges.

The right of printing *almanacs* was for a considerable time exercised by the Company of Stationers, to the exclusion of all persons (except the universities of Oxford and Cambridge), by virtue of a grant made to them in the reign of James I. The validity of this right was the subject of much litigation, until at length

¹ 2 Burr. 661.

the Court of Chancery decided, that the crown had not a prerogative power to make such a grant to the Stationers Company exclusively. Any person may therefore make and publish the calculations usually published in almanacs. There is one species of almanac, however, to which this observation does not apply, and that is the almanac termed the Nautical Almanac; for, by the 9 Geo. IV. c. 66, it is enacted, that it shall be lawful for the lord high admiral, or the commissioners for executing the office of lord high admiral of the United Kingdom for the time being, to cause nautical almanacs to be constructed, printed, published, and vended free of stamp duty; and it is declared that every person who, without the special licence and authority of the lord high admiral or commissioners as aforesaid, shall print, publish, or vend, or cause to be printed, published, or vended, any such almanac or almanacs, shall, for every such copy so printed, published, and vended, forfeit the sum of 20*l*.

International Copyright.—The first International Copyright Act was the 1 & 2 Vic. c. 58; but that act only contemplated a protection to the authors of *books* first published abroad, and was insufficient even for that purpose, having been passed before the recent amendment of the law of copyright by the 5 & 6 Vic. c. 45. It has therefore been replaced by the 7 & 8 Vic. c. 12. By this act, her majesty is empowered, by order in council, not only to confer upon the authors of *books* first published in foreign countries, their executors, administrators, and assigns, copyright of the like duration, with the like remedies for the infringement thereof, which are provided by the said Copyright Amendment Act with respect to authors of *books* first published in the British dominions, but also to confer on foreign authors &c. the exclusive right of *representing or performing dramatic pieces or musical compositions*, and to extend the privilege of copyright to *prints and sculpture* first published abroad. The duration and extent of the protection may be different for different foreign countries, and for different classes of works, and must be specified in the order in council; it must be also therein stated, as the ground for issuing the same, that due protection has been secured by such foreign power for parties interested in works first published in her majesty's dominions, similar to those comprised in such order.

To entitle an author &c. to the benefit of this act, his title to the copyright of the work, with his name and place of abode and the time and place of its first publication, representation, or performance in the foreign country, must be registered at Stationers' Hall, and a copy delivered, within the time prescribed by the order in council.

But the act is not to be construed to prevent the publication of a *translation* of any book.

No author of any book first published abroad is to have any copyright therein within her majesty's dominions other than such (if any) as he may be entitled to under this act.

Representation of Dramatic Pieces, and the Performance of Musical Compositions.—As to this kind of property, the law was in a very unsatisfactory state till the passing of the statute 3 & 4 Wm. IV. c. 15. A represented and unpublished play was indeed protected from piracy

by *printing*, the exclusive right of printing and publishing it belonging to the author, yet no action could be maintained for *representing* on the stage any dramatic production which had been previously printed and published, it being held that such representation was not a publishing within the intent of the Copyright Act.

The 3 & 4 Wm. IV. c. 15, however, enacts, that, after the passing thereof, the author of any tragedy, comedy, opera, farce, or any other dramatic piece or entertainment, or his assignee, shall have, as his own property, the sole liberty of representing or causing to be represented, at any place of dramatic entertainment whatsoever in any part of the United Kingdom, or in the isles of Man, Jersey, Guernsey, or in any part of the British dominions, any such production not printed or published by the author thereof or his assignee, and shall be deemed the proprietor thereof. And that the author, or the assignee of the author, of any such production *printed and published* within ten years before the passing of this act, or which shall hereafter be printed and published, shall, from the time of passing the act, or from the time of such publication respectively, until the end of twenty-eight years from the day of such first publication, and also if the author be living at the end of that period, during the residue of his natural life, have, as his own property, the sole liberty of representing or causing to be represented the same at any such place of dramatic entertainment, and shall be deemed the proprietor thereof.

Providing nevertheless, that nothing in the act shall prejudice or affect the right of any person to represent any such production, in cases in which the author or his assignee should, previously to the passing of the act, have given his consent to or authorized such representation.

And that if any person shall, during the continuance of such sole liberty as aforesaid, represent or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom (whichever shall be the greater damages), to the author or other proprietor, to be recovered, together with double costs of suit, in any court having jurisdiction in such cases where the offence shall be committed. And that in every such proceeding where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority, or otherwise mentioning the same.

And now the 5 & 6 Vict. c. 45, § 20, (reciting the 3 & 4 Wm. IV. c. 15, and that it is expedient to extend the term of the sole liberty of representing dramatic pieces given by that act to the full time by this act provided for the continuance of copyright, and to extend to *musical compositions* the benefits of that act and also of this act) enacts, That the provisions of the said act 3 & 4 Wm. IV. c. 15, and of this act,

shall apply to musical compositions; and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author and his assigns for the term in this act provided for the duration of copyright in books; and that the provisions herein enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were here expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent to the first publication of any book. And (§ 21) the person who shall have at any time the sole liberty of representing such dramatic piece or musical composition shall have and enjoy the remedies given in the said act 3 & 4 Wm. IV. c. 15 during the whole of his interest therein, as fully as if the same were re-enacted in this act.

And as to *registration*, it is provided, (§ 20) that in case of any dramatic piece or musical composition *in manuscript*, it shall be sufficient for the person having the sole liberty of representing or performing, or causing to be represented or performed the same, to register only the title thereof, the name and place of abode of the author or composer, the name and place of abode of the proprietor, and the time and place of its first representation or performance.

And by § 24 it is further provided, that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the 3 & 4 Wm. IV. c. 15, or of this act, although no entry be made in the book of registry aforesaid.

Under the 3 & 4 Wm. IV. c. 15, it had been held, that where an author assigned all his interest in the copyright of a dramatic piece, the liberty of representing or causing it to be represented, passed with it.¹ But sect. 22 of the 5 & 6 Vict. c. 45 enacts, "That no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said register book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment."

Engravings, Prints, &c.—A protection similar to that afforded to the authors of books is given to the proprietors of engravings and prints by the statutes 8 Geo. II. c. 13, 7 Geo. III. c. 38, and 17 Geo. III. c. 57.

By the 8 Geo. II. c. 13, the property in historical and other prints engraved by artists from their own designs was vested in them for the term of fourteen years from the day of the first publishing thereof, which is to be engraved, with the name of the proprietor, on each plate; and any one pirating the same, or selling prints so pirated, is subjected to a forfeiture of the plates and copies to the proprietor, and to the penalty of five shillings for every print found in his custody, one half to her majesty, and the other half to any person who shall sue for the same.

By the 7 Geo. III. c. 38, the term of copyright is extended to

¹ Cumberland v. Planché, 3 New. & Man. 537

twenty-eight years; and this act includes, besides historical prints, "prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print whatsoever," and also "engravings, etchings, or works taken from any picture, drawing, model, or sculpture, either ancient or modern." The penalties must be sued for within six calendar months.

The last act on this subject is the 17 Geo. III. c. 57; and by this statute an action for damages, with double costs, is also given. After reciting the 8 Geo. II. and 7 Geo. III., and that the said acts had not effectually answered the purposes for which they were intended, it enacts, That if any engraver, etcher, printseller, or other person shall, within the time limited, engrave, etch, or work, or cause or procure to be engraved, etched, or worked in mezzotinto or chiaro oscuro, or otherwise, or in any other manner copy, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, or cause or procure to be printed, reprinted, or imported for sale, or shall publish, sell, or otherwise dispose of, or cause or procure to be published, sold, or otherwise disposed of, any copy or copies of any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, which have been or shall be engraved, etched, drawn, or designed in any part of Great Britain, without the express consent of the proprietor in writing, signed by him in the presence of and attested by two witnesses, then such proprietor shall and may, by a special action upon the case, recover such damages as a jury on the trial of such action, or in the execution of a writ of inquiry thereon, shall give or assess, together with double costs of suit.

By the 6 & 7 Wm. IV. c. 59, the provisions of the 17 Geo. III. c. 57 are extended to Ireland.

The protection afforded by these acts is not confined to works of invention only, but extends to the designing or engraving any thing that is already in nature; and a print of any building, house, or garden falls within it. But if a person employ a painter to make a drawing, he is not entitled to the protection of the acts.

The operation and effect of the above acts came under the consideration of the Court of King's Bench in a recent case, where it appeared that A, being employed by B to engrave plates from drawings belonging to B, took off from the plates so engraved by him a number of proof impressions, which he retained for his own use, and that, upon his bankruptcy, the proofs of which he had so possessed himself were advertised by his assignees for sale. The question was, whether A or his assignees had rendered themselves liable to an action on the case as given by 17 Geo. III. c. 57, for having disposed of pirated prints without the consent of the proprietor; and it was held that he was not nor were his assignees so liable, inasmuch as the statute applied to impressions of engravings pirated from other engravings, and not to prints taken from a lawful plate.

Prints which are published as illustrations of a work are protected by the above statute equally with those which are published separately. But prints which are engraved and struck off abroad and published in this country are not so protected.

The vice-chancellor, in a recent case,¹ where A had made a copy of a print invented by B, in colours and of larger dimensions, and had exhibited it as a diorama, refused to restrain the exhibition of such copy, until B had established his right at law. His honour, on giving judgment, observed, that any person may copy and publish the whole of a literary composition, provided he writes notes upon it, so as to present it to the public connected with matters of his own; and that exhibiting for profit was in no way analogous to selling a copy of the plaintiff's print. His honour observed, that if B had exhibited his picture as a diorama, he might have been entitled to an injunction.

It is observable, that the 7 Geo. III. does not expressly require the name of the proprietor and the date of publication to be engraved on the print; but there is no doubt that the provisions of the previous statute in that respect should be considered as included, and that the insertion of them is necessary for the recovery of the penalties. Whether they are required in order to support an action at law or a bill in equity, has been a matter of question. In 1807 Lord Ellenborough said, "Although the plaintiff's name is not engraved upon the print, if there has been a piracy, I think the plaintiff is entitled to a verdict. The interest being vested, the common law gives the remedy. I have always acted on the case of *Beckford v. Hood*, in which the Court of King's Bench held, that an author whose work is pirated may maintain an action on the case for damages, although his work was not entered at Stationers Hall, and although it was first published without the name of the author being affixed thereto." However, in *Newton v. Cowie*, the Common Pleas held both the date and name to be essential; and the Court of Queen's Bench has since, in the case *Brookes v. Cock*, E. T. 1835, held the date to be necessary, observing, that the question had been decided in the case of *Newton v. Cowie*, and the court did not feel inclined to overrule the decision.

Sculpture, Models, and Casts.—Another species of invention to which a similar protection is afforded is that of original sculpture, and the making of models and casts of busts, statues, &c. The 38 Geo. III. c. 71 vested in the original maker the sole right and property during the term of fourteen years, provided the name of the maker and the date of the publication were put thereon; and persons making copies, without the written consent of the proprietor, may be sued for damages in a special action on the case. The provisions of this act are rendered more effectual by the 54 Geo. III. c. 56, by which *double costs* are given, and an additional term of fourteen years in case the maker be living at the end of the first fourteen years limited by the former act, unless he had divested himself of the right previous to the passing of the act.

For the *transfer* of copyright in engravings, etchings, and prints, it is required that there should be an express consent of the proprietor in writing, signed in the presence of and attested by two witnesses; and in the case of original sculpture, models, and casts, such consent must be by deed, also attested by two witnesses.

Remedies similar to those for the infringement of the copyright of books are applicable to the piracy of engravings and prints, and of original sculpture, models, and casts; but the proceedings in these

¹ *Martin v. Wright*, 6 Sim. 297.

cases must be commenced within *six* months. And the same principles which apply to the exclusion of the former from protection on account of their illegal or immoral tendency, are also applicable to the latter. It has been held that an action cannot be maintained to recover the value of obscene or libellous prints or caricatures.

Designs for Ornamenting Articles of Manufacture.—The act 5 & 6 Vic. c. 100 was passed to consolidate the laws on this subject; but, for the clearer comprehension of it, it may be as well to recapitulate the several statutes previously in existence.

The 27 Geo. III. c. 38, for the encouragement of the arts of designing original patterns for printing *linens, calicoes, cottons, and muslins*, vested the property in the designers or proprietors for *two months* from the day of the first publishing thereof, which was to be printed with the name of the proprietor on each end of every piece of linen, calico, &c. This act was renewed by the 29 Geo. III. c. 19, and afterwards made perpetual by the 34 Geo. III. c. 23, and the term of the exclusive privilege extended from two to *three months*. The 2 & 3 Vict. c. 13 extended the protection to designs for printing other woven fabrics, namely, of *wool, silk, or hair*, and of mixed fabrics composed of any two or more materials, either linen, cotton, wool, silk, or hair.

These (with the exception of the statutes relating to sculpture, and the modelling and casting of busts, statues, &c., already noticed) were the only protection afforded to designs applied to articles of manufacture until the 2 & 3 Vict. c. 27. This act, however, enabled the authors and proprietors of new and original designs, not published before the 1st July, 1839, to secure to themselves the exclusive benefit thereof when applied to any of the following purposes:—

1. For modelling, casting, embossing, chasing, engraving, or other kind of impression or ornament on any article of metal, *for three years*; and of any other material (not being a tissue or textile fabric), *for twelve months*;
2. For the shape or configuration of any article, except lace and the articles protected by the Calico-printing Acts, *for twelve months*;
3. For patterns or prints to be worked into or on, or printed or painted on, any article of a tissue or textile fabric, except lace and the articles protected by the Calico-printing Acts, *for twelve months*.

Thus stood the law until the passing of the 5 & 6 Vic. c. 100, which, reciting that the protection afforded by the said acts was insufficient, repealed the whole of them from the 1st September, 1842, when that act came into operation. Its provisions, however, have since been amended and extended by the 6 & 7 Vic. c. 65. (See p. 615.)

By sec. 3, with regard to any new and original design (except for sculpture and other things within the provisions of the 38 Geo. III. c. 71, and 54 Geo. III. c. 56), whether such design be applicable to the ornamenting of any article of manufacture, or of any substance artificial or natural, or partly artificial and partly natural, and that whether such design be so applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means such design may be so applicable, whether by printing, or by painting, or by embroidery, or by weaving, or by sewing, or by modelling, or by casting, or by embossing, or by engraving, or by staining, or by any other means whatsoever, manual, mechanical, or chemical, separate or combined, it is enacted,

that the proprietor of every such design, not previously published either within the United Kingdom or elsewhere, shall have the sole right to apply the same to any articles of manufacture, or to any such substances as aforesaid, within the United Kingdom, for the respective terms hereinafter mentioned, to be computed from the time of such design being registered according to this act:—

In respect of the application of any such design to ornamenting any article of manufacture contained in the Classes following, for the term of THREE YEARS :

Class 1.—Articles of Manufacture composed wholly or chiefly of any Metal or mixed Metals :

Class 2.—Articles of Manufacture composed wholly or chiefly of Wood :

Class 3.—Articles of Manufacture composed wholly or chiefly of Glass :

Class 4.—Articles of Manufacture composed wholly or chiefly of Earthenware :

Class 5.—Paper Hangings :

Class 6.—Carpets :

Class 8.—Shawls not comprised in Class 7 (see *infra*) :

Class 11.—Woven Fabrics, composed of Linen, Cotton, Wool, Silk, or Hair, or of any two or more of such materials, if the design be applied by printing, or by any other process by which colours are or may hereafter be produced upon tissue or textile fabrics, such woven fabrics being or coming within the description technically called Furnitures, and the repeat of the design whereof shall be more than twelve inches by eight inches :

In respect of the application of any such design to ornamenting any article of manufacture contained in the Classes following, for the term of NINE CALENDAR MONTHS :

Class 7.—Shawls, if the design be applied solely by printing, or by any other process by which colours are or may hereafter be produced upon tissue or textile fabrics :

Class 9.—Yarn, Thread, or Warp, if the design be applied by printing, or by any other process by which colours are or may hereafter be produced :

Class 10.—Woven Fabrics, composed of Linen, Cotton, Wool, Silk, or Hair, or of any two or more of such materials, if the design be applied by printing, or by any other process by which colours are or may hereafter be produced upon tissue or textile fabrics ; excepting the articles included in Class 11 (see *supra*) :

In respect of the application of any such design to ornamenting any article of manufacture or substance contained in the Classes following, for the term of TWELVE CALENDAR MONTHS :

Class 12.—Woven Fabrics not comprised in any preceding Class :

Class 13.—Lace, and any article of manufacture or substance not comprised in any preceding Class.

But, to entitle any person to the benefit of this act, the design must be registered before publication, at the office of the Registrar of Designs, in the name of the proprietor, and in respect to its application to some or one of the articles of manufacture or substances comprised in the above-mentioned classes, specifying the number of the class ; and every such article of manufacture or substance afterwards published by the registered proprietor must have, at one end thereof if a woven fabric, or at the end or edge thereof or other convenient place thereon if of any other kind, the letters *R^d* together with such number or letter, or number and letter, and in such form as shall correspond with the date of the registration according to the Registry of Designs ; which marks may be put on the article by making the same in or on the material of which the article or substance consists, or on a label attached thereto.—§ 4.

The author of a design is to be considered the proprietor, unless he has executed the work on behalf of another person for a good and valuable consideration, in which case such person is to be considered the proprietor, and entitled to be registered.—§ 5.

And any person purchasing or otherwise acquiring a right to the entire or partial use of a design may enter his title in the said register. And any writing purporting to be a transfer of such design, and signed by the proprietor, shall operate as an effectual transfer; and the registrar shall, on request and on the production of such writing, or in the case of acquiring such right by any other mode than that of purchase, on the production of evidence to the satisfaction of the registrar, insert the name of the new proprietor in the register.—§ 6.

For preventing the piracy of registered designs, it is enacted by § 7, that, during the existence of any such right to the entire or partial use of any such design, no person shall, with regard to any articles of manufacture, or substances, in respect of which the copyright of such design shall be in force, (without the licence or consent in writing of the registered proprietor) apply any such design, or fraudulent imitation thereof, for the purpose of sale, to the ornamenting of any article of manufacture, or any substance artificial or natural, or partly artificial and partly natural; nor shall any person publish, sell, or expose for sale any article of manufacture, or substance, to which such design, or any fraudulent imitation thereof, shall have been so applied, after having received, either verbally or in writing or otherwise from any source other than the proprietor of such design, knowledge that his consent has not been given to such application, or after having been served with or had left at his premises a written notice signed by such proprietor or his agent to the same effect. And if any person commit any such act, he shall for every such offence forfeit a sum not less than 5*l.* and not exceeding 30*l.* to the proprietor; to be recovered either by an action of debt or on the case against the party offending, or by summary proceeding before two justices having jurisdiction where the party offending resides.

But, notwithstanding the remedies hereby given for the recovery of any such penalty, it shall be lawful for the proprietor (if he shall elect to do so) to bring such action as he may be entitled to for the recovery of any damages which he shall have sustained.—§ 9.

In case of a design being registered in the name of a person not lawfully entitled to it, a court of equity, upon the institution of a suit therein, may direct such registration to be wholly cancelled, or the name of the real proprietor to be substituted in the register.—§ 10.

And by § 11 it is made unlawful, and subject to a penalty of 5*l.*, to apply any marks to any article of manufacture corresponding or similar to the marks hereby required to be applied in the case of a registered design, where the design shall not be registered, or the copyright thereof shall have expired, or the design shall not have been applied to such article in the United Kingdom, or for any person, knowing thereof, to publish, sell, or expose to sale the articles with such marks so unlawfully applied; and such penalty may be recovered in the same manner as penalties for pirating a design.

All actions or proceedings for offences under this act must be brought within twelve months.

Upon application to register a design, two copies, drawings, or prints thereof must be furnished to the registrar, accompanied with the name of the proprietor or of the firm under which he is trading, with his

place of abode or business or other address, and the number of the class in respect of which the registration is required; and on such copies the registrar is to affix a number corresponding to the succession of the design, and retaining one copy for the purpose of being filed at his office, return the other to the party by whom it was forwarded, with a certificate thereon, or attached thereto, that the design has been so registered, the date of the registration, the name of the registered proprietor, or of the firm under which such proprietor is trading, his place of abode or of carrying on business, or other place of address, and also the number of such design, together with such number or letter, or number and letter, and in such form, as shall be employed by him to denote or correspond with the date of such registration. And such certificate, purporting to be signed by the registrar or deputy registrar, and to have the seal of office attached thereto, shall, in the absence of evidence to the contrary, be sufficient proof of the design, and of the name of the proprietor therein mentioned, having been duly registered; of the commencement of the period of registry; of the person named therein as proprietor being the proprietor; of the originality of the design; and of the provisions of this act and of any rule under which the certificate appears to be made having been complied with.

Every person shall be at liberty to inspect any design whereof the copyright shall have expired, on paying the proper fee. But with regard to designs whereof the copyright has not expired, no such design shall be open to inspection, except by a proprietor thereof, or some person authorized by him in writing, or by a person specially authorized by the registrar, and then only in the presence of such registrar or some person holding an appointment under this act, and not so as to take a copy of any part thereof, nor without paying the fee for inspection. Provided, that it shall be lawful for the said registrar to give to any person producing a particular design with the registration mark, or producing the registration mark only, a certificate stating whether there is any copyright of such design existing, and, if there be, in respect to what particular article of manufacture or substance, and the term of such copyright, the date of registration, and the name and address of the registered proprietor thereof.

The *fee* for registering a design to be applied to any woven fabric mentioned in Classes 7, 9, or 10, shall not exceed 1s.; for registering a design to be applied to a paper-hanging, 10s.; and for a certificate relative to the existence or expiration of copyright in any design printed on any woven fabric, yarn, thread, or warp, or printed, embossed, or worked on any paper-hanging, to any person exhibiting a piece end of a registered pattern with the registration mark thereon, 2s. 6d.

This act has been amended by the 6 & 7 Vic. c. 65, and the protection afforded by it extended to new or original designs for any article of manufacture, though not of an *ornamental character*, but having reference to some purpose of *utility*, so far as such design shall be for the shape or configuration of such article, and that whether for the whole of such shape or configuration, or only a part thereof; and the proprietor shall have the sole right to apply such design for the term of *three years* from its registration. This act came into operation on the 1st September, 1843.

Of PATENTS for New Inventions.

This subject also is one of very considerable importance; and in treating of it we propose to consider, 1. The patent itself; 2. To whom, and 3. For what it may be granted; 4. The mode of obtaining it; 5. The title of the patentee; 6. What amounts to an infringement of a patent, with the remedies for such infringement; 7. and lastly, What will make a patent void, and the mode of cancelling it.

1. *Of the Patent.*—A patent is a grant by the crown,¹ to the inventor, of the sole and exclusive right of using and vending an invention for a limited period.

Some protection had been *indirectly* afforded by the act of 21 James I. c. 3, which was passed for the purpose of doing away with *monopolies*, which appear to have previously existed to a most grievous extent. This statute, after declaring that all monopolies shall be void and of none effect, provides and enacts, “That any declaration before-mentioned shall not extend to any letters patent and grants of privilege, for the term of fourteen years or under, hereafter to be made, for the sole working or making of any manner of new manufactures within this realm, to the true and first inventor or inventors of such manufactures, which others at the time of making such letters patent and grants shall not use, so as also they be not contrary to law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters patent or grant of such privilege hereafter to be made; but that the same shall be of such force as they should be if this act had never been made, and of none other.” The effect of this statute was merely to leave patents on the same footing as they rested upon previous to the passing of it. Upon this act, however, the whole law of patents for inventions is said to be founded.

It may be as well here to state shortly the form of a patent. After reciting the petition of the party upon the application for the patent, it states that the queen, of her special grace, certain knowledge, and mere motion, doth give and grant unto the patentee, his executors, administrators, and assigns, her special licence, full power, sole privilege, and authority, that he the said petitioner, his executors, administrators, and assigns, and every of them, by himself or themselves, or by his or their deputy or deputies, servants or agents, or such others as he the said patentee, his executors &c., shall at any time agree with, and no others, from time to time and at all times thereafter during the term of years therein expressed, shall and lawfully may make, use, exercise, and vend his said invention within the United Kingdom of Great

¹ All grants from the crown are in the form of charters, or letters. These are either open, thence called *literæ patentēs*, being addressed to all her majesty's subjects; or else close, called *literæ clausæ*, and addressed to particular persons. It is by the

former kind, or *letters patent*, that grants of the sole privilege and exclusive property in inventions are made. Godson on Patents, 47.

² Holroyd on Patents, 12.

Britain and Ireland;¹ and that the said patentee, his executors &c., shall have and enjoy the whole profit and advantage arising by reason of the said invention for the full term of fourteen years from the date of the patent next and immediately ensuing, and fully to be complete and ended, according to the statute in such case made and provided. Then follows a clause by which the queen commands all persons, bodies politic and corporate, that neither they nor any of them, at any time during the continuance of the said term of fourteen years, either directly or indirectly, do make, use, or put in practice the said invention or any part of the same, or in anywise counterfeit, imitate, or resemble the same, nor make any addition to or subtraction from the same, without the licence, consent, or agreement of the said patentee, his executors &c., in writing under his or their hands and seals first had and obtained, under such pains and penalties as can or may be justly inflicted on such offenders for their contempt of the royal command, and further to be answerable to the said petitioner, his executors &c., according to law, for his and their damages occasioned thereby. Then follows a clause directing all justices of the peace, mayors, sheriffs, &c., that they do not during the term in anywise molest, trouble, or hinder the patentee, his executors &c., in or about the due and lawful use and exercise of the said invention, or any thing relating thereto. Then follows an enumeration of cases in which the patent is to be void;—as, if it shall appear to the queen or her council that the grant is contrary to law, or prejudicial or inconvenient to the queen's subjects in general; or that the invention is not a new invention, or not invented by the said patentee; or if the patentee shall use or imitate any invention or work which hath been invented by any other of the queen's subjects, and publicly used and exercised in England &c., unto whom letters patent have been already granted for the sole use and benefit thereof; or if the said patentee, his executors &c., or any person who during the continuance of the grant shall claim any right or interest in or privilege of the sole use of the said invention, shall transfer or assign,¹ or declare any trust of any share or shares thereof, to or for any number of persons exceeding the number of five, or shall open any books for public subscriptions to be made by any greater number of persons than five, in order to raise money under pretence of carrying on the privilege, or shall receive any sum of money from any greater number of persons than five for the like purposes, or shall presume to act as a corporate body, or shall divide the benefit of the patent, or shall do any act contrary to the 6 Geo. I. c. 18, or in case the privilege shall become vested in or in trust for more than the number of five persons or their representatives at any one time (reckoning executors or administrators as the single person whom they represent;—in any of these cases the patent is to be altogether void. It is also provided, that if the patentee shall not particularly describe and ascertain the nature of the said invention, and in what manner the same is to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in chancery

¹ If the patent is to extend to the colonies, the words "and also all our colonies and plantations abroad," are here inserted.

A patent for exercising an invention in *England* does not extend to Ireland or Scotland.

within a certain time after the date of the letters patent, the same shall cease and be void. It is then declared, that the letters patent, or the enrolment or exemplification thereof, shall be in all things good, firm, valid, and effectual in the law, and shall be taken, construed, and adjudged in the most favourable and beneficial sense for the patentee, his executors &c., as well in courts of record as elsewhere, notwithstanding the not full and certain describing the nature or quality of the said invention, or the materials thereto conducing and belonging.

2. *To whom a Patent may be granted.*—A person, in order to entitle himself to the grant of a patent, must be the true and first inventor of the manufacture &c. for which he seeks to obtain it. The true and first inventor of a new manufacture has been defined to be, 1st, A person who discovers an invention, and who, under the protection of a patent, first published it to the world; or 2dly, A person who brings from abroad, or has had communicated to him by a foreigner, an invention, and who, under the protection of a patent, first publishes it to the world.²

No person can be entitled to a patent who is not the *original inventor* in the strictest sense of the term. If the idea has been suggested to him by any person in England, or he has extracted it from any scientific book; in neither of these cases will he be considered the true and first inventor. Also if an inventor has published his invention before taking out his patent, so that the public are already in possession of the discovery, he cannot support it, though he be in fact the true and first inventor.

Slight proof of a *prior using* has been frequently held sufficient to invalidate a patent. As a remedy, however, for the hardships which this principle might occasionally induce, the 5 & 6 Wm. IV. c. 83, § 2, has provided, that if in any suit or action it shall be proved or specially found by the verdict of a jury that the person who has obtained letters patent for any invention was not the first inventor thereof, or of some part thereof, by reason of some other person having invented or used the same or some part thereof before the date of such letters patent, or if the patentee or his assigns shall discover that some other person had, unknown to such patentee, invented or used the same or some part thereof before the date of such letters patent, it shall be lawful for such patentee or his assigns to petition his majesty in council to confirm the said letters patent, or to grant new letters patent. And the matter of such petition shall be heard before the Judicial Committee of the Privy Council; and such committee, upon examining the matter, and being satisfied that such patentee believed himself to be the original inventor, and that such invention or part thereof had not been publicly and generally used before the date of such first letters patent, may report to his majesty their opinion that the prayer of such petition ought to be complied with; whereupon his majesty may, if he think fit, grant such prayer, and the said letters patent shall be available in law and equity to give to such petitioner the sole right of using, making, and vending

¹ This clause is confined to assignments by *act of the party*, and does not apply to any assignment or transfer by operation at law, and will not therefore apply

to an assignment under a commission of bankruptcy. *Bloxam v. Elsee*, 6 Barn. & Cres. 175.

² See *Holroyd on Patents*, 509.

such invention. Provided, that any person opposing such petition shall be entitled to be heard before the Judicial Committee; and that the party to any former suit or action touching such first letters patent shall be entitled to have notice of such petition before presenting the same.

A patent granted for something which had been previously practised abroad has been held good, and the first introducer into this country was deemed the first inventor.

In the case of concurrent applications for a patent for the same object, the party who first procures the great seal to be affixed to his patent will be considered the true and first inventor.¹

In the case of *Boulton v. Bull* the question arose, which of two persons was the first and true inventor under the following circumstances. It appeared that a person had invented and obtained a patent for a new method of making object glasses, and the validity of the patent was questioned by another person on the ground that he had previously made the same discovery. It was held, however, that inasmuch as the party alleging himself to be the first discoverer had made the discovery in his own closet, and had never made it public, the person who had obtained the patent was "the true and first inventor."

3. *For what a Patent may be granted.*—It will be perceived, on reference to the statute 21 James I. c. 3, (see *ante*, 615), that letters patent may be granted for "the sole working or making of any manner of *new manufactures* within this realm, to the true and first inventor or inventors of such manufactures, which others at the time of making such letters patent and grants *should not use*, so as they are not contrary to law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient." From the terms here used it is inferred, that the invention for which a patent may be granted must be a *manufacture*; it must also possess the qualities of being "*new to the public use and exercise thereof*" in England, of being *vendible*, and of being *useful to the public*.

Various constructions have been given to the word *manufacture* by different judges. Lord chief justice Eyre, in the case of *Boulton v. Bull*, observed, "It was admitted in the argument at the bar, that the word *manufacture* in the statute was of extensive signification; that it applied, not only to things made, but to the practice of making—to principles carried into practice in a new manner—to new results of principles carried into practice. Let us pursue this admission. Under *things made* we may class, in the first place, new compositions or things, such as manufactures in the most ordinary sense of the word; secondly, all mechanical inventions, whether made to produce old or new effects,—for a new piece of mechanism is certainly a thing made. Under the *practice of making* we may class all new artificial manners of operating, with the hand or with instruments in common use, new processes in any art, producing effects useful to the public." Lord Kenyon has defined a manufacture to be "something made by the hands of man." Lord Tenterden was of opinion, "that the term might be extended to a new process to be carried on by known imple-

¹ See *Forsyth v. Riviere*, Chitty jun. Tonnant's case, Dav. 429; and *Rex v. Prerog. of the Crown*, 182. See also *Arkwright*, ib. 129.

ments or elements acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper and more expeditious manner, or of a better and more useful kind." From hence we may deduce, that *manufactures* comprise *things made*, which are useful for their own sake, and vendible as such, as medicines, stoves, telescopes, carriages, watches, &c.; and additions to or alterations in such articles, or improvements in the texture of the materials of which they are composed, as new kinds of cloth, thread, lace, &c.; and all mechanical inventions, whether made to produce old or new effects, such as lace machines, stocking frames, spinning machines, printing machines, &c.; and additions to or improvements in such machines. Again, manufactures may further comprise the *practice of making*, or all new artificial modes of operating, with the hand or instruments in common use, new processes in any art, producing effects useful to the public.

The manufacture for which a valid patent can be granted must not have been previously *used*, either by other persons or by the patentee himself. A knowledge of the manufacture without its being published is not a previous *using* within the meaning of the statute, so as to render a patent void.¹ But if, prior to the time of obtaining a patent, any part of that which is of the substance of the invention had been communicated to the public in the specification of any other patent, or was a part of the science of the country, or had been the subject of public sale, even by the inventor; or if the same effect had been produced by a similar method; or if, as we before observed, the idea had been suggested by any other person in England, or by any scientific publication; in neither of these cases is the manufacture "new to the public use and exercise thereof." Whether a manufacture is new, is a question of fact for a jury.

Not only must the manufacture not have been used by others, but it must not have been used even by the inventor or patentee himself. Thus, in a case where the inventor of a new mode of making verdigris had, four months before the date of the patent, sold (under a different name from that appearing in the patent) an article composed precisely in the same manner as that for which the patent was obtained, the patent was held to be void.²

The manufacture must be *vendible*. Mr. Justice Heath, in the case of *Boulton v. Bull*,³ said, "The subject of a patent ought to be vendible, otherwise it cannot be a manufacture;" and indeed this ingredient in the subject of a patent appears to follow necessarily from the next requisite which we are about to consider, namely, its *utility*; for we may fairly suppose, that unless inventions for which patents are taken out are useful, they are not very likely to be vendible.

A manufacture for which a patent is granted must also be *useful*. A contrary rule would obviously be productive of great inconvenience, as a patent might otherwise be obtained for a thing which in itself is a mere curiosity, and thereby the application of the discovery to a manufacture beneficial to the public be prevented. Thus, in a case where an action was brought for the infringement of a patent, obtained

¹ *Dav Pat. Cases*, 429. See further, as to what knowledge of an invention will render a patent void, *Lewis v. Marling*,

¹⁰ *Barn. & Cres.* 22.

² *Holt's Nisi Pri. Ca.* 58.

³ *2 Barn. & Ald.* 349.

in 1803, for "a hammer on an improved construction for the locks of all kinds of fowling-pieces and small arms," by means of a perforation in the hammer of a gun, it was specified, "that the air formerly confined would escape, but at the same time the powder would be secured:" but it appearing that the powder passed through the same hole as the air, and that therefore the utility of the invention and the purpose of the patent wholly failed, the plaintiff was nonsuited.¹ It is impossible to lay down any general rule as to what degree of utility will be necessary to support a patent, as each case must to a great extent depend upon its own particular circumstances. The question, however, is one of fact for a jury; and if the jury think a patent useful *in general*, the patent will be considered good, although it be shown that some cases may occur in which it will not answer.

An *addition* to or *improvement* of a manufacture may be the subject of a patent. Thus, in a case where an objection was taken to a patent, that the subject of it was not a new invention, but only an addition to an old machine, Lord Mansfield said, "If the general question of law, that there can be no patent for an addition, be with the defendant, that is open upon the record, and he may move in arrest of judgment; but that objection would go to repeal almost every patent that was ever granted."² The same point has arisen in various subsequent cases, and has uniformly received a similar determination. The addition, however, must be really useful. If the machine &c. answer the same purpose, and as well, without the addition as with it, the addition is not such an invention as will support a patent. And in all cases the patent must be confined to the addition or improvement, that the public may purchase it without being incumbered with other things. If a patent be taken out for a discovery, and it is merely an addition or improvement, the patent will be void.³

A new combination of old materials, so as to produce a new effect, may also be the subject of a patent. A patent for a machine, each part of which was in use before, but in which the combination of the different parts is new, and a new result is produced, is good, because there is novelty in the combination. But where the manufacture is produced merely by the union of a number of parts less than had been formerly used for the same purpose, and such union is effected in a mode well known and long practised, the party will not be entitled to a patent for such manufacture. What extent of alteration will be sufficient to support a patent, is a question of great difficulty, and one upon which it is vain to lay down any general rules.

A new method of applying materials previously in use will also be a good subject for a patent. But in this case, as in the case of a new combination of old materials, the specification must clearly express that it is in respect of such new combination or application, and of that only, and must not lay claim to the merit of original invention in the use of the materials.⁴

It will not be an objection to mechanical or chemical discoveries, that the articles of which they are composed were known and in use

¹ Manton v. Parker, Dav. Pat. Ca. 332.
See also Brunton v. Hawkes, 4 Barn. & Ald. 455.

² Morris v. Bransom, Bull, N. P. 77.

³ Harmer v. Playne, 11 East, 102.

⁴ See Hill v. Thompson, 3 Merivale, 622; and Lewis v. Davis, 3 Car. & Payne, 502.

before, provided the compound article be new; but the patent must be for the compound article, and not for all the articles or ingredients of which it is made.

A mere philosophical or abstract principle cannot be the subject of a patent; for, as observed by Lord Tenterden, no such principle can answer to the word "manufacture." Something of a corporeal and substantial nature—something that can be made by man from the matters subjected to his art and skill, or at the least some new mode of employing practically his art and skill, is requisite to satisfy this word;¹ at the same time, if the thing is to be made or done by a manufacture, and the mode of that manufacture is described, it then becomes in effect, by whatever name it may be called, not a patent for a mere principle, but for a manufacture of the thing so made, and not for the principle upon which it is made.²

Whether a patent would be granted for a new *method* or *process* merely, appears to be doubtful. There are, however, several instances of such patents having been granted, such as Hartley's and Huddart's patents; and the better opinion seems to be, that a patent for a method or process is good, if the description of the method or process contained in the specification amounts to something of a corporeal and substantial nature.

4. *Of the Mode of obtaining a Patent.*—The first thing to be done by a person who is desirous of obtaining a patent for an invention is to present a *petition* to the crown, stating the nature of the invention, and that the petitioner is the true and first inventor, and praying royal letters patent for the sole use, benefit, and advantage of his invention in the United Kingdom.³ A *declaration*⁴ must be made in support of the petition before a master of the Court of Chancery; and the petition and declaration must be left with the secretary of state for the home department. An answer to the petition, in the shape of a reference to the attorney or solicitor general, as to whether the prayer of the petitioner ought or ought not to be granted, may shortly afterwards be obtained. The report of the attorney or solicitor general, if favourable, states it to be proper that the patent should be granted, provided a particular description of the nature of the invention be enrolled in chancery within a given time. This report must be taken to the office of the secretary of state for the home department, in order to obtain the royal warrant, by which the attorney or solicitor general is authorized to prepare a bill for the royal signature. This bill, when prepared, must be taken to the secretary of state for the royal sign manual, and must then be passed at the Signet Office. A warrant is there obtained to the keeper of the privy seal, who prepares a warrant to the lord chancellor; which warrant must be taken to the Patent Office, where the patent is made out, and the great seal affixed to it, and the patent is then considered as passed. When the great seal is affixed to the patent, the *specification* must be acknowledged before a master in chancery, and enrolled.⁵ The time

¹ Rex v. Wheeler, 2 Barn & Ald. 345.

² 1 Dav. Pat. Cases.

³ If the patent is required to extend to the colonies, it must be so stated in the prayer of the petition.

⁴ An affidavit was formerly required; but by the 5 & 6 Wm. IV. c. 62, a declaration is substituted.

⁵ If a clerical error be made in the enrolment, it may be corrected upon application to the Court of Chancery.

within which the specification is required to be enrolled must be most carefully attended to, because if (after the patent is passed) the time expires without the enrolment having taken place, nothing can be done except by an act of parliament to enlarge the time; and as the due enrolment of the specification is the ground upon which the patent is granted, non-compliance with the proviso will make the patent void. Before the patent is sealed, an extension of the time for enrolment may be obtained by applying to the attorney general. It is absolutely necessary that this enrolment be made.

If a person wishes to object to a patent being granted for any particular invention, he must enter a *caveat* at the office of the attorney or solicitor general, requesting that no patent for the particular invention mentioned may be granted to any person without previous notice to him; and this caveat must be renewed *annually*. If a person intends opposing the grant of a patent, he should do so before the attorney or solicitor general receives the warrant authorizing him to prepare a bill for the royal signature, because, in the event of the opposition being delayed beyond that period, the party will be required to deposit a sum of money sufficient to answer the costs of the application for the patent, in case it be refused by reason of such opposition. The opposing party (if any) and the applicant for the patent are each heard by the attorney or solicitor general, who adjudicates between them. If the opposing party be dissatisfied with the decision, he may, by lodging a caveat at the Chancery Patent Office, have the matter reheard before the lord chancellor.¹

The attention of the inventor ought most particularly and anxiously to be directed to the *specification*, or description of the nature of the invention. This has been said to be "the rock upon which many patentees have split." It is looked at by courts of law with the greatest strictness, and to defects in it may be traced the greatest number of questions which have arisen upon the validity of patents. The letters patent, as we have seen, require that the patentee shall particularly describe and ascertain the *nature of his invention*, and *in what manner the same is to be performed*, by an instrument in writing under his hand and seal. The object of the specification is, that the public may have the full benefit of the invention after the expiration of the patent. It is a principle of patent law, that there must be the utmost good faith in the specification; it must describe the invention in such a way that a person of ordinary skill in the trade shall be able to carry on the process by following the specification, without any new invention or addition of his own. If the patent be for a process, the specification must be precise as to quantities, degrees, and proportions. In the specification of a substance, the different *materials* of which it is composed, the *method* by which it is made, and the *use* to which it is to be applied, must be clearly and accurately explained. There must not be any omission in or superfluous addition to the description contained in the specification. I must be confined to that which is the real invention of the patentee, it must not attempt to cover more than that which, being matter of actual and useful discovery, is the only proper subject for the protection of a patent. If a patentee seeks, by his specification, any more

¹ See Exp. Fox, 1 Ves. & Bea. 67.

than he is strictly entitled to, his patent is thereby rendered ineffectual even to the extent to which he would have been otherwise fairly entitled.¹ But, at the same time, there is no rule of law which requires the court to make any forced construction of the specification, so as to extend the claim of the patentee to a wider range than the facts would warrant; but, on the contrary, such construction would be made as will, consistently with the fair import of the language used, make the claim of invention co-extensive with the new discovery of the patentee. Diagrams or drawings may be used for the purpose of facilitating the explanation; but this is optional with the party. The specification may be brought in aid to explain the description of the invention contained in the patent.

If the invention consist of an addition or improvement, and the whole improved thing be described in the specification, a distinction must be made between that which is new and that which is old, and the claim of the patentee confined to the former.²

A person taking out a patent must communicate to the public any improvements that he may make upon his invention before the specification is enrolled.³

If the specification contain any ambiguity, or any thing calculated to mislead a person who might attempt, by following it, to carry on the process;⁴ or if the specification and the patent itself be repugnant; or if the specification do not describe the alleged invention truly;⁵ or if the result mentioned in the specification cannot be arrived at in the manner specified;⁶ or if a patentee can only do what he professes with two or three of certain ingredients specified, and he has inserted in his specification others that will not answer the purpose; or if he make the article for which the patent is granted with cheaper materials than those which he has enumerated, even although the latter will answer the purpose equally well with the former;⁷ or if he state in his specification only that mode which would be least beneficial, reserving to himself the more beneficial mode of practising it; or if the specification describe several things as being all new, and it turn out that any one of them is not new;⁸ in either of these cases the patent will be utterly void.

In a case⁹ where it appeared that one of the ingredients in a composition was a substance imported from Germany, which could be purchased only at one or two colour shops in London, and the description given of it in the specification was "the purest and finest chemical white lead," but there was no such article known by that denomination in the trade generally, or in the shops where white lead was usually sold, the lord chancellor said, the patentee ought thus to have described the ingredient: "The purest white lead which can be obtained in the shops in London will not do; but there is a purer white lead prepared on the continent, and imported into this country, which alone must be used;" and his lordship was of

¹ Per Lord Eldon, 3 Meriv. 629.

² See *Manton v. Manton*, Dav. Pat. Cases, 349.

³ *Crossley v. Beverley*, 9 Barn. & Cr. 63.

⁴ See *Turner v. Winter*, 1 Term Rep. 602; and *Campion v. Benyou*, 3 Brod. & Bing. 10.

⁵ *Rex v. Metcalf*, 2 Stark 249. *Cochrane v. Smithurst*, 1 Stark. 205. *Rex v. Wheeler*, 2 Barn. & Ald. 345.

⁶ *Turner v. Winter*, 1 Term Rep. 602.

⁷ 1 Term Rep. 607.

⁸ *Brunton v. Hawkes*, 5 B. & Ald. 455.

⁹ *Sturz v. De la Rue*, 5 Russ. 322.

opinion that the specification did not give that degree of full and precise information which the public had a right to require.

As another instance of the accuracy which is required in the specification of a patent, the reader is referred to the case of *Derosne v. Fairie*, 5 Tyrwhitt's Rep. 393.

Some remedy, however, has been attempted against the hardships which the extreme strictness of the law in this respect sometimes induced, by the recent act 5 & 6 Wm. IV. c. 83, the first section of which enacts, "That any person, who, as grantee, assignee, or otherwise, hath obtained or who shall hereafter obtain letters patent for the sole making, exercising, vending, or using of any invention, may, if he think fit, enter with the clerk of the patents of England, Scotland, or Ireland respectively, as the case may be, (having first obtained the leave of her majesty's attorney-general or solicitor-general in case of an English patent, of the lord advocate or solicitor-general of Scotland in the case of a Scotch patent, or of her majesty's attorney general or solicitor-general for Ireland in the case of an Irish patent, certified by his fiat and signature) a *disclaimer* of any part of either the title of the invention or of the specification, stating the reason of such disclaimer; or may, with such leave as aforesaid, enter a *memorandum of an alteration* in the said title or specification, not being such disclaimer or such alteration as shall extend the exclusive right granted by the said letters patent; and such disclaimer or memorandum of alteration, being filed by the said clerk of the patents and enrolled with the specification, shall be deemed and taken to be part of such letters patent or such specification in all courts whatever. Provided always, that any person may enter a caveat, in like manner as caveats are now used to be entered, against such disclaimer or alteration; which caveat being so entered shall give the party entering the same a right to have notice of the application being heard by the attorney-general or solicitor-general or lord advocate respectively. Provided always, that no such disclaimer or alteration shall be receivable in evidence in any action or suit (save and except in any proceeding by *scire facias*) pending at the time when such disclaimer or alteration was enrolled. Provided always, that it shall be lawful for the attorney-general &c., before granting such fiat, to require the party to advertise his disclaimer or alteration in such manner as to him shall seem right, and shall (if he so require such advertisement) certify in his fiat that the same has been duly made.

6. *Title of the Patentee*.—The right of property which a patentee has in his invention is derived from the royal grant, by virtue of which a temporary property becomes vested in him. This right of property is in the nature of a personal chattel, and is assignable upon certain conditions by the terms of the letters patent. The patentee may also dispose of it by will; and it will pass to his assignees if he become a bankrupt or insolvent. It seems to be doubtful whether a patent may be the subject of a trust. In a case where the question arose, Lord Thurlow said, "As to making a trust of the patent, there may be cases upon the subject, but I do not know of any."¹ A patentee may grant licences to persons to use and exercise his invention. Whether this licence may be made to any number of persons, or must,

¹ Exp. O'Reilly, 1 Ves. jun. 128.

by analogy to the case of assignment, be restrained to a number not greater than five, is not clear.¹ The limit fixed by the letters patent in this respect will, upon good grounds being shown, be extended, so as to enable the patentee to assign or transfer his patent to a number of persons greater than five.

The term for which the patent is granted may be extended. The obtaining this extension was formerly attended with very great expense. By the 4th sect. of the 5 & 6 Wm. IV. c. 83, it is enacted, "That if any person having obtained any letters patent shall advertise in the London Gazette three times, and in three London papers, and three times in some country paper published in the town where or near to which he carries on the manufacture of any thing made according to his specification, or near to or in which he resides in case he carry on no such manufacture, (or in the county where he carries on such manufacture or where he lives in case there shall not be any paper published in such town), that he intends to apply to his majesty in council for a prolongation of his term of sole using and vending his invention, and shall petition his majesty in council to that effect, it shall be lawful for any person to enter a caveat at the Council Office; and if his majesty shall refer the consideration of such petition to the Judicial Committee of the Privy Council, and notice shall first be by him given to any persons who shall have entered such caveat, the petitioner shall be heard by his counsel and witnesses to prove his case, and the persons entering caveats shall likewise be heard by their counsel and witnesses; whereupon the Judicial Committee may report that a further extension of the term in the said letters patent should be granted, not exceeding seven years after the expiration of the first term.

This act provided that no such extension should be granted if the application were not made and *prosecuted with effect* before the expiration of the term originally granted. But this has since been modified by the 2 & 3 Vict. c. 67; and the Judicial Committee are enabled, if they see fit, to entertain any such application, and to report thereon, and an extension of the term, or new letters patent, may be granted, notwithstanding the original term may have expired before the hearing of the case, if it has not been from the default or neglect of the petitioner. It is provided, however, "that no such extension or new letters patent shall be granted if a petition for the same shall not have been presented before the expiration of the term, nor in case of petitions presented after the 30th November, 1839, unless such petition be presented six calendar months before the expiration of such term, nor in any case unless sufficient reason be shown to the satisfaction of the Judicial Committee for the omission to prosecute the application with effect before the expiration of the said term."

If money be paid to a patentee for the use of an invention of which he believed himself the inventor, and from which the party has derived benefit, it cannot be recovered back, even although the patent should turn out to be void.

A man cannot have an exclusive right in a subject not protected by a patent, so as to prevent the sale of an article under the same title by another person, but who does not assume the name and character of the party claiming such right.

¹ See Holroyd on Patents, 145.

6. *Infringement, and the Remedies for it.*—What constitutes infringement is, generally speaking, a question for a jury. The making or using the least part of a manufacture protected by a patent has been held to be an infringement; and a slight departure from the specification for the purpose of evasion only would be deemed a fraud on the patent. The question would be, whether the mode of working adopted by the infringing party is or is not substantially different from that used by the patentee. It has been said, that if the thing made by another person agree in all its qualities with the invention of the patentee, that is *prima facie* evidence, until the contrary be shown, of an infringement; and that, in absence of evidence to the contrary, a jury might fairly so presume it.¹

In the case of *Minter v. Williams*,² it was held, that the mere exposing for sale in a shop chairs resembling those invented by the plaintiff did not amount to an infringement of a patent which granted to the plaintiff the sole right to make, use, exercise, and *vend* his invention, and required that no other should make, use, or put in practice such invention.

A remedy may be had for an infringement of a patent both at law and in equity. In proceeding at common law, it is necessary to prove the letters patent. This is done by the production of them, or of an exemplification of the enrolment of the specification. Whenever a patentee brings an action on his patent, if the novelty or effect of the invention be disputed, he must prove the novelty of every part of that to which the patent applies, and show in what his invention consists, and that he produced the effect in the manner specified. Slight evidence on his part will be sufficient for the latter purpose, as the *onus* of falsifying the specification will be thrown upon the defendant. The questions of novelty and utility are each, as we have before observed, matters proper for determination by a jury. If there has been an assignment of the patent, the assignee may bring an action, either alone or in conjunction with the original patentee.

For the protection of patentees, the act 5 & 6 Wm. IV. c. 83 gives a penalty of 50*l.* against a party using the name of a patentee. By the 7th section it is enacted, that if any person shall write, paint, or print, or mould, cast, or carve, or engrave, or stamp upon any thing made, used, or sold by him, for the sole making or selling of which he hath not or shall not have obtained letters patent, the name or any imitation of the name of any other person who hath or shall have obtained letters patent for the sole making and vending of such thing, without leave in writing of such patentee or his assignees; or if any person shall upon such thing, not having been purchased from the patentee or some person who purchased it from or under such patentee, or not having had the licence or consent in writing of such patentee or his assignee, write, paint, print, mould, cast, carve, engrave, stamp, or otherwise mark the word "patent," the words "letters patent," or the words "by the king's patent," or any words of like kind, meaning, or import, with a view of imitating or counterfeiting the stamp, mark, or other device of the patentee, he shall for every such offence be liable

¹ Per Lord Ellenborough, in *Huddart v. Grimshaw*, Dav. Pat. Cases, 288.

² 5 Nev. & Man. Rep. 647.

³ Taylor v. Hare, 1 New Rep. 270.

to a penalty of 50*l.*, one half to his majesty and the other half to the person suing for the same. Provided, that nothing herein contained shall be construed to extend to subject any person to any penalty in respect of stamping or in any way marking the word "patent" upon any thing made, for the sole making or vending of which a patent obtained shall have expired.

With respect to the remedies for the infringement of a patent, several alterations are made by the same act. By the 5th section it is enacted, that in any action against any person for infringing any letters patent, the defendant must give notice of any objections on which he means to rely at the trial, and he must, at the trial, prove those objections.

On the subject of costs, it is enacted by section 6, that in any action for infringing letters patent, in taxing the costs thereof regard shall be had to the part of such case which has been proved at the trial, which shall be certified by the judge before whom the same shall be had; and the costs of each part of the case shall be given according as either party has succeeded or failed therein, regard being had to the notice of objections as well as to the counts in the declaration, and without regard to the general result of the trial.

As the law formerly stood, a patentee, though he had succeeded in establishing the validity of his patent in one action or suit, was still insecure from being put to the necessity of bringing actions against other infringers. By the 3d section of the new act it is enacted, that if in any action or suit in respect of any infringement of a patent a verdict or decree shall pass for the patentee, the judge may grant a certificate, that the validity of the patent came in question before him; which certificate being given in evidence in any other suit or action touching the patent, shall entitle the patentee, upon a verdict in his favour to receive treble costs, unless the judge shall certify that he ought not to have such costs.

The relief afforded by a court of equity in cases of this nature is by granting an injunction to restrain the infringement. The principle upon which that relief is afforded is thus stated by Lord Eldon: "Where a patent has been granted, and an exclusive possession of some duration has been enjoyed under it, the court will interpose its injunction without putting the party previously to establish the validity of his patent by an action at law. But where the patent is but of yesterday, or it is shown that there is no good specification, or otherwise that the patent ought not to have been granted, the court will not, from its own notions respecting the matter in dispute, act upon the presumed validity or invalidity of the patent, without the right having been ascertained by a previous trial, but will send the patentee to establish the validity of his patent in a court of law before it will grant him the benefit of an injunction."¹ Upon an application for an injunction, the affidavits must state particularly in what the alleged infringement consists, and that the party believes, *at the time when he makes the application*, that the invention was new, or had never been practised in this kingdom at the date of the patent. It is not enough that he *believed* it to be new at *the time when the patent was taken out*.²

¹ Hill v. Thompson, 3 Mer. 624.

² Sturz v. De la Rue, 5 Russ. 322.

If the court of chancery obliges the patentee to establish his right at law, and he accordingly brings an action and obtains a verdict, he may apply to the court of chancery to revive the injunction (which was granted *ex parte* in the first instance, and was suspended till the action was brought); but if it appear that the defendant intends to move for a new trial of the action, the injunction will not be revived, but the matter will stand over until the result of the application for a new trial be known. The party against whom the application to revive is made, will in some cases be directed to keep an account of the proceeds of the working of the patent during the discontinuance of the injunction, in order that, if it shall finally turn out that the plaintiff has a right to the protection he seeks, amends may be made for the injury occasioned by him. Should the plaintiff not succeed in establishing his right at law, the defendant may apply to the court of chancery for the costs and expences there sustained by him "upon an allegation of right which cannot be supported." The court will grant an injunction to restrain the sale, both before and after the expiration of the term limited by the patent, of machines piratically manufactured while the patent was in force.¹ If there are various infringements of a patent by various parties, and the patentee intends to seek the protection of the court of chancery, he must file separate bills against each party infringing.²

7. It now only remains to say a few words upon what will *avoid* a patent, and *how it may be cancelled*. By the letters patent it is declared, that if it shall appear to the queen or her council that the grant is contrary to law, or prejudicial or inconvenient to the queen's subjects in general, or that the invention is not a new invention, or not invented by the patentee, or if the patentee shall assign to more than five persons &c., then the patent shall be void. If a patent is impeached on the ground of its being prejudicial or inconvenient to the public, it will not be sufficient to state *in general terms* that it is so; but it must be stated *in what respect it is so*, in order that the party may be prepared to answer it.³ If a misrepresentation is made to the crown, either as to the novelty of the invention or otherwise, the patent will be considered void.⁴ The process by which a void patent is cancelled, is by obtaining what is termed a *scire facias*, which is an original writ issuing out of chancery, directed to the sheriff, and returnable in the Petty Bag Office; or it may be brought in the Queen's Bench; and if returnable there, the Queen's Bench only has jurisdiction to examine the irregularity of the issuing, the return, &c.⁵ In suing out a *scire facias* by a subject, the course is, to present a petition or memorial to the queen, and to obtain a warrant thereon to the attorney general, who will grant his fiat for suing it out. The matter is tried by a jury in the Queen's Bench. If the patent is held void, it is delivered up to be cancelled, and a *vacatur* entered upon the enrolment of it;⁶ of which entry a certificate should be obtained by the party at whose instance the patent has been avoided.

¹ Crossley v. Beverley, 1 Russ & Myl. 166.

² Dilly v. Doig, 2 Ves. J. 486.

³ See Rex v. Arkwright, Dav. Pat. Ca. 129, when this question of inconvenience was very fully discussed.

⁴ Bloxham v. Elsee, 3 Car. & Payne, 6.

⁵ Holroyd on Patents, 183.

⁶ Hoiroyd, 187. See further on this point Rex v. Arkwright, *ubi sup.*; and Tidd's Practice, 1123.

CHAPTER XIX.

Of Title by Prerogative, Forfeiture, and Custom.

A SECOND mode of acquiring a title to things personal is by **PREROGATIVE**, whereby a right may accrue either to the crown itself, or to such as claim under it, as by the queen's grant, or by prescription, which supposes an ancient grant.¹ Of this nature are all *tributes*, *taxes*, and *customs*, whether constitutionally inherent in the crown, or occasionally created by act of parliament. In these the crown acquires, and the subject loses, a property the instant they become due.

If the title of the crown and that of a subject to any chattel, be it real or personal, concur, the crown will have the whole (unless it admit of being divided or separated), because the crown cannot have a joint property with any person in an entire chattel.

To this head may be referred all forfeitures, fines, and amerciaments, due to the queen or her grantee, either by ancient prerogative or particular statutes.

There are two other instances of title by prerogative, namely, the *prerogative copyrights*, and the property in such animals as are known by the denomination of *game*, with the right of pursuing and destroying them; but the former has been already considered in the preceding chapter, when treating of copyrights in general, and the latter will be fully discussed in a subsequent part of the work.

III. **FORFEITURE** is another method whereby a title to personal chattels may be lost or acquired. The cases in which a total forfeiture of goods and chattels ensues are thus enumerated by Blackstone: by a conviction of high treason or misprision of treason, of felony in general, and particularly of felony *de se*, of manslaughter, nay, even of excusable homicide; by outlawry for treason or felony; by conviction of larceny; by flight in treason or felony, even though the party be acquitted of the fact; by standing mute when arraigned of felony; by drawing a weapon on a judge, or striking any one in the presence of the queen's courts; by *præmunire*; by pretended prophecies, upon a second conviction; by owling; by the residing abroad of artificers; and by challenging to fight on account of money won at gaming.

This forfeiture commences from the time of conviction, not from the time of committing the offence, as in forfeitures of real property. Part, or the whole, of the offender's goods may be expended in maintaining him between the time of his committing the fact and his conviction; but a fraudulent conveyance of them, with intention to defeat the interest of the crown, would be void.² So all property to which a felon who is sentenced to transportation may become entitled before the completion of his punishment, or a remission thereof, is also forfeited to the crown.³ The principal enactments upon this subject

¹ *Ante*, 38.

² *Jones v. Ashurst, Skinner*, 357.

³ *Roberts v. Walker*, 1 Russ & Myl. 752.

are the 4 Geo. I. c. 11 (the foundation of the law of transportation); the 8 Geo. III. c. 15; the 5 Geo. IV. c. 94; the 6 Geo. IV. c. 25; the 7 & 8 Geo. IV. c. 29; the 9 Geo. IV. c. 32; the 2 & 3 Wm. IV. c. 62; and the 3 & 4 Wm. IV. c. 44.

The law upon this subject as applied to chattels *real* will be found in another part of this work.¹

IV. CUSTOM.—A fourth method of acquiring property in things personal is by custom; whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom. Of the many and various kinds of customs which may entitle a man to a chattel interest, two only appear to demand our attention, viz., *heriots* and *heir-loom*s.

We have before alluded to the subject of heriots;² we may, however, observe here, that heriots are divided into two sorts,—heriot service, and heriot custom. The former is such as is due upon a special reservation in a grant or lease of lands, and therefore amounts to little more than a mere rent; the latter arises upon no special reservation whatever, but depends merely upon immemorial usage or custom.

The heriot which is due to the lord of a manor upon the death of a tenant, whether in fee, for life, for years, or at will, is usually the best animal of which the tenant was possessed *at the time of his death*.³ Which is the best animal may be ascertained by the lord himself, and he may take which he pleases. Sometimes a sum *certain* is payable to the lord in lieu of the heriot. The heriot is due only on the death of a person dying *solely* seised; therefore it would not be due on the death of a coparcener, because all the coparceners make but *one tenant* to the lord, though on the death of the survivor of several parceners it will be due. It is due on the death of *each of several tenants in common*, because, as we have already seen, each is solely seised of his share. On the death of a *feme covert* no heriot can be taken, because she can have no ownership in things personal; but if the wife die in the life-time of her husband, and the husband be entitled to his curtesy, a heriot will be due on his death, as *he* would then *die tenant to the lord*.⁴ If the husband die in the wife's life-time, no heriot will be due on his death, because the wife will continue tenant to the lord. A heriot is not due on the death of a cestuique trust, though it is on the death of the trustee, because he, and not the cestuique trust, is tenant to the lord. A heriot is due on the death of a reversioner, on the ground that an estate in reversion is a tenement as much as a particular estate. The property in a heriot is vested in the lord immediately on the death of the tenant; and he may seize it, or bring an action of trover for the recovery of it. A heriot may be due as well upon *alienation* by as upon the *death* of the tenant, but there must be a custom authorizing it. If a tenant aliene part of his lands to one person and part to another, a heriot will be due on each respective alienation.⁵

¹ *Ante*, 562.

² *Ante*, 502.

⁴ 2 Inst., 301.

³ Or it may be the best inanimate thing the tenant died possessed of, as a jewel, or a piece of plate.

⁵ See *Attree v. Scott*, 6 East, 475. *Garland v. Schyll*, 2 Bing. 273.

Mortuaries are a species of ecclesiastical heriot, being a customary gift claimed by and due to the minister, in some parishes, on the death of his parishioners. The sum to be paid is regulated by the statute 21 Hen. VIII. c. 6.

Heir-looms are such goods and personal chattels as (contrary to the nature of chattels in general) go by special custom *to the heir* along with the inheritance, and *not to the executor* of the last proprietor. They are, generally speaking, such things as cannot be taken away without dismembering the freehold; at the same time carriages, household furniture, books, pictures, and jewels may also be heir-looms. The jewels of the crown are heir-looms; so are charters and deeds, court-rolls, and other evidences of the land, with the chests which contain them.

Heir-looms cannot be devised away from the heir; and they are not in general liable to be taken in execution for debt, though there is an instance of their having been so taken.¹

There are other personal chattels which also descend to the heir in the nature of heir-looms, as a monument or tombstone in a church, the coat-armour of his ancestors, with the pennons and other ensigns of honour there hung up. Pews in a church are of this nature also, and may descend from ancestor to heir by immemorial usage.

CHAPTER XX.

Of Title by Succession, Marriage, and Judgment.

WE shall now consider the fifth species of title to chattels personal, viz., by SUCCESSION. This mode is, strictly speaking, applicable only to corporations aggregate, as dean and chapter, mayor and commonalty, or the like, in which one set of men may, by succeeding another set, acquire a property in all the goods, moveables, and other chattels of the corporation; the reason whereof is, that, in judgment of law, a corporation never dies. Upon this principle a gift to such corporation, either of lands or chattels, vests an absolute property in them so long as the corporation subsists, even although the words "their successors" be not contained in the gift. But with respect to a corporation sole properly so called, such as a bishop or a parson, no chattel interest can regularly go in succession, unless in the case of a sole corporation representing a number of persons, as the master of a hospital. Therefore, if a lease for years be made to a bishop and his successors, his executors or administrators, and not his successors, shall have it. This rule, however, admits of two exceptions: the one in the case of the queen, in whom a chattel may vest by a grant of it formerly made to a preceding king and his successors; the other, where, by custom, some particular corporation sole has acquired a power of taking particular

¹ *Foley v. Burnell*, 4 Bro. Par. Cases, 319.

chattel interests in succession. If lands are given to a corporate body, and it be dissolved, they will revert to the donor.

VI. MARRIAGE.—Another mode of acquiring a title to personal chattels is by marriage, whereby, in the words of Sir W. Blackstone, those chattels which belonged formerly to the wife are by act of law vested in the husband, with the same degree of property and with the same powers as the wife when sole had over them.” As this subject has been already entered into at length in a former part of this work, it does not appear necessary to make any further observations upon it in this place.

VII. JUDGMENT.—Another mode of acquiring a property in personal chattels is by a judgment in consequence of some suit or action in a court of justice. Of this nature are damages awarded by a jury as a compensation or satisfaction for any injury done to one person by another, or for a breach or non-performance of a covenant; though, strictly speaking, in the latter case the right to the damages is not given, but only *defined* by the verdict of the jury, because the party acquired a right to *some* damages immediately upon the injury being done or breach committed.

To this principle also may be referred the title to the costs and expences of an action or suit, which are arbitrary, and rest entirely in the discretion of the judge, who, after considering the circumstances of the case and the conduct of the parties, determines whether any, and what, costs are to be paid, and by whom.

CHAPTER XXI.

Of Gifts and Grants.

A GIFT and a GRANT are thus distinguished from each other: a *gift* is always gratuitous, or, in other words, is not founded upon any consideration either of money or blood; a *grant*, on the contrary, is always founded upon some consideration or equivalent.

The law upon the subject of *voluntary* conveyances and settlements of property has been already treated of in another part of this work;¹ it will be sufficient, therefore, here to observe, that settlements of personal property are not within the 27 Eliz. c. 4,² and therefore a subsequent purchaser cannot rely upon this statute for protection against a voluntary settlement of such property.

A true and proper gift or grant of personal chattels is accompanied with delivery of possession, and takes effect immediately; though such delivery is not, strictly speaking, necessary. It is a general principle

¹ See *ante*, 388, 574

² Though as to leasehold estates this point seems to be doubtful.

of law, applicable as well to gifts and grants of real as of personal property, that a man is always estopped by his own deed, and that he cannot do any act in derogation of his own grant. There are, however, some exceptions to this general rule, arising for the most part out of the circumstances under which the gift or grant is made; as, for example, if the donor or grantor were at the time under any incapacity, as infancy, lunacy, coverture, duress, or the like, or if he were drawn in, circumvented, or imposed upon by false pretences, inebriety (caused by the grantee or by his contrivance), or surprise.

As to infancy, lunacy, and coverture, we may observe, that guardians, committees, and husbands are now enabled to do any acts on behalf of infants, lunatics, and feme coverts,¹ and such acts will of course be good and valid.

A deed of gift obtained by an agent from his employer, or indeed by any person who from circumstances attending his connexion with the party from whom the gift proceeds, may be supposed to have exercised any undue influence over him, is looked upon by courts of equity with considerable jealousy and suspicion; and if the validity of it be disputed on the ground of undue influence, the donee will be required to prove to the satisfaction of the court that the gift was *properly obtained*, and that the donor executed the deed of gift voluntarily, and with a full knowledge of its nature, effects, and consequences.

So a conveyance obtained from a party in ignorance of his rights by a party who had notice of such rights, or upon a misrepresentation of the circumstances of the property, will be set aside by a court of equity. If the inadequacy of the consideration in a deed be extreme, a court of equity will relieve against it; not, upon the ground of the inadequacy of the consideration merely, but upon that of *fraud*, which the court will consider to be shewn by the extreme inadequacy of the consideration. In cases of fraud in procuring a deed, time, in order to bar the remedy, will not begin to run, till the party defrauded acquires a knowledge of the facts constituting the fraud.

Before concluding the present subject, we may say a few words upon that species of gift which is made by a party when *in extremis*, or, as it is termed, a *donatio mortis causâ*. To the validity of a gift of this nature, it is essential that it be made by the party in his *last illness*, because in the event of his recovery the property reverts to him. A *donatio mortis causâ* cannot be made by mere *parol*: an *actual delivery* is indispensable to vest the property, if the subject matter be capable of actual delivery; or, if not, there must be something done amounting to a constructive delivery in law. Generally speaking, a chose in action cannot be disposed of in this manner; though, it seems, there may be such a gift of a bond,² unless it be a bond given as a collateral security for money due on mortgage, in which case as the mortgage itself cannot, so neither can the bond for securing it, be made the subject of such a gift.

¹ In *Thompson v. Heffernan* (4 Dru. & War. 285), Sir Edw. Sugden C. observed, "When a clergyman attends upon a person in his last moments, and sets up a gift from the dying man to himself, the evidence of the transaction ought to be perfectly free

from all suspicion, such as to leave no reasonable doubt of its truth;" and gave a decree for the plaintiff, who was administrator of the goods of the deceased. See also *Huguenin v. Burely*, 14 Ves. 273; and *Norton v. Relly*, 2 Eden. 280.

CHAPTER XXII.

Of Contracts.

I. OF CONTRACTS IN GENERAL.

THE term *contract*, in its most extensive signification, comprises every description of agreement, obligation, or legal tie, by which one party binds himself, or becomes bound, expressly or impliedly, to another, to pay a sum of money, or to perform or not to perform any particular act; though, in a familiar sense, it is most frequently applied to agreements not under seal. A contract differs from a gift or grant in this respect, that whereas the latter vests a property in *possession*, the former usually vests a property in *action*.

Contracts, then, in the larger sense of the word, are of three descriptions: 1. Contracts or obligations of record; 2. Specialties, or contracts under seal; and 3. Simple contracts, or agreements not under seal.

1. **CONTRACTS OF RECORD** are judgments, recognizances, statutes merchant, and statutes staple; which are of a superior force, as being founded upon the authority, and having received the sanction, of a court of record. These obligations bind the land; their existence is in general triable only by an inspection of the record itself; and no consideration is necessary to render them binding. They cannot be impeached by the parties themselves, even for a defect apparent on the face of them, except by writ of error. When, however, they have been obtained by any irregularity of practice, the court in which the action is pending has, of course, the power to set them aside; but they cannot, whilst in force, be impugned by the parties by pleading. In general, the record precludes all inquiry into any illegality of the consideration or fraud in the transaction; except that *third persons*, affected by a fraudulent judgment, may impeach it in pleading, or treat it as void.

2. **SPECIALTIES, OR CONTRACTS UNDER SEAL**, such as deeds, bonds, indentures, &c., are instruments not merely in writing, but *sealed and delivered* over as deeds, by the party bound, to or for the benefit of the person to whom the liability is incurred; such sealing and delivery being a particular form and ceremony which alter the nature and operation of the agreement. Neither a date, nor, at the common law, even the signature of the party, is essential to the validity of a deed; but neither the sealing nor delivery can be dispensed with. Of these instruments we have already spoken when treating of the alienation of real property; little, therefore, remains to be said concerning them in this place.

All transfers of *incorporeal* hereditaments must be by deed. Indeed, there are few transactions connected with *real* property which do not require this more formal mode of contract. Leases, when required to be in writing, and all assignments of any chattel interest (not being copyhold) in any tenements or hereditaments, are now void at law unless evidenced by deed.—7 & 8 Vic. c. 106. But, except where it is expressly directed by the legislature, a conveyance under seal seems not to be required for the transfer of *personal* property.

A deed cannot be assigned, so as to confer a right of action in the name of the assignee, except in cases provided for by the legislature, as by the statute 32 Hen. VIII. c. 34, with respect to the assignment of real estates. Bonds are not in general assignable; but a court of law will so far recognize the assignment of a bond, that if the original obligee release the debt after notice to the obligor of the assignment, it will set the release aside; for the assignment of the interest amounts to a covenant that the assignee shall receive the amount secured.

The principal points in which a deed differs in its legal effect from a simple contract are, 1st, That the absence of a consideration constitutes no defence at law to an action on the former instrument: for though in equity relief may sometimes be obtained in cases of surprise or catching bargains, or in favour of creditors, yet the mere circumstance of a bond or deed having been given voluntarily and without adequate inducement constitutes no ground, even in equity, for relieving the party himself; whereas, in support of any proceeding on a simple contract, the creditor must prove that it was founded on a sufficient consideration. And though the defendant, in an action on a deed, is at liberty to avail himself of any *illegality* in the consideration or in the transaction itself, yet it is incumbent on him to state the objection with precision in pleading.

2dly, In pleading a deed, it is not necessary to shew that it was founded on any consideration, except in setting forth conveyances under the Statute of Uses; whereas a declaration on a simple contract could not be sustained, even after a verdict, unless it appeared upon the record that there was a consideration co-extensive with the promise.

3dly, The party to a deed is in most cases precluded from controverting any statement contained in its recitals, and cannot show that it was executed with a different intent or object from that which the deed itself imports, except in cases of fraud, duress, or illegality.

4thly, The efficacy of a stipulation by deed cannot be affected or controlled at law by any subsequent simple contract; nor can the party be discharged or released from the obligation of a deed by any posterior contract, unless by release under seal.

5thly, A deed binds the heir when named; and a devisee of real estate may be sued in debt, though not in covenant, on such an instrument; whereas a simple contract creditor has no remedy at law in any case against the real estate of his deceased debtor, nor till very recently could relief be obtained in equity, except in some special instances by marshalling the assets, or where the creditor died a trader. Now, however, by the 3 & 4 Wm. IV. c. 104, it is enacted, that the real estates of deceased debtors (whether freehold, customaryhold, or copyhold) shall be assets, to be administered in courts of equity, for the payment of their just debts, as well those due on simple contract as on specialty; and the heirs and devisees of such debtors shall be liable to the same suits by simple contract creditors as they were formerly liable to at the suit of creditors by specialty where the heirs were bound; provided that all creditors by specialty where the heirs are bound shall receive their debts in full, before simple contract creditors, or creditors by specialty where the heirs are not bound, shall be paid any part of their demands.

6thly, A deed is not bound by the Statute of Limitations, 21 Jac. I. c. 16, which requires a simple contract to be sued for within six years after the cause of action accrued. Till the passing of the recent act, 3 & 4 Wm. IV. c. 52, there was no limitation to a specialty or matter of record, though the courts usually presumed them to be satisfied where there was no interest paid or acknowledgment given within twenty years.

The difference between a *recognizance* and a deed or instrument under seal is this,—that the former is equivalent to a judgment, and entitles the creditor to execution; the latter is only a chose in action, to be enforced through the intervention of legal proceedings in a court of justice.

3. SIMPLE CONTRACTS include not only all parol or verbal contracts strictly so called, but also such as are reduced into writing, if not specialties or matters of record. This is the most usual mode of contracting; and to them we shall principally direct our attention in the following observations.

II. OF THE NATURE AND REQUISITES OF A CONTRACT.

A simple contract is defined to be “an agreement, upon sufficient consideration, to do or not to do a particular thing;” or, to state it more particularly, it is the mutual assent of two or more persons competent to contract, founded on a sufficient inducement or consideration, to do a certain act, or to omit the doing of a certain act, such act or omission not being contrary to law, justice, morality, or public policy.

The difference between what is clearly specified in the contract and that which is to be supplied by construction is generally distinguished by the terms *express* contract and *implied* contract. As if a man agree with another for a specific object, all necessary incidentals are implied, though not expressed. If the expressed contract is, that A will employ B to do certain work, and B agrees to do it, this is binding upon both; and it is implied that B will use good materials, and perform his work in a sufficient manner, and that A will pay for the performance at the usual prices for that kind of work; and an action will lie for a breach of the implied as well as of the expressed part of the contract.

A contract also may be *executed*, as if A agree to change horses with B, and they do it immediately, in which case the possession and the right are transferred together; or it may be *executory*, as if they agree to change at some future time, in which case the right only vests, and their reciprocal property in the thing agreed to be exchanged is not in possession, but in action.

To the validity of a contract are necessary, 1. The assent of parties capable of contracting; 2. A good consideration; 3. That the thing contracted to be done be not illegal.

As to the *assent of the parties*. Generally speaking, nothing short of a promise, express or implied, by the party charged, and accepted by the person claiming the benefit of such promise, will be sufficient to raise a contract. No contract is raised by a mere *ex-parte* affirmation in discourse, or by a mere overture or offer to enter into an agreement, not definitely and expressly assented to by both parties.

The assent must be *mutual*. It has been decided, that if one party

to an agreement be not bound on his part to do the act which forms the subject matter of the agreement, the agreement is void for want of mutuality; but, notwithstanding the rule thus laid down, it is clear law, that an infant may sue upon his contract, although he cannot be sued upon it.

The assent of a party to a contract may be *implied* from his acts, as, to instance one case only in addition to those already mentioned, if a banker have sufficient funds of a customer in his hands, an agreement on the part of the banker to pay a check drawn by his customer will be implied.¹ Such assent may also be implied from the circumstance of a party being cognisant of the general usage or custom of any particular trade or place; but such usage or custom must be shown to be universal.²

Of the Consideration.—A consideration of some sort or other is so absolutely necessary to the formation of a contract, that a promise or agreement, not under seal, to do or pay any thing on one side, without any recompence or consideration on the other, is totally void at law; nor will a court of equity lend its assistance to the enforcing of it. Such gratuitous undertakings may be rendered binding by the execution of a deed under seal, which imports deliberation in the making; but as to simple contracts, the rule seems to be almost without exception, that some consideration for making, or some motive or inducement to make the promise upon which the party is charged, must exist, and that although the contract be reduced to writing, or else the promise is void, and no action can be maintained thereon. Even in the instance of bills of exchange and promissory notes, although the legislature and the courts have ever evinced the most anxious desire to encourage and facilitate their circulation, a consideration is held to be essential; and in an action between the immediate parties to such an instrument, as between the drawer and acceptor, or between an indorser and his indorsee, the consideration may be inquired into, and if it be proved that the plaintiff gave and the defendant received no value, the action will fail. The exceptions in favour of these instruments are, 1st, That a good consideration will always be presumed, unless the contrary be proved, and that even between the immediate parties; whereas in general, in an action upon a simple contract, the plaintiff must allege and prove consideration; and 2dly, That as regards a subsequent indorsee, who took the bill or note for value, the want of a consideration between the original or other parties is immaterial.

We have already seen, that considerations, as they relate to deeds under seal, are divided into *good* and *valuable* considerations; that the former are those of blood or of natural love and affection, and the latter are such as money, marriage, and the like. The distinction between a good and a valuable consideration is this, that a good consideration makes the instrument good as between the parties, but a valuable consideration makes it effectual against a subsequent purchaser: the former will not hold against creditors, if calculated to defraud them; the latter cannot, in general, be impeached. But the term *good* consideration, as thus applied to deeds, does not hold in re-

¹ Marzetti v. Williams, 1 Barn. & Ald. 15.

² See Roberts v. Havelock, 3 Barr Ald. 404.

lation to simple contracts; to support which, relationship or natural love or affection will not be a sufficient consideration.

Where, however, a legal consideration exists, it will be sufficient, although not *adequate* in point of value, the law having no means of deciding upon this matter. Slight services conferred by the plaintiff on the defendant, or at his request upon a third person, have been held sufficient to support an engagement. Even in equity, inadequacy of consideration is in general, of itself, no ground for impeaching a contract. If the folly of the contract be extremely gross, this circumstance will tend, if there be other facts in corroboration, to establish the case for relief on the ground of *fraud*; but mere folly and weakness, or want of judgment, will not defeat a contract even in equity.

The main rule, in regard to the sufficiency of the consideration, seems to be, that it arise either, 1st, by reason of a benefit resulting to the party promising, or at his request to a third person, by the act of the promisee; or 2dly, on occasion of the latter sustaining any loss or inconvenience, or subjecting himself to any charge or obligation at the instance of the person making the promise, although such person obtains no advantage therefrom. Thus, it has been decided to be a sufficient consideration for a promise, that one person undertook to *endeavour* to perform an act at another's request.¹ An agreement to forbear for a certain time to institute or prosecute legal or equitable proceedings for a *well-founded demand*, and one which is sustainable at law or in equity, is sufficient consideration for the promise of the debtor or a third person to pay the debt, or do any other act. The entrusting a party with property is a consideration in itself for his promise, that if he act upon the trust, he will faithfully discharge it.² The assignment of a debt, even of an uncertain amount, due from a third person is a sufficient consideration for a promise by the assignee.³ A consideration which has for its object the prevention of litigation and the settlement of disputes between parties, is also sufficient to support a contract, as in the case of a mutual submission of differences between parties to arbitration; but such submission must be mutually binding, or the consideration fails. The giving up a suit or proceedings instituted to try a question respecting which the law is doubtful, is a good consideration for a promise to pay a stipulated sum. A mere promise to do an act at some future period is, even if the act be not done, a sufficient consideration, on the ground that it subjects the party to a charge and obligation he would not otherwise have incurred. But there must, in such a case, be a reciprocity of obligation; for if the promise of one party be not binding on him, the other party is not in general bound by his agreement. A mere *moral obligation* to pay a demand or perform a duty is in many cases a sufficient consideration for an express promise,⁴ although no legal liability existed at the time of making such promise; as in the case of a promise by a man, after he has attained twenty-one years of age, to pay a debt contracted by him when an infant, and which by law he was not liable to pay.

No contract can arise upon a consideration the performance of which

¹ Gurnons v. Hodges, Yelv. 11; Lamp-
leigh v. Braithwait, Hobart, 105.

² Coggs v. Barnard, Raym. 909.

³ Price v. Seaman, 4 B. & C. 528.

⁴ Per Lord Tenterden, 2 Barn. & Ald.
811.

is naturally impossible; but a promise is not void against the party who makes it merely because its execution is improbable or difficult.

In what cases a Contract is required to be in Writing.—We have shown, that, to constitute a valid agreement not under seal, there must be the mutual assent of both parties, that each party must be bound by the contract in regard to those things which he is to perform, and that it must be founded on a valid consideration. Where the contract, therefore, is required by the Statute of Frauds to be in writing, it is essential that all those matters should appear on the face of the document or memorandum constituting the agreement; and in all cases, where the contract is in writing, though not absolutely required to be so, it is advisable that it should comprehend all those matters which are essential to give it validity, and that it should clearly and expressly state the stipulations of the parties; for much difficulty frequently occurs in the production of parol evidence to supply omissions in or afford explanation of such instruments.

In general, however, simple contracts need not be in writing. Where there is no special prohibition to the contrary, or where written evidence of the promise or contract is not required, an agreement is valid, though it be merely verbal. But the statute 29 Car. II. c. 3, (usually called the Statute of Frauds) requires in a great variety of cases that contracts should be in writing, and signed by the party to be charged thereon, or his agent lawfully authorized.

The first section of this statute enacts, “That all leases, estates, interests of freehold, or terms of years, or any uncertain interests, of, in, or out of any messuages, manors, lands, tenements, or hereditaments, made and created by livery of seisin only, or by parol, and not put into writing by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the effect of leases or estates at will, any consideration for making such parol leases or estates notwithstanding.” But the second section excepts all leases not exceeding the term of three years, where the rent reserved amounts to two-thirds of the improved value.

By the third section, no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, (not being copyhold or customary interest) of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless by deed or note in writing signed by the parties or their agents lawfully authorized by writing, or by act or operation of law.

The fourth section of the act provides, that no action shall be brought, 1st, To charge any executor or administrator upon any special promise to answer damages out of his own estate; or 2dly, to charge any defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or 3dly, to charge any person upon any agreement made upon consideration of marriage; or 4thly, upon any contract or sale of lands, tenements, hereditaments, or any interest in or concerning them; or 5thly, upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

The 17th section (which is explained by the 9 Geo. IV. c. 14) relates to contracts for the sale of goods of the price of ten pounds or upwards, which are also required to be in writing and similarly signed.

With respect to that part of the 4th section which relates to *agreements not to be performed within a year*, we may observe, that it extends to all contracts which are not to be carried into full and complete operation within one year from the making thereof; and the provisions of the statute render a parol contract void, if it appear to have been the understanding of the parties at the time that it was not to be completed within a year. It does not, however, refer to cases in which the promise made may probably be performed within a year, and the performance depends upon a contingency. Thus, a promise to leave a person a sum of money by will need not be in writing.

A contract for the sale of goods must be in writing, although at the time of the bargain it be uncertain whether the price will amount to ten pounds.¹

A contract for the sale of timber, grass, potatoes, &c. growing upon the land, where the timber, grass, &c., and not any interest in or right to the land, is the subject matter of the contract, need not be in writing.²

The statute does not require a formal agreement drawn up with technical precision. Any memorandum under the hand of the party, expressing that he had entered into the agreement, and shewing the terms thereof, is sufficient, although it be merely a recognition or adoption of the prior parol contract. Thus, a letter in answer and referring to a letter of the plaintiff which stated the terms of the contract, and by which letter the defendant recognized the bargain, though he excused the performance, was held to be a sufficient compliance with the act. If a correspondence, however, amount merely to a *treaty*, it will not sustain an action or suit. The main requisites in the formation of a contract by letter may be thus shortly stated: where one man makes an offer to another to sell for so much, and the other closes with the terms of his offer; which must be done by simply accepting the offer, without the introduction of any new terms. There must be a fair understanding on the part of each as to what is to be the purchase money, and how it is to be paid, and also a reasonable description of the subject matter of the bargain. The same construction, indeed, will be put upon a letter or series of letters, that would be applied to the case of a formal instrument.

As to the *signature* of the agreement. The statute requires the agreement to be signed by the party to be charged, or by some person thereunto by him lawfully authorized. We have already seen that at law a party who has signed an agreement is bound by it, although the other party may not have signed it. It is now settled by a series of decisions, that in equity a contract signed by one party only is binding upon the party signing; and therefore if a bill for specific performance of an agreement be brought against a party who has signed the agreement, he will be bound by it, although the other party did not sign it, as the agreement is signed by the party to be charged. In a recent case, where the defendant purchased certain leasehold premises at an auction, and signed a memorandum of the purchase on the back

¹ *Watts v. Friend*, 10 B & C. 446.

² *Anon.* 1 Raym. 182.

of a paper containing the particulars of the premises, the name of the owner, and the conditions of sale, it was held that he was bound by this contract, although it was not signed by the vendor.¹

It seems to be immaterial, for the purpose of signature, in what part of the instrument the name of the party is found. Thus, if a party prepare an agreement in his own hand-writing, beginning, "I, A. B., agree, &c." this is sufficient, although he do not subscribe his name at the bottom, and though a blank be left for that purpose. If a person be in the habit of printing his name, such printing the name by way of signature is sufficient.

As to the signature *by an agent*. The first and third sections of the statute require that the agent signing agreements of the nature therein mentioned shall be authorized *by writing*, but the 4th and 17th do not render it necessary that the agent should obtain his authority by any written instrument; and under these actions the agent may derive his authority from his principal by parol. It is, however, desirable that the agent should in *all* cases have a written authority, because where he has merely parol authority, it must frequently be difficult to prove the existence of it. An auctioneer is the agent of both parties upon the sale of goods and estates, so as to be enabled to bind them both under the statute; and a contract made by one person as agent for another is valid under the statute, although the alleged agent had no authority at the time, provided the principal afterwards ratifies it.

Of Stamping Agreements.—The amount of the stamp duties which are imposed upon agreements we have already seen; we shall here inquire what agreements require a stamp. In considering this we must advert to the distinction before noticed between simple contracts and specialties. Contracts under seal need not be stamped as *agreements* under the provisions of the stamp acts, but must be stamped as *deeds*. It is not necessary that an agreement be reduced into writing merely for the purpose of being stamped; but if it be reduced into writing, it must be duly stamped, otherwise it will not be received in evidence.² If the subject matter of the agreement be of less value than 20*l.*, no stamp is required, although the instrument relate collaterally to things of greater pecuniary amount. If an agreement be objected to on the ground of not being duly stamped, the *onus* of shewing that the subject matter is of the value of 20*l.* will be thrown upon the party who insists upon the insufficiency of the stamp.

By the 9 Geo. IV. c. 14, certain promises, in order to be binding, must be put into writing, but such writings are exempted from stamp duty.

The terms of the Stamp Act are very general as to the description or nature of the memorandum required to be stamped as an agreement. Whether the memorandum be only evidence of an existing contract, or be obligatory from its being a written instrument, it is equally liable to the stamp duty. If, however the instrument be merely *evidence of the intention* of the parties with reference to a *future agreement*, it need not be stamped; and, generally speaking, a mere written proposal or offer, not amounting in itself to an agreement, and

¹ Laythorp v. Bryant, 2 Bing. N. C. 735.

² When a bill is filed, if the agreement be in the hands of the other party or his attorney, equity will compel it to be delivered up in order that it may be stamped. Huddleston v. Briscoe, 11 Ves. 483.

not accepted in writing, need not be stamped. Thus, an estimate in writing of the expence of a certain work, not finally acceded to, may be read in evidence, though not stamped. A mere *cognovit* in an action need not be stamped, unless it contain any terms of agreement; in which case it will of course require an agreement stamp. A mere admission of the correctness of an account containing various items need not be stamped.

In ascertaining what is an agreement, with the view of determining upon the necessity of a stamp, it is necessary to inquire what is the leading object of the instrument, because an instrument will be liable to or exempt from stamp duty according to its *real*, and not its *apparent* effects. Thus, a demise by memorandum in writing not under seal has been considered as a lease and not as an agreement, and required to be stamped accordingly.¹ Now, however, a lease, if in writing, must be by deed.

By the Stamp Act, as we have already observed, a duty is imposed upon every agreement in writing; and if there are several distinct contracts, each of the value of 20*l.*, between the same or different parties, and relating to different subject matters, upon one paper, there must be a separate stamp in respect of each agreement. Not so, however, if there be but one subject matter of the agreement, however numerous may be the parties to it.

Where an agreement is complete, any further agreement in writing between the parties even upon the same paper, and although it has an express and direct reference to the first contract, must be stamped.

An unstamped agreement cannot be read in evidence to establish any claim arising out of it. And if in an action it clearly appear, upon the plaintiff's own showing or upon the cross-examination of his witnesses, that there is a written agreement between the parties, which has direct reference to the subject matter of the action, and contains the whole or some of the stipulations of the parties upon the matter, the instrument must be produced by the plaintiff duly stamped. But after the plaintiff has proved by witnesses an express or implied oral contract, without disclosing that there was a written agreement, he cannot be nonsuited by the defendant producing an *unstamped* written instrument purporting to contain the terms of the contract.*

If an agreement has been lost, or even wrongfully destroyed by the party chargeable, no action can be maintained on it, unless it be shown that it was duly stamped when it was lost or destroyed.

With respect to the consequences of agreements not being duly stamped, the time and manner in which they may be stamped, when it is necessary they should be restamped, and as to the agreements which are exempted from the stamp duty, the reader is referred to the observations we have already made upon these subjects in a former part of the work.³

III. OF THE CONSTRUCTION OF AGREEMENTS.

In putting a construction on the terms of contracts, as well of those which are, as of those which are not under seal, the courts both of law and equity are governed by certain general rules and principles, which

¹ Goodtitle v. Way, 1 T. R. 737.

² See ante, 138—144.

³ Fielder v. Ray, 6 Bing. 332.

we shall now briefly notice. 1. The courts will always put such a construction upon a contract as will make the effect of it as near the apparent intent of the parties as the rules of law and the language of the instrument will admit. 2. That the construction be liberal, so that the terms used may prevail according to their most comprehensive, plain, and popular sense, unless they have, in respect of the subject matter, as by the known usage of trade or the like, acquired a particular sense different from the popular sense of the same words, or unless the contract evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to the contract, be understood in some other special sense. 3. If the words used admit of two senses, one agreeable to, and the other against law, the former will be adopted. 4. The whole of the agreement will be considered. The court will put a construction on the entire deed, not on particular parts of it; so that every part of the instrument may, if possible, be made to take effect. 5. The law of the country where the contract arises will govern the contract; and if a contract be made between persons domiciled in a foreign country in a form known to the law of that country, the courts here, in administering the rights of the parties under it, will give it the same construction and effect as the foreign law would have given it.

As to the admissibility of parol evidence to *vary* or *annul* a written contract. Where there is no ambiguity in the terms used in an agreement, the agreement itself will be the only criterion of the intention of the parties, and parol evidence will not be admitted, either by a court of law or of equity, to annul or *substantially* vary the terms of it. And although, in the case of mercantile contracts, the particular meaning of certain expressions may be shewn by parol evidence, yet if the terms of such a contract be clear, if the expressions be of a general, and not of a technical nature, parol evidence of a usage or custom of trade, or particular intention, at variance with the import of the written instrument, cannot be received. So also with respect to the custom of any particular place, evidence of it will be excluded when the terms of the agreement are clear and unambiguous.

Parol evidence will not be admitted for the purpose of connecting two written instruments not having a direct or necessary reference to each other, in order to establish a written contract within the statute.

As to the admissibility of parol evidence to *explain* a written contract, we cannot do better than adopt the following observations of Mr. Starkie on this subject. "An ambiguity," says that learned writer, "apparent on reading an instrument is termed *ambiguitas patens*; that which arises merely upon its application, *ambiguitas latens*. The general rule of law is, that the latter species of ambiguity may be removed by means of parol evidence. On the other hand, it is a settled rule, that such evidence is inadmissible to explain an ambiguity apparent on the face of the instrument." But, in order to render parol evidence admissible even for the purpose of explaining a *latent* ambiguity, it must be clearly shown that there is such an ambiguity. Evidence which merely raises a conjecture to that effect is not sufficient. Upon the principle above mentioned, parol evidence would be admitted to show that a party apparently a principal in a contract

is in fact only an agent. Lord Hardwick has observed, that to add any thing to an agreement in writing by admitting parol evidence, is not only contrary to the Statute of Frauds, but to the rule of the common law before that statute was in being. So if parties enter into an agreement which is correctly reduced into writing, and at the same time add other terms by parol, equity will not go out of the written agreement.¹

The courts have evinced considerable reluctance in admitting parol evidence even to correct mistakes or omissions in agreements. There are, however, several instances of its having been received for those purposes. Parol evidence of even collateral matters, such as the payment of taxes, and so forth, which are of the essence of the agreement, is inadmissible both at law and in equity. The result of the authorities as to parol variation of written contracts is thus stated by Sir Edward Sugden: 1. That evidence of it is totally inadmissible at law. 2. That in equity the most unequivocal proof of it will be expected. 3. That if it be proved to the satisfaction of the court, and it be such a variation as the court will act upon, yet it can only be used as a defence to a bill demanding specific performance, and is inadmissible as a ground to compel specific performance; unless, 4. There has been such a part performance of the new parol agreement as would enable the court to grant its aid in the case of an original independent agreement; and then, in the view of equity, it is tantamount to a written agreement.

Parol evidence, however, is admissible to defeat or discharge a written contract on the ground of illegal consideration, duress, or fraud, though such oral testimony directly contradict the statements in the instrument. When fraud is distinctly proved, or a jury infer it from circumstances, an agreement is invalid at law as well as in equity; and if a contract be rescinded on the ground of fraud, the parties will be restored as nearly as possible to the situation they were in before the contract was made.

An action on the case was held maintainable for fraudulent misrepresentations as to the value of a public-house business, although such representations were not embodied in a subsequent written agreement and conveyance of the premises, and could only be shown by parol evidence.

IV. OF PERSONS WHO ARE INCOMPETENT TO CONTRACT.

Idiots and Lunatics.—The basis of all binding and valid contracts is, as we have before seen, the assent of the parties; and such assent necessarily implies the existence of a physical and moral power of consenting, as well as the faculty of making a deliberate and free use of such power. This power, it is obvious, a lunatic or idiot cannot possess. Upon this ground it is that, generally speaking, all contracts entered into by any person who is either a lunatic or an idiot is void. A person so circumstanced may however, it appears, bind himself by a contract entered into for necessities supplied to him. By the term *necessaries* is meant such things as relate to the person, as meat, drink, apparel, lodging, and medicine, at fair and reasonable prices, having regard to the estate and rank of the person. If a party were sane when a contract (whatever be

¹ Ormerod v. Hardman, 5 Ves. J. 722. Goss v. Lord Nugent, 5 Barn. & Adol. 58.

the subject matter of it) was entered into, evidence of previous or subsequent insanity is not material, except that in a doubtful case it tends to create a suspicion of insanity at the time when the agreement was made. With regard to persons of weak intellects, but not insane, even equity will not relieve, if no deception has been practised.

Drunkards.—In the case of *Pitt v. Smith*,² Lord Ellenborough was of opinion, that an agreement signed by a person in a state of complete intoxication was void, on the ground that such person had no agreeing mind. This principle has been cited in several subsequent cases.

Infants.—It is a general principle, that a contract entered into by an infant is not binding on him, unless the supply of necessities to him be the subject of the contract, or unless after he has attained his majority he affirm the contract. If a person on attaining his majority ratify a voidable contract made by him during infancy, it will bind him, although there be no other consideration than the moral obligation to pay. To render an adult's confirmation of contracts made by him when an infant binding, it must be voluntary, and not obtained by circumvention; and, by 9 Geo. IV. c. 14, § 5, it must be in writing and signed by him.

In the case of a *continuing* contract, voidable only by an infant on his coming of age, the infant is bound by and is presumed to ratify the contract, if he do not, within a reasonable time after he has attained his majority, give notice of his disaffirmance, or otherwise reject such contract, unless the other party dispense with such disaffirmance.³

An infant cannot recover back money paid by him upon a contract which, by reason of his infancy, he was not bound to complete; as a premium paid by him on a lease of premises which he actually occupied, although he avoided the lease on attaining twenty-one years of age. But, it seems, he may recover back the deposit paid by him on an agreement which he refused to perform, and which is wholly unexecuted.

An infant may sue upon a contract, as we have before remarked, although he cannot be sued thereon.

Married Women.—At law, a married woman is incompetent to enter into any contract that is binding upon herself; nor has she any right or authority to enter into any contract that will be binding upon her husband, without his authority or assent, precedent or subsequent, express or implied. With respect to certain contracts, such as for *necessaries* supplied to herself, her husband, or their family,⁴ the wife will be regarded as the agent of the husband, and his assent to the contract will be presumed. Cohabitation is strong evidence of the assent of the husband to such contracts, if they are entered into during the period of cohabitation; and such assent will be presumed even after adultery committed by the wife, if they continue to live together. But if goods which are not necessities suitable to the wife's station in life be furnished by the wife's orders, it is incumbent on the tradesman supplying them to make inquiry as to the power of the wife to bind her husband, and to prove the husband's express authority to her to make the purchase, or that the husband saw her wear or use the

¹ *Baxter v. E. of Portsmouth*, 7 D. & R. 618; *Brown v. Juddrell*, 3 C. & P. 30.

² 3 Camp. 33.

³ See further, *ante*, 326—335.

⁴ See *ante*, 321; and *Nurse v. Wills*, 4 Barn. & Adol. 739.

articles bought without expressing any disapprobation, which may be considered strong presumptive evidence of his assent.

It is fully established, that a husband and wife cannot, by a deed securing a separate maintenance to the wife, dissolve the relationship of marriage, so as to enable the latter, even whilst living apart from her husband and enjoying such separate fund, to contract as a feme sole. The marriage and its legal consequences as regards the wife still exist; and consequently, although the separation deed is valid and the husband is not liable for her debts, if the separate fund allotted to his wife be adequate to her support and be duly paid, the wife cannot contract, or sue or be sued at law, even for necessities; and he who trusts her relies on her honour only.

A married woman is not liable on her contract, although she lives apart from her husband in a state of adultery, and there exists a valid divorce *a mensa et thoro*, and she contracts during the separation in the assumed character of a single woman. To this rule, however, there are exceptions; as when the legal existence of the husband may be considered extinguished or suspended. When he is dead in law, as in the case of transportation for life or a term, his wife may contract so as to render herself personally responsible, and may sue and be sued upon her contracts, as if she were a feme sole.

Sometimes a married woman carries on trade on her own account independently of her husband; in such case, if the husband is aware that his wife carries on the business, and resides with her, and receives the profits of the trade, it will be presumed that she carries on such trade as his agent, and he will be liable accordingly for articles furnished in the trade.

By the custom of London, a married woman carrying on trade in the city independently of her husband may sue and be sued in the city courts upon contracts entered into by her as such trader in London. But even there, it seems, as well as in the courts at Westminster, the husband must be made a party to the suit for conformity; though the wife is considered as the real and substantial party to the suit.

If a marriage be declared void *ab initio* by a court of competent jurisdiction, the wife is restored to all her rights and liabilities as a single woman.

If a married woman, having property settled to her separate use, contracts debts, and promises to pay them, though not expressly out of her separate estate, such separate estate will be bound in equity; and if she procure herself to be furnished with necessities on a general representation that she has a separate property, and promises to pay, such promise may in equity be enforced against her.

Aliens.—An alien friend may legally enter into a contract with a subject of this realm either here or abroad, and may, during peace, maintain an action on such contract in the English courts. But the contract of an alien enemy is absolutely void, and cannot be enforced by him, or by any other person in trust for his benefit, either at law or in equity, unless he come into this country with a safe passport, or reside here by the queen's licence; neither can a contract be enforced as against him in favour of an Englishman, though made abroad.

Outlaws and Persons attainted.—A person outlawed in a criminal

prosecution or civil suit, or attainted of certain crimes, cannot sue on a contract entered into by him. This incapacity may, however, be removed by a pardon, or by reversal of the outlawry or attainder. But a person may be sued on a contract made by him whilst he stood outlawed or attainted.

Persons under Duress.—We have already seen, that, to give validity to a contract, the law requires the free assent of the party who becomes chargeable thereon; it therefore avoids any agreement or instrument extorted from him by terror or violence. Duress may consist either of *actual* violence, or a threat thereof. Actual imprisonment constitutes duress so as to avoid a contract, if the confinement is illegal, or if, being legal, undue and illegal force is used, or the party is made to endure unnecessary and unlawful privation, as want of food, and, to obtain his liberty or avoid such illegal hardship or privation, is induced to enter into the contract.

Uncertificated Bankrupt.—All property which a bankrupt may acquire before the final allowance of his certificate, and of course the benefit of all contracts, belong to his assignees, if they think proper to claim it; but until they do so interfere, the bankrupt is competent to contract, and to enforce such contract; and if the assignees interpose, they can enforce it. By the converse of the same rule, a person contracting with an uncertificated bankrupt can enforce the fulfilment of it against such bankrupt; and if the assignees adopt and claim the benefit of such contract, it may be enforced against them.

As to the competency of parties to contract on behalf of others.—It does not follow that because persons are under an incapacity to act for themselves, they are therefore incapable of representing and contracting on behalf of others. A person who is capable of doing any act of a civil nature by himself on his own behalf, and for his own benefit, may delegate that power to another, although the latter could not do such acts for himself and on his own behalf. The nonage of an agent therefore is not an objection, nor is a married woman under any incompetency to transact business either for her husband or any other person.

V. OF CONTRACTS NOT UNDER SEAL RESPECTING REAL PROPERTY.

There are several descriptions of persons who are, by the general rules of law, incapable of entering into a valid contract for the purchase of real property. This incapacity is said to be of three kinds: 1. An absolute incapacity; as the parishioners or inhabitants of any place, or the churchwardens, who are incapable of purchasing land by these names. 2. An incapacity to hold, although an ability to purchase; as in the case of aliens, who may purchase but cannot hold real property except for the king's benefit; persons who have committed felony or treason, or have been guilty of the offence of *præmunire*; corporations, sole or aggregate, either ecclesiastical or temporal. 3. An incapacity to purchase except *sub modo*, as infants, *femes covert*, lunatics, or idiots. Infants, when of full age, may either confirm or waive the purchase. The husband of a *feme covert* may either agree to or repudiate a contract entered into by his wife. Lunatics or idiots cannot, even if they recover their senses, of themselves waive the purchase: but if they die during the

¹ Aliens may hold every species of property except *real*; and they may hold land for residence for twenty-one years.—7 & 8 Vic. c. 66.

idiocy or lunacy, their heirs may avoid it; so may the king, upon office found; and also the committee, after the lunatic is found so by inquisition.

There are also certain persons who, by reason of the relation in which they stand to other persons, are prevented by the rules of equity from entering into a valid contract for the purchase of the property of the persons with whom they are so connected. Of this description are agents; arbitrators; attorneys, when they act as such on behalf of the vendors; assignees of a bankrupt; auctioneers; commissioners, creditors who have been consulted as to the mode of sale, and other persons confidentially consulted or employed in the management of a bankrupt's affairs; commissioners of inclosure, before the expiration of five years from the time of making their award; trustees, except when merely nominal; and mortgagees in trust for sale. The ground upon which such incapacity is founded appears to be, that any person who is entrusted with the property of others ought not to be allowed to make that confidence the means of gain or profit to himself, or to serve his own interest at the expence of those by whom he is entrusted.

A contract will not be discharged by the bankruptcy either of the vendor or purchaser; neither will the death of either vendor or purchaser before the conveyance or surrender of the property, or before the time agreed upon for completing the contract, have that effect.

If either the vendor or purchaser refuse to perform the agreement, the other may bring an action for breach of contract, or file a bill for specific performance. A vendor, however, cannot sue the purchaser on the contract, unless he (the vendor) has not only shown or offered to show a good title, if bound so to do, but has executed or offered to execute the conveyance, or tendered it to the vendee; for the party seeking to enforce an agreement of this nature must clearly evince and notify a willingness to complete it on his part, before the other party can be considered in default.¹ The purchaser is in general bound to prepare and tender the conveyance; though this obligation may, of course, be varied by the terms of the contract, in which case the vendor may maintain an action or file a bill against the purchaser without tendering the conveyance.

If a purchaser brings an action on account of the contract not having been completed, he must give the vendor a particular of every matter of fact which he means to rely upon at the trial as having been a cause of his not being able to complete the purchase; at the same time he is not bound to state in such particular any of the objections in point of law arising upon the abstract. If the vendor violate the agreement on his part, either by omitting to show a good title within the time appointed by the contract for that purpose, or by refusing to execute the conveyance, the purchaser may maintain an action against the auctioneer to recover the deposit, but not for the expences of the sale or the interest of the deposit; or against the seller, to recover the deposit and interest, with the expences incurred, and in some cases damages for the loss of the bargain; and such damages will not, it seems, be merely nominal.

¹ Sugd. Vend. and Purch. 225.

² Per Lord Tenterden, in *Hopkins v. Grazebrook*. 6 B. & C. 31.

If a vendor gives a false description of an estate, the purchaser may at law rescind the contract; and the same rule prevails in equity when the mis-description cannot be the subject of compensation. But if the purchaser *knew* the description to be false, he cannot take advantage of the mis-description, either at law or in equity. If the defect be a *latent* one, and the vendor being aware of it do not communicate it to the purchaser, he may set aside the contract at law, even though he bought the estate "with all faults," and equity will not assist the vendor.

If an abstract of the title is to be delivered, or the conveyance is to be executed, on or before a certain day, the time fixed is said to be of the essence of the contract, and the purchaser may rescind the contract if the abstract be not delivered before or on the exact day. If neither the vendor nor the purchaser be ready at the appointed time, the contract seems to be *ipso facto* dissolved, and the deposit is recoverable, unless the time has been enlarged by consent.

If, however, the delay be accounted for on the ground of defects in the title, such delay will not prevent a specific performance being decreed, where the time fixed for completing the contract is not material.

In order to enable a court of equity to decree a specific performance of a contract against a purchaser, the title must be free even from suspicion.¹ It will not therefore, compel the purchaser to take a doubtful title; though he will not be permitted to object to a title on account of a bare *possibility* or a mere *suspicion* of fraud. Nor will a purchaser be compelled to take a title if an act of bankruptcy has been committed by the vendor.

VI. OF CONTRACTS FOR THE SALE OR EXCHANGE OF GOODS.

Sale, or exchange, is a transmutation of property from one man to another in consideration of some price or recompence in value. If it be a commutation of goods for goods, it is more properly an *exchange*; but if it be a transferring of goods for money, it is called a *sale*.

Property may be transferred by sale either where the vendor hath in himself the absolute property in the thing sold, or where he hath not such property.

Where the vendor hath in himself the property of the goods sold, he has the liberty of disposing of them to whom and in what manner he pleases, unless judgment has been obtained against him for a debt or damages, and the writ of execution is actually delivered to the sheriff; for in such case the sale will be considered fraudulent, and the property of the goods will be bound to answer the debt from the time of the delivery of the writ.

If a man agree with another for goods at a certain price, he may not carry them away before he has paid for them; for it is no sale without payment, unless the contrary be agreed. And therefore if a seller says, the price of a beast is four pounds, and the purchaser says he will give four pounds for it, the bargain is struck, and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement entered into, it is no contract, and the owner of the goods may dispose of them as he

¹ Sugd. Vend. & Purch. 314.

* Lowes v. Lush, 14 Ves. 547.

pleases. But if any part of the price be paid, or any portion of the goods delivered by way of earnest, the property of the goods is absolutely bound thereby, and the purchaser may recover the goods by action, as well as the vendor may the price of them. As soon as the bargain is struck, the property of the goods is transferred to the purchaser, and that of the price to the seller; but the vendee cannot take the goods until he tenders the price agreed on. But if he tenders the money to the vendor and he refuses it, the purchaser may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A sell a horse to B for 10*l.*, and B pay him earnest, or sign a note in writing of the bargain, and afterwards, before delivery of the horse or money paid, the horse die in the vendor's custody, still he is entitled to the money, because by the contract the property was in the purchaser. We may here notice, as applicable to the case last mentioned, a difference which appears to exist when the day of payment is limited, and when not. In the first case the contract is good *immediately*, and an action lies upon it without payment; but in the other, not so. As, if a man buy of a draper twenty yards of cloth, the bargain is void if he do not pay the money immediately; but if the day of payment be agreed upon by the parties, in that case one shall have his action for the money if not paid on the day appointed, and the other for not delivering the cloth. Where a portion of an entire bulk of goods is sold, the contract is incomplete, and no property passes, if such portion be not ascertainable without weighing, and it has not been distinguished and separated from the entire quantity.

The property in goods may sometimes be transferred by sale, though the vendor has none at all therein. The general rule of law is, that a man who has no authority to sell cannot, by making a sale, transfer the property to another. An exception to this principle is, however, afforded in the case of a sale of goods in market overt. A market overt (or open) is a fair or market held at stated intervals in particular places by virtue of a charter or prescription. In London every day (except Sunday) is a market day, and every shop (but not a wharf) is a market for the sale of goods. But the sale must be in the usual and public or exposed part of the premises, where goods are placed for sale; and no place is for this purpose a market overt except as to goods usually sold therein, and appropriate to the trade of the occupier.

We shall here say a few words with respect to the *sale of horses*.* A person gains no property in a horse that has been stolen, unless it be bought in a fair or market overt, according to the directions of the statutes 2 Ph. & Mary, c. 7, and 31 Eliz. c. 12. By these statutes it is enacted, that the horse shall be openly exposed in the time of such fair or market for one whole hour together, between ten o'clock in the morning and sunset, in the public place used for such sales, and not in any private yard or stable, and afterwards brought by both vendor and purchaser to the book-keeper of such fair or market; that toll be paid, if any be due, and if not, one penny to the book-keeper, who shall enter down the price, colour, and marks of the horse, with the names, additions, and places of abode of the vendor and purchaser, the former being

properly attested. Nor shall such sale take away the property of the owner, if, within six months after the horse is stolen, he puts in his claim before some magistrate of the place where the horse shall be found, and, within forty days more, proves such his property by the oath of two witnesses, and tenders to the person in possession such price as he *bonâ fide* paid for him in market overt. But in case any of the points before-mentioned be not observed, the sale is utterly void, and the owner shall not lose his property, but at any distance of time may seize or bring an action for his horse wherever he happens to find him.

It seems formerly to have been considered, that if a person's goods were stolen from him and sold in market overt, such sale would be good, not only as between the parties, but as to all persons claiming any property in the goods stolen under certain circumstances. But by the 7 & 8 Geo. IV. c. 29, § 57, the owner of any chattel &c. or other property stolen is entitled to restitution, although the same may have been *bonâ fide* sold in the interim, provided the owner, or his executor, shall prosecute the thief or receiver to conviction, and the court shall award restitution. There is an exception, if it appear, before the award of restitution, that any valuable security shall have been *bonâ fide* paid or discharged by the party liable, or, being a negotiable instrument shall have been *bonâ fide* taken, by transfer or delivery, by any person for a valuable consideration, without any notice or reasonable cause to suspect that the same had been stolen.

Of the Statute of Frauds, as it affects Contracts for the Sale of Goods.—At common law, a *parol* contract for the sale of goods is valid; but by the 29 Car. II. c. 3, § 17, it is enacted, that no contract for the sale of any goods, wares, or merchandizes for the price of ten pounds sterling or upwards, shall be allowed to be good, unless the buyer shall accept part of the goods so sold, and actually receive the same; or shall give something in earnest to bind the bargain, or in part payment; or unless some memorandum or note in writing of the same bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized. And by the 9 Geo. IV. c. 14, after reciting that it had been held that the English and Irish Statutes of Frauds as to the sale of goods do not extend to certain *executory* contracts for the sale of goods, which nevertheless are within the mischiefs intended to be remedied thereby, it is provided that the said enactments shall extend to all contracts for the sale of goods of the value of ten pounds sterling or upwards, notwithstanding the goods may be intended to be *delivered at some future time*, and may not at the time of such contract be actually made, procured, or provided, or be fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

It is now settled that the sale of goods by public auction is within the Statute of Frauds.¹ It is also considered that the statute applies to a contract for a sale made in market overt.²

¹ *Hinde v. Whitehouse*, 7 East, 568. ² Per Lord Ellenborough, in *Stude v. Kenworthy v. Scholesfield*, 2 B. & C. 945. *Whitehouse*.
4 D. & R. 556.

In order to satisfy the statute, there must, as we have observed, be a delivery of the goods by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with an intention of taking to the possession as owner. A written order, given by the seller of goods to the buyer, directing the Dock company or person in whose care or custody the goods are, to deliver them to the vendee, is a sufficient delivery within the statute.¹ It is, however, necessary, not only that the purchaser should accept the delivery order, but that the party holding the goods, and who is agent of the vendor, should recognize the order, and assent to retain the goods for the vendee.

The purchaser must actually receive the goods. If a purchaser of goods direct the seller to forward them to him by a carrier, &c., such direction will not be considered an actual acceptance of the goods by the purchaser. If a person, upon an agreement for the purchase of goods, direct that the goods be left in the vendor's possession till called for, it will not constitute an acceptance. Thus in *Howe v. Palmer*, (2 Barn. and Ald. 321), where A agreed verbally at a public market with the agent of the vendor to purchase twelve bushels of corn, then in the vendor's possession, constituting part of a larger quantity in bulk, to remain in the vendor's possession till called for, and the agent on his return home measured and set apart the twelve bushels; it was held that this did not constitute an acceptance by the purchaser, so as to take the case out of the statute.

The marking casks of wine sold by parol, and lying in the docks, with the initials of the purchaser, at his request and in his presence, cannot be considered a sufficient acceptance within the statute, at least if the time of payment has not, when the casks are so marked, been fixed, so that the contract is then incomplete. And in no case can the marking goods with the name of the purchaser by his consent constitute an acceptance within the act, if it be not evident that the name was affixed with intent to denote that the vendee had purchased the article, and had appropriated it to his own use. The delivery of a sample which is not taken from nor forms any part of the thing sold will not take the case out of the statute; but if the sample be delivered and received as part of the bulk, it is then a sufficient delivery and acceptance. If several lots of goods be separately knocked down to a purchaser, the acceptance of one lot will not constitute an acceptance of the others, upon the ground that there is a distinct contract as to each lot.

The 4th section of the statute requires that an agreement which is not to be performed within a year from the making thereof shall be in writing. But a parol contract for the sale of goods to be delivered, and which are accordingly delivered within a year from the making of the bargain, but which are not, by the terms of the bargain, to be paid for until the expiration of that period, is not within that section, because in such case all that is to be performed on one side, namely, the delivery of the goods, is done within a year.

As to Earnest,—After earnest given upon the sale of goods, the vendor cannot sell them to another without a default in the vendee, be-

¹ *Searle v. Reeves*, 2 Esp. 598.

cause, as we before remarked, upon payment of the earnest the property in the goods &c. is absolutely bound by it. Therefore, if the vendee do not come and pay for and take away the goods, the vendor ought to go and request him; and if he then do not come and pay for and take away the goods in a convenient time, the agreement is dissolved, and the vendor is at liberty to sell them to any other person.

In order to constitute a payment as earnest, or a part payment within the statute, there must be an actual transfer or delivery of the thing or money agreed to be given as earnest or part payment.

The delivery of a bill of exchange or promissory note on account or in payment of the price of goods sold under a parol contract, would take a case out of the statute; such instrument amounting to payment till dishonoured.

Of the Form of a Contract in Writing for the Sale of Goods.—A memorandum of a contract which does not mention the names of both the contracting parties or their agents, and the price agreed to be given, will not be sufficient. It is not, however, necessary that the whole of the terms of the contract for the sale of goods should be contained in one written memorandum; if they can be collected from several distinct writings having reference to the same agreement, or from subsequent letters having reference to each other, whereby the transaction is admitted, it is a sufficient compliance with the statute.

Much of the commercial business of this country is carried on through the medium of persons who buy and sell goods for others on commission, and are called *brokers*. A broker, though employed originally by one party, becomes the agent of the other when he treats with him. The practice of brokers is, to keep books in which they enter the terms of any contract they effect, and the names of the parties. The broker's signature to this entry will satisfy the Statute of Frauds, it being in law the signature of the parties by their agent; and the authority of the broker need not be obtained by a written instrument. Such signature of the broker is sufficient to create a binding contract, although the broker do not (as is usually done) deliver to the respective parties the bought and sold notes of the bargain transcribed from his books, and signed by him. The entry in the broker's book is the original, and ought to be signed by him; and the bought and sold notes delivered to the parties ought to be copies of it. A valid contract may nevertheless be made by perfect notes signed by the broker and delivered to the respective parties, although the broker's book contain no entry, or contain an entry which is not signed.

If a broker who is employed by one person to sell, and by another to buy a particular article, sell and give the purchaser a sale note of an article of a different description, and give the seller a note of the particular article, no contract arises between the parties, and the notes so delivered cannot be materially corrected or aided by the entry in the broker's book.

A broker's authority cannot be delegated, and exercised by another person, without the assent of the principal.

Of Fraudulent Sales.—It is an established principle, that if a purchaser obtains goods by means of a gross fraud practised on the seller under colour of a purchase, whether on credit or otherwise, he

(the purchaser) acquires no property in or title to the goods, and cannot retain them against the seller.

• If, according to the terms of a contract, a purchaser is to pay ready money for goods sold to him, and, instead of so doing, he gives the seller a check on a banker, which is dishonoured, the vendor is at liberty to treat the sale as a nullity; and that although the purchaser, at the time of giving the check, had not any *reasonable* cause to believe that his check would be dishonoured.¹

By the statute 13 Eliz. c. 5, it is enacted, that every gift, grant, bargain, and conveyance of goods &c., or of any profit thereof, by writing or otherwise, with intent to delay, hinder, or defraud creditors and others of their lawful actions, debts, damages, &c., shall be utterly void against the creditors or persons having the rights to such actions, debts, &c.; with a proviso or exception in favour of estates or interests in goods &c. created or vested upon good consideration and *bonâ fide* in any person not having notice of fraud.

There have been, as might be expected, several decisions upon this statute. In all the cases that have come before the courts, the circumstance of the vendor continuing in possession of the goods after the sale has been looked upon as presumptive, though not conclusive, evidence of fraud,² which consists in the collusive attempt to delay or defeat a creditor, or to favour the debtor at the expence and prejudice of the creditor. Where, however, a transfer is founded on a good consideration, and there is no intention *in fact* to defraud creditors, the legal presumption of fraud created by non-delivery of possession does not arise, if the transaction or transfer was a matter of publicity or notoriety; and in these cases the notoriety of the transfer is the question on which the validity or invalidity of the assignment will depend. The legal presumption of fraud will not arise where the party in possession was not the original owner of the goods, and in fact never acquired any property therein, and had nothing more *ab initio* than the mere occupation of the goods by the consent of the true owner.

The legal presumption of fraud above mentioned will of course be rebutted by the fact of a change of possession of the goods having taken place; but such change of possession must be substantial, *bonâ fide*, and exclusive. Thus, if after a sale of goods they be left upon the premises of the seller, and in his apparent order and disposition, the sale will be considered fraudulent and void, although the purchaser or his servant enter on the premises, and be also in possession of the goods.³

If two persons enter into a contract under the semblance of a sale of goods, not intending really to buy or sell the commodity, but merely as a gambling speculation, and to pay the difference of the market price on a particular day, like a time bargain in the stocks, such a contract is illegal and void at the common law, and no action will lie to enforce it. And if a man sells goods to be delivered on a future day, and neither has the goods at the time of the sale, nor has entered into any contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and buy the

¹ See *Noble v. Adams*, 7 Taunt. 59.

² *Hing v. Motley*, 7 Bmg. 552.

³ See *Twyne's case*, 3 Co. 80.

⁴ *Paget v. Perchard*, 1 Esp. 205; *Benton v. Thornhill*, 7 Taunt. 149.

goods which he has contracted to deliver, he cannot maintain an action for non-performance of the contract.¹

It is, in fact, a general rule, that a present grant or assignment of goods not in existence is without operation.

Contracts for the sale of goods are illegal when the goods are bought and sold for the express purpose of being smuggled into this country; and an action for the breach of the contract may be defeated by shewing either, that the plaintiff was a sharer in the illegal transaction, or that he assisted in the act of smuggling.

If the contract for the sale of goods be completed on a Sunday, it is void.

Remedies for Non-performance of Contract.—The usual remedy for recovering the price of goods sold and delivered is an action of assumpsit, on the common *indebitatus* count, which alleges that the defendant is indebted to the plaintiff in a named sum for the price and value of goods sold and delivered by the plaintiff to the defendant at his request. Where there is an entire contract for work, labour, and materials, the latter cannot be recovered under a count for goods sold. If goods are to be paid for partly in money and partly in goods to be delivered, the vendor must declare specially; but if the goods are delivered to him in part performance, the money may be recovered under the common count.

The remedies which are open to a purchaser for the non-delivery to him of goods contracted to be sold is an action of assumpsit. Before, however, the purchaser can bring this action, he must pay or tender the price of the goods; though, in an action for not delivering the goods which the defendant had sold and undertaken to deliver to the plaintiff *on request* at a certain price, the plaintiff need not aver an actual tender of the price, it will be sufficient for him in his declaration to aver such request, and that he was ready and willing to receive the goods and pay for them according to the terms of the sale, but that the defendant refused to deliver them.²

In the case of a sale of goods (expected by a particular ship) *on arrival*, if no goods arrive in the ordinary course of trade and navigation, the vendor is not liable, the contract being conditional.

Of a Warranty upon the Sale of Goods.—Some warranties are implied by law, without any express stipulation between the parties. In contracts for sales it is understood, that the seller undertakes that the commodity he sells is his own; and if it prove otherwise, an action on the case lies against him, to recover damages for the deceit. But with regard to the *quality* or *soundness* of goods, the maxim is, *caveat emptor* (the purchaser should take heed); and no liability in general exists in regard to bad quality or defects, unless there be a special warranty or fraud.² But if the vendor practise any *intentional* deception for the purpose of disguising the latent defects of a commodity, he would be liable to an action on the case for the deceit; and such action might be maintained although it were stipulated that the vendor might return the article if he disapproved of it; but a knowledge of the deceit must in all cases be proved.

¹ Bryan v. Lewis, R. & M. 586.

² Bach v. Owen, 5 T. R. 709. See also Early v. Garrett, 9 B. & C. 932.

If, however, a representation of the quality of the thing sold be made before the sale, with full opportunity allowed to the purchaser to examine the truth of the representation, and a contract of sale be afterwards reduced into writing in which that representation is not embodied, no action for the deceit will lie against the vendor, whether he knew of the defects or not.

The custom of any particular trade may establish an implied warranty between parties transacting business therein; but where there is an express warranty, it cannot be restrained or varied by such custom. The description of goods as being of a particular kind in an advertisement, or in conditions of sale, will in some cases amount to a warranty that the goods answer such description.

With respect to goods ordered and sold for a particular purpose being warranted fit for that purpose, it appears to have been the opinion of Lord Tenterden, that if a person sells a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for that purpose. This opinion, however, does not appear to have been generally acquiesced in.¹ A promise or warranty, that the goods delivered shall be of *mercantile quality* of the kind ordered is implied, where the vendee had not, before or at the time of sale, a sufficient and reasonable opportunity of inspecting them, and there are no circumstances (such as smallness of price &c.) to negative the presumption that goods of that description were meant to be bought.

A sale of goods by sample is, in effect, a sale thereof by warranty; but if there be sale notes, or any other written agreement, not alluding to the sample, it is no sale by sample.

Express warranties relating to the subject matter of the contract may be either general or special. The advantage arising to the buyer from an express warranty as to the quality or value of the commodity sold is, that such warranty extends to any defect in the quality or value known or unknown to the seller; and if the warranty be false, the purchaser has a remedy against the seller, or may altogether refuse to accept or to keep the commodity.

No particular form of words is necessary to constitute a warranty. The word *warrant* need not be used; a bare representation or assertion as to the quality of the goods may amount to a warranty, if there be nothing to negative that it was understood to be such. A simple commendation of goods by the vendor as to their quality or fitness does not necessarily amount to a warranty; it must be mutually understood to have been such, or it will not form part of the contract. And in many cases the positive representation of the seller is not, from the nature of the case, to be regarded as a warranty, but merely as an expression of his belief and opinion on a matter of which he could have no certain knowledge, and on which the purchaser was as capable as himself of forming an opinion.²

A warranty, in order to be valid, should be made during the treaty, or before or at the time of sale, or at least before the performance of the substantial terms thereof. If it be made after the sale is complete or the contract performed, it will not be binding, for want of consideration.

Gray v. Cox, 1 C. & P. 184.

² *Dunlop v. Waugh*, Peake's Rep. 123.

Where there is an express written warranty, the purchaser of the goods is not at liberty to avail himself in addition thereto of any representation not embodied in the contract, and made by the vendor without fraud.

A general warranty will not extend to guard against defects that are plain and obvious to the senses of the purchaser, and require no skill to detect. Blackstone says, that a warranty will only reach to things in being at the time of the warranty made, and not to things *in futuro*; but, according to Lord Mansfield, there is no doubt but you may warrant a future event.¹

If there be a breach of an express warranty, the purchaser may re-sell the goods, and declare specially in an action against the seller for the loss or difference incurred in such re-sale. It is not absolutely necessary that any notice of the breach of the warranty should be given to the seller,² though it is better to give such notice, and also to make an offer to return the goods.

When goods are sold by sample, the purchaser has a right to refuse to receive the goods, or, if received, to return them within a reasonable time allowed for the purpose of examination and comparison, if they be not of the same quality as the sample.

With respect to *warranties on the sale of horses*, an erroneous opinion at one period prevailed, namely, that a sound price given for one was tantamount to a warranty of soundness; but the ground on which this principle was established appeared so loose and unsatisfactory, that the court, in a modern case, rejected it, observing that there should either be an express warranty of soundness, or fraud in the seller, in order to maintain an action.³

It is a common practice to stipulate at the time of sale, that the horse shall be returned within a limited period if the warranty prove untrue. In such case it is necessary to return the horse within the time specified, otherwise no action can be maintained on the warranty; but these conditions will not be applicable to defects not expressly mentioned. Where there is an express warranty that the horse is sound, free from vice, &c. coupled with an undertaking on the part of the seller to take the horse again and pay back the money, if on trial he should be found to have any of the defects mentioned in the warranty, the buyer must, in such case, return the horse as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller.

On the warranty of the soundness of a horse, an infirmity which renders it less fit for present use and convenience is an unsoundness, and it is not necessary that the infirmity should be of a permanent nature; but roaring and crib-biting do not amount to unsoundness, unless clearly proved to be so in a particular case.

We have already, in a preceding part of this work, fully considered the subject of **BAILMENTS**; it will be sufficient, therefore, to refer the reader to the observations which are there made.⁴

¹ See *Eden v. Parkinson*, Doug. 735.

² See *Fidler v. Starkin*, 1 H. Bl. 19.

³ 2 East, 214. See also, 1 Stark, 127;

1 R. & M. 126; 3 Campb. 523; 7 Taunt. 153;

8 Moore, 32; 2 Esp. 673.

⁴ See *ante*, 293.

OF GUARANTEES AND INDEMNITIES.

We have but little to add on this subject to what has been already said in a former part of the work.¹ We propose, however, to make a few observations—1. Upon the manner in which guarantees are affected by the Statute of Frauds; and 2. On the form and requisites of a written contract to guarantee.

The Statute of Frauds provides, (sec. 4) “that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.” It has been decided, that this enactment applies only to *collateral* engagements, that is, where there exists a debt or legal liability on the part of a *third* person, and does not extend to an original promise to pay a debt, or satisfy a demand or damages, in regard to which no other person was ever responsible. It applies, however, not only to a contract to be answerable for the debt of another, but also to a collateral engagement for the satisfaction of *damages* recovered or recoverable against such person; and it is not necessary that the party originally liable should have requested the person giving the guarantee to enter into the engagement, or that he should be in any manner a party thereto.²

In determining whether an engagement entered into by a guarantee is or is not collateral, and consequently whether it ought or ought not to be reduced into writing, the inquiry will be, whether any credit was given to the original party; or, in other words, whether he incurred any responsibility to the creditor. This will sometimes depend not altogether on the particular words of the guarantee, or promise or engagement of the party; but upon the particular circumstances of the case, and the general features of the transaction. The subsequent conduct of the creditor may likewise be adduced in evidence to show that he viewed the transaction (if of a dubious nature) as one of guarantee only. If the party for whom the guarantee was given incurred any responsibility to the creditor, the guarantee must be reduced into writing.³ If, however, the credit was given entirely to the other party, and it was agreed that he alone should be responsible, as if in fact the sale was to him, although the goods were delivered to or for the use of another person, the guarantee need not be in writing; the party to *whom the sale was made* will be liable on his parol agreement under a common count for goods sold. Although the debt of another form the subject matter of the undertaking, still if the guaranteeing party promise to pay the debt upon some new consideration received by himself, and the consideration be the creditor's resignation of a charge or lien on goods which afforded him a remedy or fund to enforce payment, the case does not fall within the statute. If a third party be not *legally* liable for a demand in respect of which a guarantee is given, as, for instance, goods (not being necessities) furnished to an infant, such engagement cannot be considered collateral,

¹ *Ante*, 401—412. ² Chit. on Contracts, 402. ³ *Matson v. Wharam*, 2 Term. Rep. 80.

and therefore need not be in writing. Nor if the party were himself, either alone or jointly with others, liable for the demand which forms the subject of his subsequent promise, need such promise be in writing. Neither need a promise by a surety to a person to indemnify him if he also would become surety for the principal be in writing.

With respect to the *form* and *requisites* of a written contract to guarantee: It is now fully settled, that, to render a memorandum or agreement in writing valid under the 4th section of the statute, the consideration for the promise, as well as the engagement itself, must be stated therein, and that the omission cannot be supplied by parol testimony. This doctrine is established with a view to give full effect to the intention of the act, namely, the prevention of fraud and perjury, it being considered that the admission of parol evidence to show the terms or consideration of the contract would cause the mischief the legislature intended to prevent. The consideration must be *clearly* stated. The necessity of this will be apparent from the following observations made by Lord Lyndhurst in a recent case on this subject: his lordship said, "It appears to me, that if in a written agreement to be answerable for the debt of another person two distinct considerations may with equal probability be inferred as the inducement for the engagement, the writing is not taken out of the operation of the Statute of Frauds, and consequently can give no right of action."¹ At the same time, if a particular consideration can be reasonably collected, or fairly and satisfactorily *inferred*, from the defendant's memorandum, or, if not from it *alone*, from it and any written correspondence or papers which passed between the parties, it will be sufficient to satisfy the act. Such memorandum must, however, expressly refer to the correspondence, or to an instrument which contains the whole contract, and state that the terms of the contract are comprised in the writing thus referred to.²

OF CONTRACTS RESPECTING SERVICES AND WORKS.

It is not our intention here to enter into any consideration of the rights which arise out of contracts entered into by particular persons for services and works to be performed by them, but merely to state one or two rules which appear to be applicable to such species of contract, with whomsoever they may be entered into. Thus, if a contract to perform any work, or to transact any business, be not tainted with an illegal consideration or object, the law implies an engagement on the part of the person undertaking to do the work or transact the business, that it shall be done and transacted with due care, diligence, and skill, or according to the orders given and assented to, and a promise by the party who employs the workman to pay him in money a reasonable remuneration, to be ascertained by a jury,³ if no specific price be agreed on. Where a specific remuneration is fixed upon, a subsequent promise, without any new consideration, to pay an additional sum for the same services is *nudum pactum*. Where, however, it is expressly agreed between the parties, that the work shall be *gratuitously* done, though the contract is *nudum pactum*, and the party undertaking to execute the work is not bound to enter upon or perform

¹ Cole v. Dyer, 1 C. & J. 461.

² *Ante*, 652.

³ 2 Camp. 45.

it, yet he becomes liable if, having actually proceeded on the employment, he be guilty of any misfeasance in the course thereof, to the injury of the other party.

A workman who has bestowed his labour upon a chattel has a lien for the remuneration due to him, whether the amount of such remuneration was fixed by the express agreement of the parties or not, and although the chattel was delivered to him at different times, if the work done under the agreement be entire. But no such lien exists, if by the bargain a future day of payment was agreed on; for in such case the detention of the chattel would be inconsistent with the terms of the contract.¹

A contract for the hire and service of an agent, clerk, or servant, need not be in writing, unless the retainer is, by the terms of the bargain, to extend beyond a year, in which case a written agreement is necessary.²

OF CONTRACTS BY HIRING AND BORROWING.

These are contracts whereby a qualified property may be transferred to the hirer or borrower. In the two kinds of contracts there is only this difference, that *hiring* is always for a price or stipend; *borrowing* is merely gratuitous. In each case the possession and a qualified property are transferred for a particular time or use, on condition of restoring the goods so hired or borrowed as soon as the time is expired or use performed, together with the price or stipend (in case of hiring) either expressly agreed upon by the parties, or left to be implied by law according to the value of the service.

OF INTEREST.

By the 3 & 4 Wm. IV. c. 42, § 28, it is enacted, that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue or on any inquisition of damages, may, if they should think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand for payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided, that interest shall be payable in all cases in which it is now payable by law.

It is said, 1. That this clause of the statute does not extend to special actions on contracts strictly for the recovery of unliquidated damages resulting from the breach of such contracts, and ascertainable only by a jury; 2. That it is discretionary in the jury whether or not interest shall be allowed, even in the cases specified; 3. That they have no discretionary power to award interest, unless there be proof of a written instrument whereby the debt or sum certain is made payable at a certain time, or of a written demand of the money, comprising a notice that interest will thenceforth be claimed; and 4. That the jury have no discretion, but must give interest in all those instances in which it was claimable as a matter of right by law at the time the act was passed. We may therefore inquire in what instances interest was so claimable.

¹ Chit. on Contracts, 433.

² See *ante*, 274; and *Beeston v. Collier*, 4 Bing. 309.

The general common law rule appears to be, that the law does not imply a contract on the part of a debtor to pay interest on the sum he owes, although the debt may be of fixed amount, and may have been frequently demanded. It is not due as a matter of right, in the absence of an express stipulation, even in the case of written instruments, unless they be commercial instruments of a negotiable nature, as bills of exchange, &c. Interest is not *primâ facie* claimable on a demand for goods sold, although the price was to have been paid on a certain day; or on a balance struck on an account for goods sold, or for work or materials; or on a debt for money lent to or paid for the defendant, or had or received by him though fraudulently for the plaintiff's use. Nor is interest necessarily allowed on a guarantee, or on a foreign judgment, or upon a sum due upon the balance of accounts. But there are instances in which the law impliedly gives interest, as upon bills of exchange and promissory notes, where the claim to it is supported by mercantile usage. Money awarded to be paid on a particular day carries interest, if duly demanded thereon, in certain cases, as if the plaintiff proceeded by action; but not if he proceed by attachment. A bond conditioned for the payment of money impliedly carries interest from the time of the obligor's default; but such interest cannot be recovered to an amount exceeding the penalty of the bond. In all cases interest is allowed, if there be a contract for the payment thereof. And an agreement between the parties that it should be paid, may be inferred from the course of dealing between them; as if it has frequently been charged and paid without objection in former and similar accounts between them. The invariable custom or usage in any particular trade or business to charge interest may also evidence and establish a contract to allow it between parties having transactions therein; and even compound interest is allowed if the claim be supported by the known usage or custom of trade in the particular course of dealing between the parties.

OF ILLEGAL CONTRACTS.

These are—1. Contracts that are illegal at common law; and 2. Contracts that are rendered unlawful by statute.

1. *Of Contracts that are illegal at Common Law.*—It is a general rule founded on principles of public policy, that no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act: *ex turpi contractû oritur non actio*. Although, as we have already seen, parol evidence cannot be received to contradict or add to the provisions of a written contract, it will be received to show that the instrument is valid on account of the invalidity of the consideration, however formal or regular the document may appear to be.¹ At the same time the presumption of law is in favour of a contract; illegality of consideration will not be referred, but it will be incumbent on the party who objects to the contract on that ground to prove it clearly.

Every agreement is invalid which violates the precepts of religion or morality, or the rules of public decency or decorum. Thus, a contract for the sale of blasphemous, obscene, or libellous prints is void, or for printing an immoral publication, or for the rent of a house

¹ Chit. on Contracts, 513; and *Collins v. Plantern*, 2 Wills. 347.

knowingly let for the purposes of prostitution. So an agreement in consideration of future illicit cohabitation between the parties is void. But a contract in consideration of past seduction and cohabitation will be good, on the ground that if a man mislead an innocent woman, it is both reason and justice that he should make her a reparation; and, notwithstanding the immorality of the connection which led to the provision, a court of equity will lend its aid to enforce it; and if a woman be the victim of a married man, it is no less reason and justice that he should make her reparation than if he were unmarried.¹ A court of equity would not, however, enforce the performance of a *verbal* promise by a single man, that he would settle an annuity on a married woman with whom he had cohabited whilst she was separated from her husband.

Agreements contrary to public policy, and injurious to the community, are invalid; as, for instance, stipulations in general restraint of trade, as an engagement not to carry on a particular business in any part of England; though an agreement not to carry on a certain trade within prescribed boundaries would be valid. An agreement for withdrawing an opposition to a bill in parliament; or a contract that a ship shall be registered in a manner different from the mode directed by the Registry Acts; or a stipulation incompatible with the design of the Insolvent Acts; or a simoniacal contract; or one made for the purpose of smuggling; or one which may tend to the maintenance of suits; or an agreement for the sale of offices, or connected with bribery or extortion; or which has a tendency to induce a public officer to act in dereliction of his duty; or in restraint of marriage generally, or in procuration of marriage; or a contract to pay a commission for recommending a customer; or a contract which has a tendency to prevent the due course of justice, by dropping a criminal prosecution, suppressing evidence, compounding felony or other public crime, are respectively illegal. So is an agreement by a person in this country to raise money by way of loan, to assist subjects of a foreign state to prosecute a war against a government in amity with our own.

A contract detrimental to the interests or rights of third persons is invalid. Thus, where a composition deed is entered into, a secret stipulation between the insolvent and a creditor by whom it is executed, that the latter shall receive a sum of money or security in addition to what is payable to the other creditors, is void.

If a person be induced to enter into a contract by fraud or gross misrepresentation on the part of the person with whom he contracts, or by an industrious concealment on his part of any defect in the subject matter of the contract, it will not be enforced either at law or in equity. And the fraud of an authorized agent will have the same effect upon a contract entered into by him for his principal, as would the fraud of the principal.

We have already seen, that mere inadequacy of price is not of itself sufficient to induce a court of equity to set aside a contract for the purchase of an estate. The court will view such inadequacy as an index of fraud, and will consider it in conjunction with other circumstances of suspicion in establishing fraud. With respect to inadequacy of price,

¹ *Knye v. Moore*, 1 S. & S. 91.

we may observe, that there are but few cases in which a purchaser of an estate could be relieved on that ground after the conveyance is executed and the purchase completed.¹

With respect to misrepresentation, cases of this nature depend upon the particular facts, as the relative situation of the parties and their means of information. A misrepresentation or concealment, if made for the purpose of obtaining an estate at a grossly inadequate price, would be considered as amounting to a fraud. But if the party to whom the false statement is made knew the real state of the facts, such misrepresentation would not be fraudulent, because the party was not thereby deceived. If a party be guilty of misrepresentation, though it operate to a small extent only, such misrepresentation disqualifies him from calling for the aid of a court of equity, where he must come with clean hands. At law, where a misrepresentation of a material fact not within the observation of the opposite party is made, the person making the misrepresentation, knowing at the time that his statements are untrue, will be liable to an action for the purpose of recovering a compensation in damages for the injury the party has sustained, notwithstanding the contract was in writing, and notwithstanding these particulars may form no part of the terms of the written contract; and a party will also be entitled to apply to a court of equity to get rid of a contract founded on such fraudulent misrepresentations. At the same time we must bear in mind, that courts of justice always expect parties to be vigilant, and to exercise a due degree of caution. A misrepresentation of the *legal effect* of an agreement does not constitute fraud.² But the concealment of a matter which may disable a party from performing a contract is a fraud. In fine, either *suppressio veri* or *suggestio falsi* may invalidate a contract.

2. *Of Contracts void by Statute.*—If any part of the entire consideration for a promise, or any part of an entire promise not in its nature capable of separation, be illegal, either at common law or by statute, the whole agreement is void.³ Where, however, a contract contains an independent stipulation void at common law, not affecting or forming part of the entire consideration or promise, the invalid stipulation may be rejected, and the remainder of the contract will stand. It seems, that although a statute merely inflicts a penalty for doing a certain act without expressly prohibiting it, a contract having such matter for its consideration or object is invalid.

Usury.—By the 12 Ann. st. 2, c. 16, it is enacted, that no person, upon any contract, shall take, directly or indirectly, for loan of any money, wares, merchandizes, or other commodities whatever, above the value of five pounds for the forbearance of 100*l.* for a year, and so after that rate for a greater or lesser sum or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever, made for the payment of any principal money to be lent, or covenant to be performed, upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of 5*l.* in the 100*l.* as aforesaid, shall be utterly void. But by the 58 Geo. III. c. 93 it is enacted, that no bill of exchange or promissory note shall, though it may have been given for a usurious consideration or upon a usurious contract, be void

¹ See 3 Western's Conveyancing, p. 85.

² Stark. Ev. 461

³ Lewis v. Jones, 11 B. & C. 506.

⁴ Chit. on Contracts, 536.

in the hands of an indorsee for valuable consideration, unless such indorsee had, at the time of discounting or paying the consideration for the same, actual notice that such bill or note had been originally tainted with usury. See also the recent act 5 & 6 Wm. IV. c. 41 (recited under the next head, *Gaming*) which extends to mortgages also.

And a still more important alteration in the law of usury, as regards bills and notes, was effected by the 3 & 4 Wm. IV. c. 98, which enacts, that no bill of exchange or promissory note made payable at or within three months after the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring the same, be void; nor shall the liability of any party to any bill or note be affected by reason of any statute or law in force for the prevention of usury; nor shall any person or persons drawing, accepting, indorsing, or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest, in Great Britain and Ireland respectively, for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture. And this exemption is still further extended, by the 1 Vict. c. 80, to bills and notes not having more than *twelve months* to run.

No contract is usurious, although more than 5*l.* per cent be reserved on the loan of money, if the principal and interest be by the legal effect and terms of the agreement placed in jeopardy, and the lender on a specified contingency run the risk (though remote) of losing both. Thus, the *bonâ fide* purchase of an annuity on the most exorbitant terms does not constitute usury.¹ But whenever the legal operation of a contract is such, that the principal money is secured thereby and payable in any event, and yet more than 5*l.* per cent may be gained by the terms of the contract, it is usurious.

In order to defeat a debt or agreement on the ground of usury, the contract must have been usurious at the time the debt or demand was created; for if a debt or demand do not originate in or accrue from a usurious bargain, no subsequent reservation of illegal interest, or posterior arrangement for a usurious security, will taint or invalidate the original claim, although the penalty will be incurred on taking usurious interest on such an agreement.

A contract whereby interest at a higher rate than five per cent is reserved will not be deemed usurious, provided the excess of interest above five per cent be *bonâ fide* contracted for to cover reasonable expences incident to the transaction; so that a banker, bill broker, or other person discounting a bill, or an agent procuring the acceptance or payment of bills, may lawfully charge and take, besides legal interest, a reasonable commission or remuneration for his *bonâ fide* and necessary expences and trouble. If the contract and loan be made abroad, and be not usurious in the country in which they are made, they will not be deemed so in this country.

Gaming.—By the 16 Car. II. c. 7 it is enacted, that if any person shall play at any pastime or game other than with or for ready money, or shall bet on the sides of such as play thereat, and shall lose any

¹ Fussil v. Brookes, 2 C. & P. 318.

money or thing so played for, exceeding the sum of 100*l.* at any one time or meeting, upon tick or credit or otherwise, and shall not pay down the same at the time of the loss, the party so losing shall not be bound to pay, and the contract or any security for the same shall be void. And by 9 Anne, c. 14, it is enacted, that all notes, bills, bonds, judgments, mortgages, or other securities or conveyances, entered into for any money or other valuable thing won by gaming or playing at cards, dice, tables, tennis, bowls, or other games whatsoever, or by betting on the sides of such as do game at any of the said games, or for reimbursing or repaying any money knowingly lent for such gaming or betting, or lent at the time or place of such play to any person so gaming or betting, or who shall during such play so play or bet, shall be void. But the 5 & 6 Wm. IV. c. 41 enacts, that notes, bills, or mortgages given or made for the purposes mentioned in such acts shall not be considered as absolutely void, but as made or given for an *illegal consideration*. They are therefore valid in the hands of *bonâ fide* holders for a valuable consideration without notice of their illegality. And by the 2d section it is enacted, that in case any person shall, after the passing of that act, make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the recited acts held to be void, and such person shall actually pay to an indorsee, holder, or assignee thereof the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall have so paid such money, and shall accordingly be recoverable by action at law in any of her majesty's courts of record. And, by sect. 3, so much of the recited acts of 9 & 11 Anne as enacted that such securities should enure for the benefit of parties in remainder, is repealed.

Besides the 16 Car. II. c. 7, and 9 Anne, c. 14, (above quoted), and the corresponding Irish acts 10 Wm. III. and 11 Anne, relative to securities given for money lost at play, the recited acts referred to in the foregoing clause of the 5 & 6 Wm. IV. are the 12 Anne, st. 2, c. 16 (also above quoted) with the corresponding Irish act 5 Geo. II., relative to securities founded on usurious contracts, the 6 Geo. IV. c. 16, with the Irish act 11 & 12 Geo. III., relative to securities given as a consideration or inducement for signing a bankrupt's certificate, and the 45 Geo. III. c. 72, relative to securities given for the ransom of a ship or vessel or of the goods or merchandize on board. So that any note, bill, or mortgage made or given in contravention of any of these acts is no longer absolutely void, but to be considered as made or given for an illegal consideration, and consequently good and available in the hands of a *bonâ fide* holder for value who had no notice of the original illegality.

Betting at cricket, a horse-race, or a foot-race against time, have been held to be games within the meaning of the act of 9 Anne;¹ but insuring in the lottery is not. And, by § 9, it does not extend to gaming in the king's palace where the king is actually resident.

¹ 1 Wils. 220; 2 Wils. 36; 2 Stra. 1159.

Stock-Jobbing.—The 7 Geo. II. c. 8 (made perpetual by the 10 Geo. II. c. 8) enacts, that all contracts and agreements upon which any premium shall be given or paid for liberty to put up, or deliver, receive, accept, or refuse any public or joint stock, or other public securities whatsoever, or any part, share, or interest therein, and also all wagers, and contracts in the nature of wagers, and all contracts in the nature of putts and refusals, relating to the price or value of such stocks or securities, shall be void; and all premiums or sums given, received, paid, or delivered upon any such contracts or agreements, or upon any such wagers, or contracts in the nature of wagers, shall be restored or repaid to the person who shall give, pay, or deliver the same; who shall be at liberty, within six months after the agreement or laying the wager, to sue for and recover the same from the person receiving them, with double costs of suit, by action of debt founded on the act.

The statute requires that persons selling stock shall be possessed thereof at the time of the contract. It will, however, be sufficient if a principal selling stock through the medium of a broker, be at the time of the sale possessed thereof, although the broker did not, at the time of the bargain, disclose the name of his principal.

Gambling transactions in foreign funds are not within the prohibition of the 7 Geo. II. c. 8;¹ neither are foreign securities within the act.²

Illegal Charges by Clergymen on their Benefices.—By the 13 Eliz. c. 20 (repealed by the 43 Geo. III. c. 84, but revived as regards this provision by the 57 Geo. III. c. 99) it is enacted, that all chargings of benefices with cure, thereafter, with any pension or with any profit out of the same to be yielded or taken, other than rents to be reserved upon leases thereafter to be made, according to the meaning of that act, should be utterly void. A demise by a parson of his benefice expressly to secure an annuity is void; but the grant of an annuity by a clergyman, and a covenant to pay it, may be good, although the same deed contain a void charge upon his benefice as a collateral security.³

Contracts for the Sale of Reversionary Interests.—The rules respecting this species of contract, particularly where an heir is the seller, are said to depend upon principles applicable only to themselves, and not easily definable. The heir of a family (whether infant or adult) dealing for an expectancy in that family, will be distinguished from ordinary cases, and an unconscionable bargain made with him will not only be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore to be repressed; and though a contract by an heir include property in possession, yet if the bulk of the property is reversionary, the whole of the contract will be set aside. But this extraordinary protection will be withdrawn, if it appear that the transaction was known to the father or other person standing *in loco parentis*, or to the person after whom the reversionary interest was to become vested in possession, even although such parent or other person took no active part in the negotiation, pro-

¹ Wells v. Porter, 2 Bing. N.C. 722.

² Oakley v. Rigby, ib. 732.

³ See on this subject Aberdeen v. Newland, 4 Sim. 281; Colebrook v. Laxton,

4 B. & Adol. 578, and cases there cited; Bishop v. Hatch, 1 Adol. & Ellis, 171; Saltmarshe v. Hewitt, id. 812; and Alchin v. Hopkins, 1 Bing. N.C. 99.

vided it was not opposed by him.¹ A protection is also afforded to persons selling reversionary interests, who are not heirs.

But a *bonâ fide* sale of a reversionary interest cannot be set aside, whether the vendee be heir or not, unless fraud or imposition be expressly proved, or implied from the inadequacy of the consideration or other circumstances attending the sale;² and if the application to the court be delayed for a great length of time, or the vendor, with full notice of all the circumstances, and of his right to set aside the contract, confirm the purchase, a court of equity will not grant any relief.

If the purchaser of a reversionary interest seeks the assistance of a court of equity, he must show that the transaction was in all respects fair, and that a full and adequate consideration was given.

The rules above stated do not extend to sales of reversions by auction; for, there being no treaty between vendor and purchaser, there can be no opportunity for fraud or imposition on the part of the latter, and the sale by auction is of itself evidence of the market price. Nor do the rules apply to a contract by a father, tenant for life, and his son, tenant in tail in remainder, as they together form a vendor with a present interest, and meet a purchaser with the same advantages as if a single person had the whole power over the estate.

XII. OF THE DEFENCES TO ACTIONS UPON SIMPLE CONTRACT.

These are various in form, but seem to be reducible to the following heads; viz., performance,—payment,—accord and satisfaction,—release,—another action pending,—arbitrament and award,—tender,—set off,—statute of limitations,—infancy,—coverture,—bankruptcy and certificate—discharge under the insolvent acts.

Performance.—It is a rule, that a person who is to be discharged from liability upon a contract by the performance of a certain act, is bound to do, or cause to be done, the act which is to exonerate him.

If a contract is in the alternative, as that a party shall do a certain act on the 1st of January *or* the 1st of February, the right to select the time of performance is impliedly vested in the promiser. In case an election be given of two several things, he that is the first agent, or the person who ought to do the first act, shall have the election; as if a man grant a rent of 20s. *or* a robe to one and his heirs, the grantor shall have the election, for he is the first agent, by payment of one or delivery of the other. But if I give to a man one of the horses in my stable; there the donee shall have the election, for he shall be the first agent by taking or seizing one of them.

When *no time is fixed* by the contract for the performance, the law infers an engagement that it shall be executed within a *reasonable* time. A contract must in general be performed strictly at the appointed time; but the right to insist on such strict performance may be waived, if the party having such right, on being informed that the contract cannot conveniently be performed until the following day, make no objection to such substitution at the time of completion. Sometimes it is necessary for the party insisting upon the performance of a contract to give to the other party notice of a fact upon which

¹ See *King v. Hamlet*, 2 Myl. & K. 456; 9 Bligh, 575; *Barker v. Vansommer*, 1 Bro. C. C. 149.

² See *Gowland v. De Paria*, 17 Ves. J. 29.

the right to have such performance depends; but if this notice be not required by the terms of the contract, it is only necessary to be given where the matter lies more properly or peculiarly within the knowledge of one of the parties than the other, as the case may be. Where, however, the contract is to be performed upon notice, or at some specified time after notice, it is of course necessary that such notice should be given by the party wishing to enforce the contract.

Sometimes the performance of a contract is rendered impossible by an act of the legislature. When an act of parliament will amount to a repeal of a covenant (and this applies equally to a contract), and when not, is thus stated in a recent case:—Where a man covenants not to do a thing which it is lawful for him to do, and an act of parliament comes after, and compels him to do it, there the act repeals the covenant, and *vice versâ*. But where a man covenants not to do a thing which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the act does not repeal the covenant.¹ So where the law casts a duty on a party, the performance shall be excused, if it be rendered impossible by the act of God. But where a party by his own contract engages to do an act, it is deemed to be his own fault and folly that he did not thereby expressly provide against contingencies; and in such case the performance is not excused by an inevitable accident or other contingency, although not foreseen by or within the controul of the party.

It is a general rule, that an entire contract cannot be apportioned; and if a party undertake to complete a certain act (entire and indivisible) before his claim to remuneration is to arise, he cannot recover for a partial performance, although the completion of the contract was prevented by inevitable accident.

A contracting party will be discharged from his liability if the other party do any act which renders it impossible for him to perform his engagement; as, for example, if the time or mode of performance is to depend upon the notice or appointment of the party with whom the contract is made, and he omit to give such notice; or if his personal attendance be, by the terms of the contract, essential, and he absent himself; in neither case does any liability on the contract arise.

As to the right to abandon or rescind a contract *in toto* on non-performance by the other party, the general rule is, that if an act is to be done by one party before the other's liability can arise, the non-performance of such act entitles the other party to consider himself freed altogether from liability under the contract. This rule, however, appears to admit of some qualification; for if the agreement be continuous, and the liability is to accrue at intervals, upon distinct acts to be done by one party before the other can insist on the performance of the contract, the non-completion by the former of his part of the agreement in one instance shall not discharge the other party from liability on a subsequent occasion upon which the former party shall not be in default. Such right to abandon or rescind a contract *in toto* vests only in the party who has been guilty of no default, and by him it must be exercised within a reasonable time.

A contract cannot be rescinded by one party, so as to enable him to

¹ Brewster v. Kitchen, Ld. Raym. 321.

recover back money paid by him thereon as money had and received to his use, unless the other party concur in treating such contract as abandoned *ab initio*; or unless it were part of the original bargain, that in a certain event the power of rescinding, and right to recover back such money, should be vested in one of the parties.

If one party fail in performing a contract, the other, if he mean to rescind the contract, should give clear notice of such his intention.

A contract cannot be rescinded *in toto* by either of the parties, unless both of them can be restored to the situation in which they were before the contract. Thus, a contract for freight cannot be rescinded, if the consignee has received the goods, and therefore derived some benefit from the carriage, although the goods were damaged by the negligence of the carrier beyond the amount of freight.¹

Payment.—If the contract be for payment of money, it will of course be a sufficient defence to an action brought upon such contract, if the party can shew that the money has been paid. It may be useful, therefore, to consider to whom, and in what manner, such payment ought to be made, in order to afford a valid defence to such action.

Payment to the party's attorney employed to obtain the debt is as effectual as if made to the party himself; but payment to an agent employed by such attorney to sue the defendant has been held to be no payment to the principal party. Payment to an agent in the ordinary course of business, although he be known to be only an agent, binds the principal, if such payment be made before the principal himself requires payment. In the case of *Barret v. Deare* (Moo. & M. 200), which was an action for money due on a contract, it appeared that the defendant had paid the debt at the plaintiff's counting-house, to a person sitting there in a part railed off, with account books near him, and apparently entrusted with the conduct of the business; and Lord Tenterden held, that this was a good payment to the plaintiff, although the person to whom the money was paid had not in fact any authority to receive it.

Generally, payment to one partner binds the firm; and payment to one of several executors is sufficient.

The payment of part of a debt is in general no legal satisfaction for the remainder, though the creditor agree to receive the smaller sum in full discharge of the whole demand, and give a receipt accordingly. But if a *stranger*, out of his own monies, pay a creditor part of his demand, under an express agreement that it shall be received in full satisfaction of all claims on the debtor, the creditor cannot afterwards maintain an action for the remainder of his demand, as this would be a fraud on the third person, who discharged part of the debt under the impression that he thereby released the debtor from the residue.

The payment of a sum of money will sometimes, as we have already remarked, be presumed from lapse of time and other circumstances, and may thus operate as a defence, although the statute of limitations had not been pleaded. The judges were formerly in the habit of holding that a lapse of twenty years, if not taken as a positive bar, should at least be fatal to actions *upon bonds*. The judge always directed the jury under such circumstances to presume that the debt

¹ *Shields v. Davis*, 6 Taunt. 65.

had been satisfied. This presumption is of course capable of being rebutted by circumstances, as if interest be proved to have been paid upon the debt, or if upon demand any acknowledgment was made that it still remained unsatisfied; in such cases the presumption ceases.

We have already seen, that where a debtor owes several debts, and not one entire account, and pays money generally to the creditor, without directing it to be applied in satisfaction of one of the debts in particular, the creditor may apply it in discharge of any of the debts he thinks fit. To the instances of the non-application of this doctrine which are there mentioned, we may here add the following; namely, where one of several accounts is with the debtor as executor and the other in his own right, the law will apply the payment to the money due to himself individually, and will not allow the creditor to appropriate it to the other demand. And where one of several demands arises out of a lawful contract, and another out of a contract forbidden by law, and the debtor makes a payment which is not specifically appropriated by either party at the time of the receipt, the law will apply it in payment of the well-founded and legal demand.

It will be a good plea to an action for the recovery of a simple contract debt, that the plaintiff has taken for it a bill of exchange or promissory note, accepted, made, or indorsed by the debtor, for the same amount, payable to the creditor himself, or at his instance to a third person.¹ If, however, the bill be dishonoured, the right to sue upon the original demand will be revived. An express agreement by a creditor to take a bill or note for the full amount of his debt, as an absolute and unconditional payment or extinguishment thereof, destroys the right of action as for such debt, and leaves the creditor without remedy, except upon the instrument.

Accord and Satisfaction.—Accord without satisfaction is no bar to an action for a debt. The accord or promise to confer satisfaction must be fully executed and accepted, in order to afford a defence to such action. A contract not under seal may, before breach, be discharged by parol, but after breach it cannot; the discharge must then be by deed, unless it operate as accord and satisfaction.

Release.—The various modes in which a debt may be released, and the effect of such release on the contract upon which such debt arose, have been already fully considered.²

Another Action pending.—The mere pendency of an undecided action for the recovery of a debt or damages does not operate in extinguishment of the simple contract upon which the right to such debt or damages is founded; but the right of action in a second suit for the same cause is suspended or abated, and the pendency of the first unfinished suit may be pleaded in abatement, whether the first action were in another or in the same court at Westminster. The pendency of a suit in an inferior court cannot be pleaded to an action in one of the courts at Westminster for the recovery of the same demand.

When a judgment has been already obtained in a prior action by the plaintiff against the defendant for the identical demand, the contract or obligation is merged by the superiority of the security thus acquired, and the creditor can no longer sue upon the original promise or demand,

¹ *Ante*, 380, &c.

² *Ante*, 382.

though it accrued upon a specialty. If he do, the defendant may plead in bar, that the plaintiff has already recovered judgment against him for the same cause of action.

Arbitrament and Award may effectually be pleaded in bar where an action is brought for the recovery of unliquidated damages arising from a tort connected or unconnected with a contract, and an award has been made between the parties, upon a submission giving mutual remedies in case of non-performance. In this case, the award is a bar to an action upon the original cause of action, although the defendant has not performed the award. But where an action is brought for a debt, and the award has merely decided that it is due, and ascertained its amount, the plea of arbitrament and award is bad.

Tender.—The tender of a debt before action brought is available as a defence whenever the demand is of a pecuniary nature, reduced or reducible to a certainty, and the debtor has always been ready to pay the money. With regard to the mode of making such tender, the person to whom and the time when it ought to be made, the reader is referred to the observations in a preceding part of the work.¹

Statute of Limitations.—This defence to an action for debt has been already treated of.² We may, however, on viewing it in more immediate connection with the subject before us, subjoin one or two observations to those already made upon it.

If a debt sought to be recovered in a court in this country was contracted and accrued due in a foreign country, the English statute of limitations may be pleaded in bar, though the period of limitation according to the law of such foreign country may not have elapsed.

If a written acknowledgment, as required by the 9 Geo. IV. to prevent the operation of the statute of limitations has been given, and such instrument be lost, oral evidence of the contents may be received.

An acknowledgment signed by an agent of the debtor will not revive a debt barred by the statute of limitations; the acknowledgment must be signed by the debtor himself.³

If a cause of action, arising from the breach of a contract to do an act at a specified time, be once barred by the statute, a subsequent acknowledgment by the party "that he broke the contract" will not take the case out of the statute.

The 9 Geo. IV. c. 14 provides, that even a written acknowledgment of the debt by one of two joint debtors or executors shall not revive the remedy against the other party, &c.; but a *part payment*, by one of several original joint debtors or contractors, either of principal or interest, composing the original debt, revives the remedy against the other parties, although they were sureties merely; and this rule applies, although the parties were bound severally as well as jointly to pay the debt, and the action is brought separately against one of them who did not make the part payment. But such payment by one of several joint debtors must have clear reference to their debt, or it will not bind or affect the other party. The liability imposed upon all of several debtors by the part payment of a debt by one of them lasts so long only as there is a community of interest between them; so that after the death of one of two joint contractors, his executors cannot

¹ *Ante*, 372.

² *Ante*, 375.

³ *Hyde v. Johnson*, 2 Bing. N. C. 1776.

be prejudiced or made liable by a part payment after a lapse of six years by the surviving debtor.

Set-off.—The law upon this subject has been already considered;¹ we shall therefore merely refer the reader to the remarks there made.

Infancy and Coverture have also been already incidentally noticed. Each of these may, under certain restrictions, be a good defence to an action or suit upon a contract. If to a plea of infancy the plaintiff reply, denying the infancy, or that the defendant ratified the promise when he came of age, it will be incumbent on the defendant to prove the time of his birth; and after the defendant has established his infancy when the contract was made, the plaintiff, upon a replication of subsequent acknowledgment, must prove an express promise to pay after the defendant attained full age, and before the commencement of the action.

Bankruptcy and Certificate, and Discharge under the Insolvent Debtors Act, will be treated of in a subsequent part of the work.

Having thus noticed the several kinds of defence which may be set up to an action or suit upon a contract, we propose to consider the DAMAGES or sum recoverable at law upon the breach or non-performance of a contract, and, in conclusion, to introduce a few observations upon the rules by which courts of equity are guided in decreeing the specific performance of contracts for the sale or purchase of estates.

Where the parties to a contract mutually agree, that the one shall pay to the other a specified sum of money in the event of a breach of its provisions, it not unfrequently becomes a question of some difficulty whether such sum is to be considered in the nature of a penalty merely, to cover the damages which may be incurred by a violation of the agreement, or the full sum really to be paid in that event, as liquidated or settled damages, without reference to the extent of injury sustained. The courts are disposed to view, if possible, the sum reserved as in the nature of a penalty, rather than as stipulated damages. But if a contract provide, that a certain sum shall be paid in the event of performance or non-performance of a particular specified act, in regard to which damages in their nature *uncertain* may arise in case of default, and there be no words evincing an intention that the sum received in case of a breach of the contract shall be viewed only as a penalty, such sum may be recovered as liquidated damages.

In all articles guarded by penalties, there are two remedies to be pursued, at the option of the party injured: he may, as often as the articles are broken, have an equitable relief upon the footing of the articles themselves for a practical breach of the contract, or he may take the penalty; or, in other words, where there is a penalty and a covenant in the same deed, the party has his election either to bring debt for penalty or an action on the covenant for damages. But he cannot resort to *both* remedies.

If an action of assumpsit is brought upon a contract for the recovery of general damages by reason of the non-performance of an act which the defendant had undertaken to perform, or the commission of an act he had contracted to avoid, the jury may take into their consideration any consequential injury the plaintiff has sustained, if such injury be the fair and natural result of the defendant's violation

¹ *Ante*, 385.

of his agreement. Thus, if an action be brought for not replacing stock lent on a given day according to agreement, the measure of damages will be the price or value of the stock on the day when it ought to have been replaced, or on the day of trial, at the option of the plaintiff.

Whenever a party is liable for a breach of a contract, either express or implied, it seems that the party to whom he has become liable is entitled at all events to nominal damages, although the action be framed in *tort* for such breach, and no actual damage be proved.

If a party, after he has discovered a fraud practised on him, and which induced him to enter into a contract, voluntarily pays a sum of money under such contract, he has no remedy to recover back the money so paid. And if an illegal contract be performed, and both parties are *in pari delicto*, no action lies to recover back money paid under it; but if the contract be executory, and the plaintiff dissent from or disavow the contract before its completion, he may, on disaffirmance thereof, recover back money paid under it to the other party.

Damages may be given for a loss which the plaintiff may probably sustain *in futuro* by the breach of the contract.¹

As to the rules by which courts of equity are guided in decreeing specific performance of agreements. The original foundation of these decrees was, that damages at law would not give the party the compensation to which he was entitled, that is, would not put him in a situation so beneficial to him as if the agreement was specially performed; and courts of equity have frequently refused to interfere, where, from the nature of the case, damages would be commensurate with the injury sustained. The decreeing specific performance is a matter of discretion, but not of an arbitrary capricious discretion; it must be regulated upon grounds that will make it judicial.² A court of equity frequently decrees a specific performance where the action at law has been lost by the default of the very party seeking the specific performance, if it be, notwithstanding, conscientious that the agreement should be performed. A court of equity will decree specific performance, although the seller may have not the legal but only an *equitable* estate in the subject matter, and it will oblige him to obtain the concurrence of the parties having the legal estate.

In case a contract be in its terms both positive and negative, and a court of equity cannot enforce the positive part of the contract, it will not interfere to restrain the breach of the negative part. Nor will a court of equity give any assistance to a party seeking to enforce a hard bargain.³

If the court refuse to decree specific performance against the purchaser, the vendor may in general still bring his action at law for the breach of the agreement. A court of equity will sometimes decree the performance *pro tanto* of an agreement; but generally, where a person sells an interest, and it appears that the interest which he pretended to sell was not the true one, as if he held a term for a less number of years than he had contracted to sell, the purchaser may consider the contract at an end, and bring an action for money had and received, to recover any sum he may have paid in part performance of the contract.

¹ Howell v. Young, 5 B. & C. 168.

² Per Lord Eldon, 7 Ves. 35.

³ Kinterley v. Jennings, 6 Sim. 340.

CHAPTER XXIII.

Of Bills of Exchange, Promissory Notes, &c.

I. OF BILLS AND NOTES IN GENERAL

A **BILL OF EXCHANGE** is defined to be an open letter of request from one person to another, desiring him to pay a sum named therein to a third person on his account, either at sight, or a certain number of days after sight or after date, or at single, double, or treble usance, or on demand. The person who makes or draws the bill is termed the *drawer*; he to whom it is addressed is, before acceptance, called the *drawee*, and afterwards the *acceptor*; the person in whose favour it is drawn, is termed the *payee*, and when he indorses the bill, the *indorser*; and the person to whom he transfers it is called the *indorsee*. This indorsee again may, by indorsing it to another person, become an indorser as to him, and so on successively, through as many hands as the bill may pass. In all cases the person in possession of the bill is called the *holder*.

Bills of exchange are either foreign or inland. *Inland* bills are such as are both drawn and payable in England, Scotland, or Ireland respectively. *Foreign* bills are such as are drawn or payable, or both, abroad; or drawn in one realm of the United Kingdom and payable in another.

Bills drawn in England and payable in Scotland or Ireland, or *vice versa* are foreign bills.¹ But bills drawn and payable in Scotland, or drawn and payable in Ireland, are inland bills within the 1 & 2 Geo. IV. c. 78, to which an acceptance in writing is necessary.*

A **PROMISSORY NOTE** is a direct engagement in writing to pay a sum specified, at a time limited, or on demand, to a person therein named or his order, or to the bearer. This note is analogous to, and has the same effect, as an accepted bill of exchange, only that the drawer and acceptor are embodied in one person, who is called the *maker*, and stands, in law, in the same situation as the acceptor of a bill of exchange. Promissory notes seem to have been originally permitted to exist as common law instruments only between the immediate and primary parties, as between the payee and the maker. It was denied that they were justified or negotiable by the custom of merchants; and so strenuously was this opinion entertained and enforced by that eminent judge, Chief Justice Holt, that it was deemed necessary to pass the statute 3 & 4 Anne c. 9. Promissory notes must therefore be considered to owe their efficacy as negotiable instruments to that statute; by which they are now placed on the same footing in every respect as bills of exchange.

The peculiar properties of bills of exchange and promissory notes are, 1st, That they may be assigned, so as to vest the legal as well as equitable interest therein in the indorsee or assignee, and entitle him to sue thereon in his own name, so that no release by the drawer to the

¹ Mahoney v. Ashien, 2 B. & Ad. 478.

* Ibid.

acceptor, nor set-off or cross demand due from the former to the latter can affect the right of action of the payee or indorsee; whereas, in most other choses in action, a release from the obligee, or a set-off due from him to the obligor, may be an effectual bar to the action. And 2dly, That although a bill or note is not a specialty, but merely a simple contract, yet it will be presumed to have been given for a good and valuable consideration until the contrary appear.

These securities are thus preferable to many others of a more formal nature; for each of the parties to a bill or note, by simply writing his name upon it as drawer, acceptor, or indorser, guarantees the due payment of it at maturity, and the consideration in respect of which he became a party to it can rarely be inquired into; whereas, in the case of a formal guarantee, the Statute against Frauds requires the consideration to be expressed, and other matters of form, which frequently render an intended guaranty wholly inoperative.

There are however, some disadvantages attending them, as compared with other securities, and principally that, in case of the dishonour of the bill or note by the person on whom it is drawn, the holder must immediately give notice to all the other parties, or he will lose the benefit of his security; whereas in the case of a guaranty, such exact conduct on the part of the creditor is not in general requisite. Again, in case of death, a bill or note, being a simple contract only, is not entitled to the same priority of payment out of the assets of the deceased as bonds; nor is there the same expeditious and extensive mode of obtaining payment as in the case of a bond, warrant of attorney, statute staple, or statute merchant.

Bills of exchange and promissory notes are, as simple contracts, affected by the Statute of Limitations, and must be sued for within six years; but the operation of the statute does not begin to take place from their date, but from the time they became due or payable.

Bills and notes seem to be property of a mixed and *peculiar* character. They partake in most respects of the nature of choses in action, and, as such, they will not pass by a bequest of "all the testator's property" in a particular house, for choses in action have no locality; though bank notes would in such case pass, they being considered *quasi* cash. But in some late cases they have been viewed, for particular purposes, as property of a more tangible nature, somewhat resembling a chattel. Thus, it has been held, that if a single woman, possessed of a bill payable to her order, marry, the husband may alone sue thereon, although the wife has not indorsed the bill; notwithstanding the general rule, that a husband must join his wife in an action to recover a debt or chose in action which accrued to her before marriage. And the fraudulent delivery of a bill of exchange by a trader to his creditor has been held to be an act of bankruptcy within the 6 Geo. IV. c. 16, § 3, although that section mentions only "goods and chattels." So, though bills or notes are not the subjects of larceny at common law, as it was considered that a chose in action could not be stolen; yet, by the 7 & 8 Geo. IV. c. 29, the stealing of any bill, note, or warrant, or order for the payment of money, is made felony of the same nature and punishable in like manner as larceny of any chattel of like value with the money

due on the security. So the embezzlement of bills or notes by clerks or servants is felony; and their embezzlement by agents not being clerks or servants, or the selling, negotiating, or pledging them in violation of the purpose for which they were entrusted, is a transportable misdemeanor.

So, before the passing of the 1 & 2 Vict. c. 110, bills or notes could not be taken in execution; but, by that act, the sheriff is now empowered, under a writ of *fieri facias*, not only to take money and bank notes, but also cheques, bills of exchange, promissory notes, bonds, specialties, and other securities for money, and to sue in his own name for the recovery of the sums secured thereby when the time of payment thereof shall have arrived.

A CHECK, or draft on a banker, is a written order addressed to persons carrying on business as bankers, by a party having money in their hands, requesting them to pay on demand, that is, on presentment, a certain sum of money therein named. Checks are negotiable, and in general subject to the same rules as bills of exchange, which they resemble in point of form, differing only in this respect, that they are uniformly made payable to bearer, and should be drawn upon a regular banker. When drawn according to the directions prescribed by statute, they are exempt from stamp duty. Though in practice treated as cash, they are not considered so in law, unless actually paid: they are not money within the meaning of the Annuity act.

BANK NOTES, whether of the Bank of England or of other licensed bankers, are a species of promissory note payable to the bearer on demand, and assignable by delivery. In their general form and legal effect they are similar to other promissory notes, and are subscribed either by the parties on whose account they are issued, or by some one in their employment whose signature is binding on them. They are subject to a different rate of stamp duty from other promissory notes, and may be re-issued after payment as often as may be thought fit, whereas bills or notes payable otherwise than to bearer on demand are not re-issuable, under a penalty of 50*l*.

The circulation of bank notes for less than five pounds in England was restrained by the 15 Geo. III. c. 51, from the year 1766 to 1797, when that act was suspended; but it was again revived by the 7 Geo. IV. c. 6, and the issue of bank notes for less than 5*l*. either by the Bank of England or by any other English bankers was again prohibited from the 5th April, 1829.

Notes of the Bank of England are not, like bills of exchange, mere securities or documents for debt, but are treated as money or cash in the ordinary course and transactions of business; and on payment by them, whenever a receipt is given, it is always given as for money. By the recent Bank Charter act, they are a valid tender for all sums above 5*l*., except at the Bank of England or any of the branch banks of that establishment. They pass by a will which bequeaths all the testator's money or cash. They are negotiable abroad as well as in this country. so that the transferee may sue thereon, or maintain trover &c. to recover their value, if wrongfully taken or withheld, in his own name in this country. They cannot be followed, by a party who has lost or been cheated or robbed of them, into the hands of a person who has

subsequently taken them *bonâ fide* for value under circumstances not likely to create suspicion in the mind of a careful and prudent person that they had been improperly obtained.

Notes are now rarely issued, except by country bankers; their use in London having been superseded by the introduction of checks. They are commonly made payable at the country bank where issued and also in London. They are transferable from one person to another by delivery, and, like the notes of the Bank of England, are usually received as cash. If tendered in discharge of a debt, the tender will be good as an offer in money, unless specially objected to at the time as not being cash. But though taken as cash, if they be presented *in due time* and not paid, they do not amount to a payment, and the deliverer of the notes is still liable to the holder. It is not easy to determine what is a due or reasonable time, inasmuch as it must depend in a great measure on the circumstances of each particular case. The safest rule seems to be, to present all notes or drafts payable on demand, if received in the place where they are payable, on the day on which they are received, or as soon after as possible. When they have to be transmitted by post for payment, no unnecessary delay should be allowed to intervene.

Promissory notes issued by bankers, if not payable to bearer on demand, do not come under the denomination of bank notes; they are not, like the latter, taken as cash; nor are they, like them, assignable by mere delivery.

II. OF THE PARTIES TO BILLS OF EXCHANGE, &c.

There is nothing, generally speaking, to distinguish these instruments, in regard to the *competency* of parties to become chargeable thereon, from other simple contracts. Every person, whether merchant or not, who possesses understanding and legal capacity to enter into a contract in general, may become a party to a bill of exchange or promissory note.

Corporations, by the intervention of their agents, may become parties to a bill of exchange. In favour of the Bank of England, however, it is enacted, that no body politic or corporate, or society or company *exceeding six persons* united in partnership, in London or within sixty-five miles thereof, shall borrow, owe, or take up any sum of money on their bills or notes payable on demand, or at any time less than six months, during the continuance of the exclusive privileges granted to that corporation. But companies, however numerous, carrying on business at any place beyond that distance, may issue their notes payable on demand or otherwise, and make them payable in London or any other place, and have agents in London and such other places for the purpose of payment only, provided no such bill or note be for any less sum than 5*l.*, or be re-issued in London or at any place within sixty-five miles thereof.

An *infant* cannot bind himself by a bill or note drawn in the course of trade. Nor can an action be supported against him on a bill or note given by him, even for necessities, if in the hands of a third person; for he would then be precluded from disputing the value of the necessities. But, by a written promise after full age, he may become liable on a

bill to which he became a party whilst a minor.¹ It is no defence for any other party to a bill, that a prior or subsequent party is an infant; for the privilege is personal. An infant may sue on a bill.²

A married woman cannot be charged upon a bill made by her during coverture, except in those instances in which the husband is considered as *civiliter mortuus*, as in the case of his transportation for felony, &c. And it seems that her indorsement of a bill payable to her is totally inoperative, so that even the maker of the note may dispute her indorsee's title, except her husband's authority was expressly given or can be inferred.³ If a bill or note be payable to a married woman, her husband may sue thereon with or without his wife.⁴

But though no action can be supported on a bill against a person incapacitated to draw, indorse, or accept it, such bill will nevertheless be valid against all other competent persons, parties to it subsequent to such incapacitated person.

A person may become a party to a bill of exchange, not only by his own act, but also by that of his *agent* or *partner*.⁵ In the former case the bill is said to be drawn, accepted, or indorsed *by procuration*.

When a person draws, accepts, or indorses a bill as agent, unless he states that he draws &c. as agent, his principal will not be bound. Besides, should an agent draw, accept, or indorse a bill in his own name, which was directed to him personally, and not to his principal, he will be personally liable, although such direction described him in his official character, unless he state that he acts as agent.⁶ An agent, however, contracting on the part of government need not describe himself as agent.

Where there are joint traders, and one of them during the existence of the partnership draws, accepts, or indorses a bill or note in the name or as on the behalf of the firm, such acceptance, indorsement, &c. will render the other partners liable, although they were ignorant that the bill was negotiated by such partner for his own individual benefit; and no subsequently acquired knowledge by the creditor taking the bill, that such acceptance &c. was made without the consent of the other partners, will defeat his claim against the whole partnership. But the acceptance &c. of one of several partners, on behalf of himself and copartners, will not bind the others, if it be given for his individual debt, and the holder of the bill, at the time he became so, was aware of that circumstance.

It is not necessary that a partner, when he draws, accepts, or indorses a bill on behalf of the partnership, should express the name of the firm, or all the partnership names; it will be sufficient to bind the firm if he subscribes his own name only.

But where one member of a copartnership draws bills in his own name, and gets them discounted, the party who discounts them cannot enforce payment against the copartnership, although he erroneously conceived at the time of discounting the bills that they were drawn on the partnership account; for, on the discount of a bill the discounter

¹ Stevens v. Jackson, 4 Camp. 164.

² Chitty, 18. Warwick v. Bruce, 2 M. & S. 205; Holiday v. Atkinson, 5 B. & C. 501.

³ She cannot, like an infant, convey a title to third persons. Barlow v. Bishop, East. 432.

⁴ Phillis Kirk and Wife v. Pluckwell, 2

M. & S. 293; Burrough v. Moss, 10 B. & C. 558.

⁵ Coombe's case, 9 Coke, 75.

⁶ Attwood v. Munnings, 7 B. & C. 278; 1 Man. & R. 78. See also Coote v. Callaway, 1 Esp. 115; Chitty, 165.

⁷ Leadbitter v. Farrow, 5 M. & S. 345.

stands in the situation of a *purchaser*, and therefore cannot resort for payment to others whose names do not appear on the bill.

Articles of agreement between partners, that no one partner shall draw, accept, or negotiate bills of exchange, will not protect the firm against bills drawn &c. in violation of the agreement, unless the holder had at the time notice of the stipulation. But if notice of such agreement can be brought home to the party, or if, in the absence of such an engagement between the parties, the other parties give him notice that they will not be responsible for bills circulated by their copartner, the firm cannot be charged, though the bill was given in the course of partnership transactions. And if the defendants show that the bill was circulated in violation of the partnership articles, they may put the plaintiff to prove that he gave value for it.

With respect to dormant or *sleeping* partners, it would seem, from a case judicially decided in 1825, that a sleeping partner is not responsible for a bill accepted by the acting partners in their names, unless such bill relate to the business of the partnership; because the sleeping partner had neither privity of interest in the bill (not being accepted in a partnership transaction), nor was the bill taken or circulated on his credit, as he was not known to be a partner.

An act of bankruptcy committed by one of several partners, however secret, *ipso facto* determines his power to make use of the name of the firm; and no person can derive any benefit or right of action against the firm upon any bill or note negotiated by the party after such his act of bankruptcy. And after a dissolution of a partnership by agreement, an express authority given to one of the persons who composed the firm to settle the partnership affairs, and to receive all debts owing to, and to pay those due from the partnership previous to its dissolution, will not authorize him to draw, accept, or indorse a bill of exchange in the partnership name, even for a debt that existed prior to the dissolution; it being a principle of law, that the moment the partnership ceases, the partners are distinct persons, and from that time tenants in common of the partnership property.

The *executor* of a deceased party to a bill or note has in general the same rights and liabilities as his testator. An indorsement by an executor or administrator is as effectual as an indorsement by the deceased; and though an executor may not have proved the will, he is bound to present a bill when presentable.

An executor, like an agent, is personally liable, on making, drawing, indorsing, or accepting negotiable instruments, though he describe himself as executor, unless he expressly confine his stipulation to pay out of the estate.

III. OF THE FORM AND REQUISITES OF BILLS OF EXCHANGE.

In order to constitute a bill of exchange or promissory note, no particular form or precise words are necessary. An order or promise to deliver money, or a promise that I.S. shall receive money, or a promise to be accountable or responsible for it, will be a sufficient bill or note.

There are two principal qualities essential to the validity of a bill or note: first that it be *payable at all events*, not dependent on any contingency¹ or payable out of a particular fund. and secondly

¹ Carlos v. Fancourt, 5 T. R. 482.

that it be *for the payment of money only*, and not for the payment of money and performance of some other act, or in the alternative. And if the bill or note be insufficient in its formation in either of these respects, it will not become valid by any subsequent occurrence rendering the payment no longer contingent. Thus, an order or promise to pay money, "provided the terms mentioned in certain letters shall be complied with;" an order or promise to pay "out of his growing subsistence;" or to pay a sailor's wages, "if he do his duty as an able seaman;" or a request to J. S. to pay a certain sum "out of the moneys in J. S.'s hands belonging to the proprietors of the Devonshire mines," or out of a named payment "when due;" and the like; will not constitute a bill or note, on account of the contingency to which the payment is subject. So an order from the owner of a ship to the freighter to pay money "on account of freight," is not valid, because the quantity due on freight may be open to litigation. Neither is a bill or note given for the delivery of horses *and* payment of money on a particular day.

If, however, the event on which the payment is to depend must inevitably happen, it is of no importance how long the payment may be in suspense. And therefore if a bill be drawn payable six weeks after the death of the drawer's father, or payable to an infant when he shall come of age, specifying the day when that event shall happen, it will be valid and negotiable. So the statement of a particular fund in a bill of exchange will not vitiate it, if it be inserted merely as a direction to the drawee how to reimburse himself. And therefore where J. S. drew a bill on J. N., and directed him, one month after date, to pay A. B. or order a sum of money "as his quarter's half-pay from the 24th June to 25th September next in advance," the bill was held to be valid, because it was not payable on a contingency, nor out of a particular fund, but was made payable at all events, the mention of the half-pay being only by way of direction to the drawee how he should reimburse himself.

Besides these principal qualities which bills of exchange must possess, there are certain other matters proper to be attended to in the formation of them, which will be best shown by considering the particular parts of a bill in their regular order. We must premise, however, that bills and notes *under five pounds* are subjected to certain regulations by statute which do not affect those of a higher amount. We shall therefore first notice what these regulations are; which will render it afterwards unnecessary to refer to these bills and notes as forming exceptions to some of the observations which will subsequently be made with regard to bills and notes in general.

Bills and Notes under Five Pounds.—By the 48 Geo. III. all promissory notes, bills of exchange, drafts, or undertakings in writing, being negotiable or transferable, for the payment of a less sum than twenty shillings, are absolutely void.

And by the 17 Geo. III. c. 30, all notes, bills of exchange, or drafts, being negotiable or transferable, for the payment of twenty shillings or above that sum and under five pounds, or on which twenty shillings or less than five pounds shall remain undischarged, must be made payable *within twenty-one days* after the day of the date thereof, must express the names and places of abode of the persons respectively to

whom or to whose order the same are payable, and must bear date before or at the time of drawing or issuing thereof, and not on any day subsequent thereto. They are not transferable or negotiable after the time limited for payment; and every indorsement thereon must be made before the expiration of that time, must bear date at the time of indorsing, and specify the name and place of abode of the person to whom or whose order the money is to be paid. And the signing of every such note &c. and of every indorsement thereon must be attested by one witness. All persons issuing or negotiating bills or notes contrary to these regulations, either as to bills or notes under 20s. or those under 5*l.*, are liable to a penalty of from 5*l.* to 20*l.*

We shall now proceed to consider the several parts of a bill or note in their regular order:—

1. *Stamp*.—A bill or note made in Great Britain must be written on paper previously stamped; and the commissioners of stamps are not justified in impressing a stamp on a bill or note after it is drawn &c., except, it seems, in the instance of its being already stamped with a stamp of a wrong denomination, and which is not on the face of it expressly appropriated to some other instrument (as a receipt &c.), but is of equal or superior value to the stamp which should have been on the bill or note.

The stamp is to be calculated on the amount of the *principal* money secured by the instrument, without reference to the interest thereby made payable, though interest be to be paid from the date thereof.

The effect of a bill &c. not being duly stamped is, that it cannot be pleaded or given in evidence, or be in any way available in any court either of law or equity.¹ It is void even in the hands of a *bonâ fide* holder for value. The *jury* are precluded from looking at it, even to establish a claim to the original debt or consideration upon the other counts. The *court* may look at the instrument to ascertain whether it requires a stamp, or is properly stamped; and it may be looked at even by the jury for a *collateral* object.² The debt, however, may be recovered by the creditor, upon evidence of its existence.

If a bill or note be made in any part of the queen's dominions, as in Jamaica &c., and by the law of such place a stamp is necessary, it will not be available in this country without such stamp;³ but in other cases our courts do not regard the revenue laws of a foreign country.⁴ Promissory notes payable to bearer on demand, made out of Great Britain, cannot be negotiated or paid in this country unless stamped as notes made in Great Britain, under the penalty of 20*l.*⁵

2. *Place where made*.—It is usual to date the bill at the city or place where it is drawn; but this is not necessary. No place need be stated. If a place be stated, it will be *presumed* that the drawer resides therein; and if only a general description be given, as "London," or "Manchester," it will then be sufficient, in the absence of information, or ready means of acquiring intelligence as to the particular street &c. in which the drawer resides, to give *him* notice of dishonour by letter addressed to him merely "London" &c.

¹ Wilson v. Vysar, 4 Taun. 288.

² Gregory v. Fraser, 3 Camp. 454.

³ Alves v. Hodgson, 7 T. R. 241; Clegg

v. Levy, 3 Camp. 166.

⁴ James v. Catherwood, 3 D. & R. 190

⁵ 9 Geo. IV. c. 49, § 29.

3. *Date*.—As the time when a bill is to become due is generally regulated by the time when it was made, the date ought to be clearly expressed. A date, however, is not, in general, essential to the validity of a bill; for where a bill has no date, the time will be computed from the day it was issued.¹ A check, if post-dated and not stamped, is invalid;² but a bill of exchange may legally be post-dated;³ and although the time of payment may be thus deferred beyond two months &c. from the time of issuing the instrument, so that a higher stamp should be on the instrument than it actually bears, and a penalty of 100*l.* is thereby incurred,⁴ yet the bill will be good in the hands of a *bonâ fide* holder. So a bill may be ante-dated. The word *date*, as used in the Stamp Act, signifies the day *expressed* as the date on the face of the bill.

A bill may legally be drawn and dated on a Sunday.

Notes payable to the bearer on demand must not have the date *printed*, under a penalty of 50*l.*⁵

4. *Sum payable*.—This is generally expressed at length in the body of the bill, and superscribed in figures. There is no absolute necessity for the superscription, though it is usual. If it were contradictory to the body of the bill, it would be rejected; on the other hand, if in the body of the bill there were an omission of the word *pounds*, the superscription would aid it by supplying the word.⁶

5. *Time of Payment*.—This depends entirely on the agreement of the parties, and there is no limitation in point of law, though the payment must not be contingent. Foreign bills are frequently drawn payable at usance or usances; but they, like inland bills, may be drawn payable at sight, or at days, weeks, months, or years after sight or date, or on demand. Bills, however, are very seldom drawn payable on demand; but usually, when it is intended they should be payable immediately, are drawn payable at sight. If drawn at or after sight, the drawer of a foreign bill should express that it is payable according to the course of exchange at the time of making it; for otherwise it seems that the drawee must pay according to the exchange of the day when he has sight of the bill.⁷

6. *The Payee*.—The bill may be made payable to the drawer or to a third person. It is not essential that either should be named, provided the bill be made payable to the *order* of the drawer (when in effect it is payable to him), or to *bearer*. But alternative words on the face of the instrument, as to the party to whom payment is to be made, will invalidate the bill; as if it be payable to A or B.

If a bill be payable to A, "for the use of B," or "in trust for him," A has the legal interest, and is the payee.

If, on framing a bill, a blank or space be left for the name of the payee, the acceptor and drawer tacitly authorize a *bonâ fide* holder, afterwards taking the bill from the drawer or his transferee, to supply his own name,⁸ so as to give effect to the instrument *ab origine* as a

¹ De la Courtier v. Belamy, 2 Show. 422; Hague v. French, 3 B. & P. 173; Giles v. Bourne, 6 M. & S. 73.
² 55 Geo. III. c. 184, § 13; 9 Geo. IV. c. 49, § 15; Martin v. Morgan, Gow. 123; S. C. 3 B. & More, 635.

³ Pasmore v. North, 13 East. 517.
⁴ 55 Geo. III. c. 184, § 12. ⁵ Ibid, § 18.
⁶ Elliott's case, 2 East. P. C. 951.
⁷ Poth. 174.
⁸ Crutchley v. Clarence, 2 M. & S. 90; Atwood v. Griffin, R. & M. 423.

bill payable to himself; and the objection of uncertainty, which would otherwise prevail, is thus obviated.

If the name of a *fictitious* person be introduced as payee, the bill is inoperative in the hands of a party who takes it with knowledge of that fact; but the parties to the bill who were aware of the circumstance shall not be permitted to avail themselves of the irregularity; and against them the bill, in the hands of an innocent holder for value, may be treated and declared upon as a bill payable to *bearer*.¹

If the bill be *drawn* in the name of a fictitious person, payable to the order of the drawer, with the acceptor's knowledge, the latter may be charged by a *bona fide* holder as undertaking to pay to the order of the person who signed as the drawer.

If a bill be payable to "Ship Fortune or *bearer*," it is good, for in law it is payable to bearer only without indorsement.²

7. *Of the several parts.*—Inland bills, notes, and checks, consist only of one part; but foreign bills, in general, consist of several parts, in order that if the holder lose one, he may receive his money on the other. If the drawer only give one bill, he will, if it should be lost, be obliged to give another, of the same date, to the loser. The several parts of a foreign bill are called a *set*; each part containing a condition, that it shall be paid, provided the others remain unpaid. Each of the parts must be stamped, if a stamp on either be required.

8. *Of the words "Order," or "Bearer."*—It was once thought, that unless the words "order," or "bearer," were inserted, bills would have no greater effect than that of being mere evidence of a contract. It is, however, now well established, that it is not essential to the validity of a bill that it be transferable from one person to another. If, however, it be intended to be negotiable, care must be taken that

¹ *Minet v. Gibson*, 3 T. R. 481; judgment affirmed in parliament, 1 H. B. 569; 1 Camp. 180. And see *Vere v. Lewis*, 3 T. R. 182; *Collis v. Emmett*, 1 H. Bl. 312; *Tatlock v. Harris*, 3 T. R. 174. To *Bennett v. Farnell*, 1 Camp. 130, the learned reporter appends the following note:—"Almost all the modern cases upon this question arose out of the bankruptcy of *Livesay & Co.* and *Gibson & Co.*, who negotiated bills with fictitious names upon them to the amount of nearly a million sterling a year. The first case was *Tatlock v. Harris*, 3 T. R. 174, in which the court of K. B. held that the *bona fide* holder for a valuable consideration of a bill drawn payable to a fictitious person, and indorsed in that name by the drawer, might recover the amount of it in an action against the acceptor, for money paid, or money had and received; upon the idea, that there was an appropriation of so much money to be paid to the person who should become the holder of the bill. In *Vere v. Lewis*, 3 T. R. 182, decided the same day, the court held, there was no occasion to prove that the defendant had received any value for the bill, as the mere circumstance of his acceptance was sufficient evidence of this; and three of the judges thought the plaintiff might recover

on a count which stated that the bill was drawn payable to bearer.—*Minet v. Gibson*, 3 T. R. 481, put this point directly in issue, and the unanimous opinion of the court was, that where the circumstances of the payee being a fictitious person is known to the acceptor, the bill is in effect payable to bearer. Soon after, the Court of C. P. laid down the same doctrine in *Collis v. Emet*, 1 H. Bl. 313. This decision was acquiesced in; but *Minet v. Gibson* was carried up to the House of Lords. 1 H. Bl. 569. The opinion of the judges being then taken, *Eyre, C. B.* (p. 698), and *Heath, J.* (p. 619), were for reversing the judgment of the court below, and Lord Thurlow, C., coincided with them (p. 625), but the other judges thinking otherwise, judgment was affirmed. *Parl. Cas.* 8vo. ii. 48. The last case upon the subject reported is *Gibson v. Hunter*, 2 H. Bl. 178, 288, which came before the House of Peers upon a demurrer to evidence; and in which it was held, that in an action on a bill of this sort against the acceptor, to show that he was aware of the payee being fictitious, evidence is admissible of the circumstances under which he had accepted other bills payable to fictitious persons. See *Tuft's case*, *Leach Cro. Law*, 206."

² *Grant v. Vaughan*, 8 Burr, 1516.

the operative words of transfer be inserted therein; although if omitted by mistake, it seems, and the bill was originally intended to be negotiable, the words "or order" may be inserted at any time without a fresh stamp.

9. *Of the words "Value Received."*—It is now settled, though formerly thought otherwise,¹ that these words are not absolutely essential in a bill or note, value received being implied in every bill and indorsement as much as if expressed in *totidem verbis*.² However, to entitle the holder of an inland bill or note for the payment of 20*l.* or upwards to recover interest and damages against the drawer and indorser, in default of acceptance or payment, it should contain the words "value received." And it is necessary that the bill or note should contain those words in order that an action of *debt* may be sustained by the payee against the maker. It is therefore advisable in all cases to insert these words.

10. *Drawer or Maker's Signature.*—It is not material whether the drawer of a bill or maker of a note puts his name to it at the foot or in the body of it, so that it be inserted. Thus, if it be in his own handwriting in this manner, "I, John Smith, promise to pay," it is just as valid as if John Smith signed it.

The *liability of the drawer or maker* has been thus defined by Mr. Justice Bailey: "The act of drawing a bill implies an undertaking from the drawer to the payee and every other person to whom the bill may afterwards be transferred, that the drawer is a person capable of making himself responsible for its payment; that he shall, if applied to for the purpose, express in writing upon the bill an undertaking to pay it, and that he shall pay it when it becomes payable; and it subjects the drawer, on a failure in any of these particulars, to an action at the suit of the payee or holder. So the making of a note is an express engagement of the payee, or to any person to whom it shall be transferred, to pay the money mentioned therein according to its tenor."

11. *Direction to the Drawee, and Place of Payment.*—A bill of exchange should be addressed properly to the drawee; as, if no other is expressed, such direction is the place of payment.

Notes for less than 20*l.* payable to bearer on demand must be made payable at the bank or place where made, though they may be made payable at other places also.

Ambiguous Instruments.—If an instrument be made in terms so ambiguous that it is doubtful whether it be a bill of exchange or a promissory note, the holder may treat it as either, at his election.

A person may draw a bill *upon himself*. The instrument is valid as a bill, and the party may be sued as drawer, or (if he accept it) as the acceptor; or the instrument may be treated as a promissory note, and the party sued thereon as the maker.

In a case in which, instead of the usual address to the drawee, only the words "payable at No. 1, Wilmot-street" were inserted, it was held that a person who resided at that place, and who accepted the

¹ Cramlington v. Evans, 1 Show. 5; Vin. Ab. Bills of Exchange, G. 2.

² White v. Ledwith, Bayley, 34; Grant v. Da Costa, 3 M. & S. 351; and see Popplewell v. Wilson, 1 Stra. 264.

³ Chitty, p. 67.

⁴ Bishop v. Young, 2 B. & P. 78; Priddy v. Henbry, 3 D. & R. 163.

⁵ Taylor v. Dobbins, 1 Stra. 399; Sanderson v. Jackson, 2 Bos. & Pul. 238.

bill, was liable thereon as acceptor.¹ But this case does not show that the instrument can be perfect as a bill, when it does not appear on the face of the instrument who is the drawee. The drawer might, however, it seems, be sued thereon as a maker of a note, for such is the legal effect of the instrument.

A note by two or more makers may be either joint, or joint and several. A note signed by more than one person, and beginning "We promise &c., is a joint note only. A joint and several note usually expresses that the makers "jointly and severally promise." But a note beginning "I promise &c." and signed by two or more persons, is several as well as joint. So a note beginning in the singular, "I promise," and signed by one partner for his copartners, is the joint note of all, and the several note of the signing partner.

A note beginning "I, A. B., promise," and signed "A. B. or else C. D.," is a good note against A. B., but only evidence as against C. D. of a conditional agreement to pay if A. B. does not.

If the instrument be defective as a bill or note, it still may be evidence of an agreement.

The common memorandum, I O U such a sum, does not amount to a promissory note; it is mere evidence of a debt, and need not be stamped. Nor indeed is a stamp required for any instrument which is merely an acknowledgment for money deposited, to be accounted for, and not a receipt for money antecedently due.²

IV. OF THE CONSIDERATION.

In the case of other simple contracts, the law presumes there was no consideration unless a consideration appear; in the case of contracts on bills or notes, a consideration is presumed till the contrary appear, or at least appear probable. The defendant is not in general permitted to put the plaintiff on proof of the consideration which the plaintiff gave for the bill, unless the defendant can make out a *prima facie* case against him,³ by showing that the bill was obtained from the

¹ Gray v. Miller, 8 Taun. 739.

² Wayman v. Bend, 1 Camp. 175; Israel v. Israel, 1 Camp. 499; Fisher v. Leslie, 1 Esp. 426; Childers v. Boulnois, D. & R. N. P. C. 8. But see Guy v. Harris, Chitty, 335, where Lord Eldon held such an instrument to be a promissory note. But it clearly is not such at the present day; see Tomkins v. Ashby, 6 B. & C. 541.

³ Duncan v. Scott, 1 Camp. 100; Grant v. Vaughan, 3 Burr. 1516; King v. Milson, 2 Camp. 54; Patterson v. Hardacre, 4 Taun. 144; Thomas v. Newton, 2 C. & P. 606; De la Chaumette v. Bank of England, 9 B. & C. 208; Heath v. Sansom, 2 R. & Ad. 291; and see Basset v. Dodgin, 10 Bing. 40. It was formerly necessary, in order to enable the defendant to put the plaintiff on proof of consideration, that the defendant should have given the plaintiff notice to prove consideration. Patterson v. Hardacre, 4 Taun. 114; Bayley, 5 Edit. 472—500. It is now, however, settled, that notice to prove consideration is not necessary. Mann v. Lent, 1 M. & M. 240; Heath v. Sansom, 2 B. &

Ad. 291. It is, however, often prudent to give notice. "For it is," says Lord Tenterden, "matter of comment, if no notice were given, or if it were not given at a reasonable time." Mann v. Lent, 1 M. & M. 240. It was formerly held, that where the consideration given by the plaintiff is disputed, and a notice to that effect has been given, the plaintiff must go into his whole case in the first instance, and cannot reserve the proof of consideration as an answer to the defendant's case. Delauney v. Mitchell, 1 Stark. 439; Plumbers v. Ruding, Chitty, 7 Edit. 401; Spooner v. Gardiner, R. & M., N. P. C. 86; Best, C. J. in C. P. But now, in all the courts, the plaintiff is allowed to prove the handwriting, and make out a *prima facie* case, and then, in answer to the defendant's case, to prove consideration, R. & M. 255, n. If, however, he call witnesses to prove the consideration in the first instance, he will not be allowed, after the defendant's case has closed, to call other witnesses for the same purpose. See Browne v. Murray, R. & M. 254.

defendant, or from some intermediate party, by undue means, as by fraud, felony, or force; or that it was lost; or that he received no consideration. But he is at liberty to show positively, by his own witnesses, the absence or failure of consideration, in an action between immediate parties.

In order to ascertain correctly the various instances in which the *want* or *failure of consideration* affords a defence to an action upon a bill, note, or check, it should be considered—1st. Whether the action is between the parties to the original transaction, and whose names stand in immediate connection with each other on the face of the instrument; or 2dly, Whether the action is brought by a third person, or holder, who did not receive the bill or note from the defendant.

1. Where the action is between immediate parties, the *total want* of consideration for the instrument (as if it were drawn by the plaintiff and accepted by the defendant solely for the plaintiff's accommodation, or indorsed by the defendant to the plaintiff for the like purpose, without any value) will give the defendant a complete defence to the action.

If there was only a *partial* consideration for the instrument between these immediate parties (being the plaintiff and defendant), as if the bill is for 100*l.*, but the debt or consideration between them was 50*l.* only, and as to the remainder the bill was for the plaintiff's accommodation, then the action is not defeated *in toto*, but the verdict shall be limited to the sum really due (the 50*l.*)

It often happens that there was a full consideration for the instrument when drawn or indorsed, but before it becomes due, or is sued upon, the consideration *wholly* or *partially* fails. Where the consideration *entirely* fails—where the defendant has received no benefit, and the contract is rescinded or put an end to, either in virtue of its original terms, or by the mutual consent of both the parties,—or where it is *utterly void* on account of fraud, which the defendant has immediately treated as a ground for vacating the contract,—then the defendant stands in the same situation, in regard to the bill or note, as if the plaintiff had originally received it from him without any consideration, and the plaintiff will be nonsuited.

And where the consideration *partially* fails, there shall, in some cases, as where the extent to which it has failed, or, in other words, the amount really due, is matter of ready and certain pecuniary calculation, be a reduction to the extent of the failure or depreciation. But in cases of special contracts, and other instances in which the sum to be deducted from the amount of the bill &c. is not a matter of easy and definite computation, and the extent of the failure or subsequent deficiency or consideration involves a question of *unliquidated damages*, it has been deemed better to permit the plaintiff to recover the full amount of his bill in his action thereon, and to leave the defendant to seek redress, and recover back part of the amount, by a cross suit for damages on the special contract.

2. Where the action is not between immediate parties, the general rule is, that a person taking a bill, note, or check *bona fide* for value, or upon a good consideration as between himself and his indorser, shall not be prejudiced in his remedy against a prior party thereto, by the circumstance of the latter having put his name to the instrument

without any consideration or value, or by reason of the total or partial failure of the consideration as regards such earlier party. Thus, if A draw a bill on B, and indorse it to C, and C to D (the holder); D, having given value for the bill, may sue not only C, but either of the prior parties (A or B), although the bill was drawn and accepted solely for C's accommodation. And it is not material that D, when he took the bill, had notice that neither A nor B had received any value for it.

And it seems that a prior party cannot set up as a defence, that he received no value, and that the plaintiff holds without consideration, if an *intermediate party* took the bill or note *bonâ fide* and gave value for it. In such case the plaintiff, an indorsee, shall be permitted to recover as trustee or agent for the benefit of the intermediate indorsee for value, who might himself have sued the defendant upon the instrument, and who shall be assumed to have indorsed it to the plaintiff for the purpose of enabling him to sue thereon, it not appearing that such indorsee for value claims the instrument adversely to the plaintiff.

But if the defendant received no value, and the party to whom he gave or indorsed the instrument transferred it to the plaintiff without consideration, and the latter holds it under such circumstances without consideration, he in effect stands in the position of the party from whom he received the instrument, and cannot sue the defendant thereon; although at the time of the transfer to the plaintiff he had no notice that the defendant signed the instrument without consideration. And if, under such a state of facts, the plaintiff gave value for the bill for *part* only of the amount secured thereby, he can recover no more than the sum really due to him upon the transaction in respect of which he received the instrument. But where the defendant has received full value for the bill, the plaintiff (an indorsee) may recover the full amount, although he holds the bill for value to the extent of part only of the sum secured.

If a man give his acceptance to another, that will be a good consideration for a promise on another bill, though such acceptance is, after all, unpaid. And therefore cross acceptances for mutual accommodation are respectively considerations for each other.

A debt due from a third person is a good consideration for a note, or from the defendant and a third person. So is a moral obligation. Thus, where a bankrupt, after his bankruptcy, gave a promissory note to the plaintiff, one of his creditors, for a part of his debt, it was held that the note was given on a good consideration.

The consideration or contract on a bill or note must not be in fraud either of the defendant or third persons; for fraud totally avoids all contracts both in law and equity. Thus, if a man sell goods, warranting them, and take a bill or note in payment, and the warranty turn out false, and it be proved that he knew it at the time of sale, he cannot recover on the instrument. But where a fraud has been practised on the maker or acceptor, an innocent indorsee for value may, nevertheless, recover against him.

Where a particular consideration is stated on the face of a bill or note, parol evidence cannot be received to show that it was given upon *another* consideration, *inconsistent* with that which is so expressed.

Illegality of Consideration.—Whenever the defendant would be at liberty to insist upon the want of a consideration (if, in fact, he had received none) as a defence to an action upon a bill or note, he may insist that the consideration was illegal.

And where the consideration was partly good and partly illegal, the illegality will vitiate the whole instrument; because, it has been held, the security is entire, and there can be no apportionment. Though, if there be a direct privity between the parties as to the consideration independently of the bill or note, the invalidity of that instrument will not prevent the recovery of the debt so far as it arises from a legal transaction, if it can be established without the aid of the bill or note.

And where a bill or note is invalid in regard to all or any part of its consideration, and another bill or note is substituted for it, however disguised by means of a change of parties or otherwise, such substituted note will be equally invalid as the original one, unless all the illegal part be entirely withdrawn.

The same general rules which apply to the nature of the consideration for other simple contracts as affecting their legality, are also applicable to the various contracts on a bill or note. We must therefore refer the reader to what has been already said on that subject under the head of Contracts, *ante*, p. 660. In general, whatever is in itself either felonious, fraudulent, or otherwise illegal, subversive of morality, against public policy,¹ or contrary to the provisions of any act of parliament, will be an invalid consideration for a bill or note, but will not prejudice a *bonâ fide* holder who has given value for it without any knowledge of the nature of the consideration.

Formerly, indeed, bills and notes, as well as other securities, were, in some instances, expressly declared by statute to be *void*; and in such cases the illegality of the consideration not only affected those parties who were privy to the transaction, or knew of the invalidity of the instrument when they took it, and those persons to whom they had passed it without a valuable consideration, but even extended to *bonâ fide* holders who had taken it for value without notice of the illegality. These instances were, when the consideration of the bill or note was either—1st, Money lent on an usurious contract, contrary to the 12 Anne, st. 2, c. 16; or 2dly, Money lost by gaming, or by betting on the sides of persons so gaming, or for money knowingly lent for such gaming or betting, or lent at the time and place of such play to any person either then gaming or betting, or who should, during the play,

¹ *Binnington v. Wallis*, 4 B. & A. 651; *Gibson v. Dickie*, 3 M. & S. 463; *Nye v. Mosely*, 6 B. & C. 133.

² Contracts in general restraint of trade, *H. & B. Co. Lit.* 206, b, n. 1; *Hunlock v. Blacklowe*, 2 Saun. 156, n. 1; *Mitchel v. Reynolds*, 1 P.W. 190, S.C. 10 Mod. 130; *Davis v. Mason*, 5 T. R. 118. In general restraint of marriage, 4 Burr. 2225; *Baker v. White*, 2 Vern. 215; *Hartley v. Rice*, 10 East. 22; 3 Lev. 411, 3 P. W. 75, Com. Dig. Chancery, 3 Z. 8. To the injury of the revenue, *Biggs v. Lawrence*, 5 T. R. 454; *Vandyck v. Hewitt*, 1 East. 97; *Hodgson v. Temple*, 5 Taun. 181. Impeding the course of public justice, *Nerot v. Wallace*, 3 T. R. 117; *Fallowes v. Taylor*, 7 T. R. 475; *Edgecombe v. Rodd*, 5 East. 294; *Drage v. Ibbetson*, 1 Esp. 643; *Beeley v. Wingfield*, 11 East. 46; *Kirk v. Strickwood*, 4 B. & Ad. 421; and see *Baker v. Townshend*, 1 B. Moore, 120; *Wallace v. Hardacre*, 1 Camp. 45. For sale of public offices, 2 Bing. 247. Tending to a neglect of duty in a public officer, *Cole v. Gower*, 6 East. 110. With a public enemy, *Willison v. Patteson*, 7 Taun. 438; *Antoine v. Morshead*, 6 Taun. 237; *Duhammel v. Pickering*, 2 Stark. 90.

play or bet, in contravention of the 16 Car. II. c. 7, and 9 Anne, c. 14; or 3dly, Signing a bankrupt's certificate, contrary to the 6 Geo. IV. c. 16; or 4thly, The ransom, or money knowingly lent to enable the owner to obtain the ransom, of the ship or vessel of a British subject, or any goods or merchandize on board the same, contrary to the 45 Geo. III. c. 72.

But the 58 Geo. III. c. 93 enacted, that no bill of exchange or promissory note, made after the 10th June, 1818, shall, though it may have been given upon an usurious consideration, or upon an usurious contract, be void in the hands of an indorsee for a valuable consideration, unless such indorsee had, at the time of discounting or paying such consideration for the same, actual notice that such bill or note had been originally given for an usurious consideration or upon an usurious contract.

And as to bills founded on gambling considerations, it had been held that they were good in the hands of a *bond fide* holder without notice of their original illegality against all parties except the person who lost the money at play.

Now, however, by the 5 & 6 Wm. IV. c. 41, it is enacted, that any note, bill, or mortgage given or made for any of the purposes above mentioned shall not be considered as absolutely *void*, but as made, given, drawn, accepted, or executed for an *illegal consideration*. They are therefore good in the hands of *bond fide* holders for a valuable consideration without notice of their illegality. And the 2d section enacts, that in case any person shall, after the passing of that act, make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the recited acts held to be void, and such person shall actually pay to an indorsee, holder, or assignee thereof the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall have so paid such money, and shall accordingly be recoverable by action at law in any of her majesty's courts of record. And by sect. 3, so much of the 9 Anne and 11 Anne as enacted that where such mortgages, securities, or other conveyances as therein mentioned should be of lands, tenements, or hereditaments, or such as should incumber or affect the same, they should enure for the benefit of such persons as would be entitled to such lands &c. in case the grantor or person incumbering the same had been dead, is repealed.

With respect to *usurious* considerations, indeed, bills and notes not having more than twelve months to run have by recent enactments been withdrawn from the operation of the usury laws altogether. First, the 3 & 4 Wm. IV. c. 98 enacts, that no bill of exchange or promissory note not having more than *three* months to run should be void, nor the liability of any party thereto be affected by any law in force for the prevention of usury. And the 7 Wm. IV. and 1 Vict. c. 80 has since extended the same exemption to bills and notes not having more than *twelve* months to run.

If the consideration upon which a bill or note was made is not illegal, an illegality in the consideration upon which it is afterwards transferred will be no defence, if the plaintiff took it *bonâ fide* and upon a good consideration.

By suffering a judgment by default, the defendant loses the opportunity of objecting to the consideration.

V. OF THE TRANSFER AND INDORSEMENT OF BILLS AND NOTES.

Bills and notes are usually made payable, not only to the payee, but to his *order*, or to the *bearer*. If made payable "to order," they are not transferable in the first instance except by *indorsement*; but if payable to the bearer, they are transferable by mere *delivery*.

A bill or note which does not contain a direction or promise to pay to the *order* of the payee, or to *bearer*, is not transferable; nevertheless, if the payee does indorse a bill not negotiable, he is liable on his indorsement to his indorsee.¹

Indorsements are of two sorts: an indorsement *in blank*, or, as it is sometimes termed, a *blank* indorsement, and an indorsement *in full*, or a *special* indorsement.² No particular form of words is essential to any indorsement.³

A *blank* indorsement is made by the mere signature of the indorser on the back of the bill; its effect is to make the instrument thereafter payable to bearer.

An indorsement *in full*, besides the signature of the indorser, expresses in whose favour the indorsement is made. Thus, an indorsement in full by A. B. is in this form; "Pay Mr. C. D. or order. A B;" the signature of the indorser being subscribed to the direction. Its effect is to make the instrument payable to A. B. or his order only; and accordingly A. B. cannot transfer it otherwise than by indorsement. The omission of the words "or order" is not material in a special indorsement; for the indorsee takes it with all its incidents, and, among the rest, with its negotiable quality, if it were originally made payable to order.⁴

Neither indorsement nor acceptance⁵ is complete before delivery of the bill.

If a bill be once indorsed in blank, though afterwards indorsed in full, it will still, as against the drawer, the payee, the acceptor, the blank indorser, and all indorsers before him, be payable to bearer;⁶ though, as against the special indorser himself, title must be made through his indorsee.

The indorsee may covert a blank indorsement into a special one in his own favour, by superscribing the necessary words. He may also convert the blank indorsement into a special one in favour of a stranger, by superscribing above the indorsement the words, "Pay A. B. or order;" and if he transfer the bill in that way, instead of by indorsing it, he is not liable as indorser.⁷

¹ Hill v. Lewis, 1 Salk. 182.

² The mark of a person who cannot write is a sufficient indorsement.—George v. Surrey, 1 M. & M. 516.

³ Peacock v. Rhodes, Doug. 633; Francis v. Mott, Doug. 612.

⁴ Moore v. Manning, Com. Rep. 811; Acheson v. Fountain, 1 Stra. 557; Eadie v. East India Company, 2 Burr. 1216.

⁵ Cox v. Troy, 5 B. & A. 474.

⁶ Smith v. Clarke, Peake, 225.

⁷ Vincent v. Horlock, 1 Camp. 442.

By the law of France, an indorsement in blank does not transfer any property in a bill; therefore the holder of a bill drawn in France and indorsed there in blank cannot recover against the acceptor in the courts of this country.

As to the circumstances under which the indorsement of a bill amounts to a fresh drawing, see *Penny v. Jones*, 5 Tyrwhitt's Rep. 107.

Liability of Indorser.—Every indorser is considered as a new drawer, and is liable to every succeeding holder in default of acceptance or payment by the drawee. But a man may indorse a bill without incurring personal responsibility, by expressing in his indorsement that it is made with this qualification, that he shall not be liable on default of acceptance or payment by the drawee. Such qualified indorsement will be made by annexing the words "*sans recours*," or "without recourse to me;" and this is the proper mode of indorsement by an agent. If there be a verbal agreement between the first indorser and his immediate indorsee, that the indorsee shall not sue the indorser, but the acceptor only, it has been held that such an agreement would be a good defence, on the part of the original indorser, against his immediate indorsee suing in breach of the agreement.¹

Rights of Indorsee.—A transfer by indorsement vests in the indorsee a right of action against all the parties whose names are on the bill, in case of default of acceptance or payment; and we have already seen, that against an innocent indorsee for value no prior party can set up the defence of fraud, duress, or absence of consideration. But if the payee of a bill payable to order neglect to indorse, the holder has no remedy against any person but him from whom he received it. If a bill be reindorsed to a previous indorser, he has no remedy against the intermediate parties, for they would have their remedy over against him, and the result of the actions would be to place the parties in precisely the same situation as before any action at all.²

A bill may be indorsed *conditionally*; and where a bill was indorsed on condition by the payee, afterwards accepted, then passed through several hands, and was finally paid by the acceptor before the condition was performed, it was held that the acceptor was liable to pay the bill again to the payee.³

Where a bill or note is merely indorsed to another, and deposited with him as a trustee, the indorsee can only use it in conformity with the stipulations on which he became the depository of it. And if he indorse it over in breach of trust, the indorsee, with notice of the breach of trust, acquires no title to the bill as against the rightful owner; but otherwise if the bill had been indorsed in blank, and the transferee took it without knowledge of the particular and limited purpose for which the bill was deposited with the trustee.⁴

The trust may be expressed on the bill itself by a *restrictive* indorsement, so that into whose hands soever the bill may travel it will carry a trust on the face of it.⁵ The following have been held to be restrictive

¹ *Pike v. Street*, 1 M. & M. 226.

² *Bishop v. Hayward*, 4 T. R. 470; *Britten v. Webb*, 2 B. & C. 483.

³ *Robertson v. Kensington*, 4 Taun. 30.

⁴ *Boiton v. Puller*, 1 B. & P. 539; *Ramsbottom v. Cater*, 1 Stark. 228; *Collins v.*

3 B. & C. 45; *Wookey v. Poole*, 4 B. & A. 13; and see *Roberts v. Eden*, 1 B. & P. 398.

⁵ Such restrictive indorsements are not of very late invention, but they appear to have been well known before the middle of the last century.—*Snee v. Prescott*, 1 Atk. 207; *Eden v. The Bank of England*, 2 Burr. 1027.

directions or indorsements:—"The within must be credited to A. B.;" "Pay to A. B. or order for my use;" "Pay to A. B. for my account;" "Pay to A. B. only."

A holder who takes a bill the circulation of which is thus restricted cannot sue the drawer or acceptor upon it, but holds the bill or the money received upon it as the trustee of the restraining party.

Liability of a Person transferring by Delivery.—A transfer by mere delivery, without indorsement, does not make the transferor liable on the instrument to the transferee; but, in case it were given for a pre-existing debt, he is liable on the consideration, if the bill turn out of no value, as if it prove to be forged, and the transferee had not made it his own by laches.⁴ He is not responsible to a subsequent transferee on the consideration, nor can such subsequent transferee prove for the value, in case of the first transferor's bankruptcy.⁵

But if a bill or note be delivered without indorsement, not in payment of a pre-existing debt, but by way of exchange for goods, for other bills, or for money transferred to the party delivering the bill at the same time, such a transaction is held to be a sale of the bill by the party transferring it, and a purchase of the instrument with all risks by the transferee.

But, in all cases, if notes or bills are transferred as valid when the transferor knows they are good for nothing, it is a fraud, and he is liable.

Rights of Transferee by Delivery.—Bills and notes payable to bearer circulate as money, and are considered as such; and it is absolutely essential to the currency of money, that the property and possession should be inseparable. We have already seen that the indorsee of a bill payable to order, and not made payable to bearer by a blank indorsement, has no right to the bill either so as to retain it against the real owner, or to sue any party upon it, unless the indorser had a right to indorse;⁶ whereas if a check, bill, or note be payable to bearer, the title of the holder, both as against a former owner on the one hand, and the maker, acceptor, or indorser on the other, is not affected by any infirmity in the title of the transferor, provided the holder took it *bonâ fide*, and not under circumstances which might reasonably awaken the suspicions of a prudent man.⁷ But if he took it out of the usual course of business, or under suspicious circumstances, or without proper and reasonable caution, he is liable in trover to the real owner, and cannot enforce payment against the parties to the instrument. So if a bill or note be transferred after it is due, or, in case of a check payable on demand, long after it was issued, that very circumstance should put the party taking it on his guard. In this respect exchequer bills, which are payable to bearer before the blank is filled up,⁸ bonds of foreign princes and states payable to bearer,⁹ and East India bonds, resemble bills of exchange; they cannot be followed, like goods, into the hands of a *bonâ fide* holder, by a person who has lost them, or by a principal whose agent had fraudulently sold or pledged them.⁷

⁴ Jones v. Ryde, 5 Taun. 492; Bruce v. Bruce, ib.; see Bayley, 98; Fuller v. Smith, 1 R. & M. 49.

⁵ In re Barrington, 2 Sch. & Lef. 112.

⁶ Mead v. Young, 4 T. R. 28.

⁷ Grant v. Vaughan, Burr. 1516; Solomons v. Bank of England, 13 East. 135.

⁸ Wookey v. Pole, 4 B. & A. 1.

⁹ Gorgier v. Melville, 8 B. & C. 45.

⁷ Embezzling bills by agents, or pledging them beyond their lien, is punishable with transportation.—7 & 8 Geo. IV. c. 29, § 49.

An indorsement cannot be made for the transfer of a less sum than the whole amount of the bill or note purports to be; and the act of indorsing conveys no title against the person making it, unless it is made by him who has a right to make the transfer. Consequently, if a bill or note be stolen, or lost by accident, the thief or finder may confer a title by transferring it, if it be assignable by mere delivery; but if it be not negotiable otherwise than by indorsement, he cannot; though it appears, if it be special, an action may be maintained without producing the bill.

If the holder of a bill become bankrupt, the property in it vests, from the act of bankruptcy, in his assignees, and they must indorse.

A bill or note payable to a married woman passes by the indorsement of the husband alone.

As to the Time of Transfer.—An indorsement may be made even before the bill or note itself, and in such case it renders the indorser liable to subsequent parties to any amount warranted by the stamp.

So an indorsement may be made either *before* or *after acceptance*. If a bill be indorsed after refusal to accept and notice thereof to the indorsee, or after it is due, these are circumstances which may reasonably excite suspicions as to the liability or solvency of the antecedent parties. "After a bill or note is due," says Lord Ellenborough, "it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it. If he takes it, though he give a full consideration for it, he takes it on the credit of the indorser, and subject to all the equities with which it may be encumbered."

But a distinction has been taken between the transfer of a *bill* or *note* over due, and the transfer of a *check* some days old. For in the case of a bill or note, there is a fixed time for payment, after which it cannot possibly circulate without some suspicion; but there is no such fixed time in the case of a check. And therefore it has been held, that though the taking of a check six days old is a circumstance from which the jury may *infer* negligence or fraud, it is not conclusive evidence of either, so as to prevent the party taking the check from suing on it, or retaining it, or the money received upon it, as if he had taken an over-due bill of exchange.¹ A note payable on demand is not to be considered as over-due, without some evidence of payment having been demanded and refused.²

After *payment* at maturity by the acceptor or maker, bills or notes cannot be transferred;³ except promissory notes payable to bearer on demand, re-issued by the original maker, who has taken out a licence for that purpose.⁴ "But a bill of exchange," says Lord Ellenborough, "is negotiable *ad infinitum* until it has been paid by or discharged on behalf of the acceptor." And if a bill or note is paid before it is due, and is afterwards indorsed over, it is a valid security in the hands of a *bona fide* indorser.⁵

¹ Rothschild v. Covey, 9 B. & C. 388.

² Barough v. White, 4 B. & C. 327.

³ 55 Geo. III. c. 184, § 19.

⁴ Ibid, § 14 and 24. Until a bill or note has been paid by the maker or acceptor, it has not discharged its functions, and does not require a new stamp, though re-issued after due, and after it has been paid by an

indorser.—Collins v. Lawrence, 3 M. & S. 98.

⁵ The drawer of a bill payable to *his own order*, indorsed it over, and, on its being dishonoured, paid it to the holder, and afterwards indorsed it again. Held, that this last indorsee might recover against the acceptor.—Callow v. Lawrence, 3 M. & S. 97; see also Hubbard v. Jackson, 3 C. & P. 134.

If the bill has been *partly paid*, either by the acceptor or by the drawer (who for this purpose is the agent of the acceptor),¹ the bill may be *specially indorsed* for the part remaining due.²

A bill or note cannot be indorsed for *part of the sum remaining due* to the indorser upon it, if the limitation of the sum for which it is indorsed appear on the indorsement itself. Such an indorsement is not warranted by the custom of merchants, and is attended with this inconvenience to the prior parties, that it subjects them to a plurality of actions.³ It is conceived, that the effect of such an indorsement is to give a lien on the bill, but not to transfer a right of action, except in the indorser's name.

But if a bill or note be indorsed or delivered for part of the sum due on it, and the limitation of the transfer do not appear on the instrument, the transferee is entitled to sue the maker or acceptor for the whole amount, and is a trustee of the surplus for the transferor.⁴

The holder cannot transfer *after action brought*, so as to give his transferee a right of action, provided the latter were aware of the suit commenced.⁵

A court of equity will interpose to restrain the negotiation of a bill unduly obtained; for the defence at law may not be available as against an innocent indorsee for value, or time may destroy the evidence;⁶ and it will, on equitable terms, decree a bill which was void in its creation, or unduly obtained, to be delivered up to be cancelled.⁷

It may not be useless to subjoin a few words as to the extent to which bills or notes may be the subjects of a *donatio mortis causâ*. The result of the cases seems to be, that though a bond⁸ or a bank-note are good *donationes mortis causâ*,⁹ and the delivery of a bond and mortgage deeds will impose a trust upon the real and personal representatives in favour of the donee,¹⁰ yet the gift of a check drawn by the donor upon his banker, or of a promissory note, will not amount to a *donatio mortis causâ*, and will have no greater effect in equity than at law." The general rule appears to be, that a chose in action cannot so pass; but a bond, being a specialty, and naving in the eye of the law a substantive existence and locality, independent of the value which it represents (being, for example, *bona notabilia* in the place where the parchment lies) is an exception. And negotiable instruments which are commonly treated as money for other purposes may, like money, pass as a *donatio mortis causâ*; while such bills or notes as are not commonly used for money, as a check or common promissory note, though payable to bearer, will not be within the exception. Nor is it probable that future decisions will hold notes or checks to be objects of a *donatio mortis causâ*, for the courts lean against this sort of disposition.¹²

¹ Bacon v. Searles, 1 Hen. Bl. 88.

² Hawkins v. Cardy, 1 Ld. Raym. 360; and see Johnson v. Kennon, 2 Wils. 262.

³ Hawkins v. Cardy, 1 Ld. Raym. 360.

⁴ Reid v. Furnival, 1 C. & M. 528.

⁵ Marsh v. Newell, 1 Taun. 109.

⁶ Bromley v. Holland, 7 Ves. 20, 413;

2 Ves. Jun. 483; 3 Ves. 757; 9 Ves. 355.

⁷ 2 Ves. Jun. 488; 7 Ves. 413; 2 Ves. &

Bea. 302; Mackworth v. Marshall, 3 Sim. 368.

⁸ Snelgrove v. Baile, 3 Atk. 214.

⁹ Drury v. Smith, 1 P. W. 405; Miller v. Miller, 3 P. W. 356.

¹⁰ Duffield v. Elwes, 1 Bligh, 499.

¹¹ Tate v. Hilbert, 2 Ves. Jun. 111.

¹² Duffield v. Elwes, 1 Bligh, 533, *z. d.* 1827. There must be an actual transfer.—2 Marshall, 532.

VI. OF THE PRESENTMENT FOR ACCEPTANCE.

It is in all cases advisable for the holder of an unaccepted bill to present it for acceptance without delay; though presentment for acceptance is not absolutely necessary in the case of a bill payable at a certain period after date. It is said, however, that it is incumbent on a holder who is a mere agent, and on the payee when expressly directed by the drawer so to do, to present the bill for acceptance as soon as possible; and that, for loss arising from neglect, the payee must be responsible, and the agent must answer to his principal.¹

But in the case of a bill payable at sight, or at a certain period after sight, presentment for acceptance is indispensable; for till such presentment there is no right of action against any party; and unless it be made within a reasonable time, the holder loses his remedy against the antecedent parties. What is a reasonable time, depends on the circumstances of each particular case, and is a mixed question of law and fact,² to be decided by the jury, acting under the direction of the judge, upon the particular circumstances of each case.³

The holder may, however, put the bill into circulation without presenting it. "If a bill drawn at three days sight," says Mr. Justice Buller, "be kept out in circulation for a year, I cannot say that there would be *laches*; but if, instead of putting it into circulation, the holder were to lock it up for any length of time, I should say that he would be guilty of *laches*."⁴

Illness, or other reasonable excuse not attributable to the misconduct of the holder, will excuse. But the holder must present, though the drawer have desired the drawee not to accept.⁵

The presentment must be made either to the drawee himself, or to his authorized agent, and should be made during the usual hours of business.⁶

In case the bill is directed to the drawee at a particular place, it is to be considered as dishonoured if the drawee has absconded.⁷ But if he have merely changed his residence, or if the bill is not directed to him at any particular place, it is incumbent on the holder to use due diligence to find him out. If the drawee be dead, the holder should inquire after his personal representative, and, provided he live within a reasonable distance, present the bill to him.⁸

When the bill is presented, it is reasonable that the drawee should be allowed some time to deliberate whether he will accept or no. It seems that he may demand twenty-four hours for this purpose, and that the holder will be justified in leaving the bill with him for that period; at least if the post do not go out in the interim, or unless in the interim he either accepts or declares his resolution not to accept. If more than twenty-four hours be given, the holder ought to inform the antecedent parties of it.⁹

¹ Chit. 159; Poth. 128; Marius, 46.

² Muilman v. D'Eguino, 2 H. B. 569; Fry v. Hill, 7 Taun. 397; Shute v. Robins, 1 M. & M. 133; Mellish v. Rawdon, 9 Bing. 423.

³ Mellish v. Rawdon, 9 Bing. 416.

Muilman v. D'Eguino, 2 H. B. 565.

⁵ Hill v. Heap, 1 D. & R. C. N. P. 57.

⁶ Mar. 112.

⁷ 1 Ld. Raym. 743.

⁸ Chitty, 165.

⁹ Marius, 15; Com. Dig. Merch. F. 6; Ld. Raym. 281; Bayley, 186; Ingram v. Foster, 2 Smith, 242.

VII. OF ACCEPTANCE.

Acceptance, in its ordinary signification, is an engagement by the drawee to pay the bill when due.¹

Generally speaking, the drawee of a bill is not liable till acceptance. But a banker, having in his hands effects of his customer, is bound, within a reasonable time after he has received the money, to pay his customer's checks, and is liable to an action at the suit of the customer if he does not.²

The statute 3 & 4 Anne, c. 9, § 5, expressly enacts, that no acceptance of any inland bill of exchange shall be sufficient to charge any person whatever, unless it be underwritten or indorsed *in writing* on the bill. This statute, however, seems to be very loosely and obscurely drawn. Two chief justices accordingly held, on considering the whole of the act, that a verbal acceptance was binding, notwithstanding these words; which decision was finally settled to be law by Lord Hardwicke. It had often been lamented by the judges, that any thing short of a writing on the bill should have been considered as an acceptance; and at length, in accordance with the opinions of the bench, the 1 & 2 Geo. IV. c. 78, § 2, enacted, that no acceptance of any inland bill of exchange shall be sufficient to charge any person, unless such acceptance be in writing on such bill, or, if there be more than one part of such bill, on one of the said parts.

The usual and regular mode of making such an acceptance on the bill, is by writing the word "Accepted," and subscribing the drawee's name. Signature, however, is not essential to a written acceptance within this statute; but it is a question for the jury, whether the acceptance is complete.³ If the bill be payable after sight, the day when accepted should also be expressed. But the drawee's name alone, written on any part of the bill, is a sufficient acceptance; so, without any name, the word "Accepted," "Presented," "Seen," or the day of the month, or a direction to a third person to pay it.⁴

It will be observed, that the 1 & 2 Geo. IV. c. 78, so far as it relates to acceptance in writing, does not extend to *foreign* bills. It is necessary, therefore, to consider the state of the law previously to this enactment in respect of acceptances not on the bill, as it still applies to the acceptance of bills drawn abroad.

A promise, written or verbal, to pay or accept an existing foreign bill, is of itself an acceptance;⁵ and so, indeed, is any conduct of the drawee by which it is intended that the holder should understand that he means to accept or pay a bill already drawn. But a promise to accept a bill not in existence will not be available as an acceptance, at least in favour of a subsequent holder, unless communicated to him at the time he took the bill. Where the drawee answered an application to accept the bill, by saying, "The bill shall have attention," it was held that these words were ambiguous, and did not amount to

¹ 4 East, 72.

² In Fry and Chapman's bankruptcy, in the year 1829, several holders of checks on the bankrupts claimed to prove, alleging that they were equitable assignees of choses in action. The commissioners took time to consider, and disallowed the claim.

³ Dufour v. Oxenden, 2 M. & M. 90.

⁴ Comb. 401; Powell v. Monnier, 1 Atk. 611; Moore v. Whitby, B. N. P. 270; Dufour v. Oxenden, 2 M. & M. 90.

⁵ Clarke v. Cork, 4 East, 57; Cox v. Coleman, Bayley, 184; Wynn v. Raikie, 5 East, 514.

an acceptance;¹ so, an answer by the drawee, "There is your bill, it is all right," is no acceptance.² The mere detention of a bill by the drawee will not, it seems, amount to an acceptance.

An acceptance may be either *absolute* or *qualified*.

The holder is entitled to require from the drawee an *absolute* engagement to pay according to the tenor and effect of the bill, unincumbered with any condition or qualification. A general acceptance, without any express words to restrain it, will be such an absolute acceptance. If the drawee offer a qualified acceptance, the holder may either refuse or accept the offer. If he means to refuse it, he should note the bill, and give notice of the dishonour to the antecedent parties. If he intends to acquiesce in it, he must give notice of the nature of the acceptance to the previous parties, or they will be discharged; but he must not protest or note the bill, or give a general notice of dishonour, for he would thereby preclude himself from recovering against the acceptor.³

Qualified acceptances are of two kinds; *conditional*, and *partial*, or *varying* from the tenor of the bill.

Whether an acceptance be *conditional* or not, is a question of law.⁴ Acceptances, "to pay as remitted for,"⁵ "to pay when in cash for the cargo of the ship Thetis,"⁶ "to pay when goods consigned to him (the drawee) were sold,"⁷ or an answer, that a bill would not be accepted till a navy-bill was paid, have respectively been held to be conditional acceptances. When the acceptance is in writing, and absolute, it may be suspended on a condition by another contemporaneous writing.⁸

A *partial* acceptance varies from the tenor of the bill, as where it engages to pay part of the sum, or to pay at a different time from that at which the bill is made payable by the drawer.⁹

Before the 1 & 2 Geo. IV. c. 78, it was a point much disputed, whether, if a bill was accepted payable at a particular place, such an acceptance was a qualified one. That statute, however, has now settled, that an acceptance, payable at a banker's or other particular place, is a general acceptance, unless it express that the bill is payable there "*only, and not otherwise or elsewhere*."¹⁰

But if the drawer makes the bill in the body of it payable at a particular place, and the drawee accepts it payable at that place, without adding the words "and not otherwise or elsewhere," presentment at that place, though not necessary, since the act, in order to charge the acceptor, is still necessary to charge the drawer.¹¹ And it should seem that even where the bill is drawn without being made payable at any particular place, and is accepted payable at a particular place (though without the words "and not otherwise or elsewhere"), a presentment at the place named is necessary to charge the drawer.¹²

We have already seen that one partner may, by his acceptance, bind his copartners. But if a bill be drawn upon several persons not in partnership, it should be accepted by all, and if not, may be treated

¹ Rees v. Warwick, 2 B. & A. 113.

² Powell v. Jones, 1 Esp. 17.

³ Sproat v. Matthews, 1 T. R. 182; Bentinck v. Dorrien, 6 East, 200; Chit. 182.

⁴ Sproat v. Matthews, 1 T. R. 182.

⁵ Banbury v. Lissett, Stra. 1212.

⁶ Julian v. Shobrooke, 2 Wils. 9.

⁷ Smith v. Abbot, 1 Str. 115.

⁸ Bowerbank v. Montiers, 4 Taun. 844.

⁹ Molloy, 283; Walker v. Atwood, 11 Mod. 190.

¹⁰ It will be observed that this part of the statute applies to all bills, foreign as well as inland.

¹¹ Gibb v. Mather, 8 Bing. 214.

¹² Ibid.

as dishonoured.¹ Acceptance will, however, be binding on such as do make it.

There cannot be two separate acceptors of the same bill not jointly responsible. But although there can be no other acceptor after a general acceptance of the drawee, it is said that when a bill has been accepted *supra protest* for the honour of one party, it may, by another individual, be accepted *supra protest* for the honour of another.²

We have already seen, that the signature of a drawer, maker, or indorser of a negotiable instrument on a blank form will bind them respectively; so an acceptance written on the paper before the bill is made will also charge the acceptor to the extent warranted by the stamp. And it has been decided, since the 1 & 2 Geo. IV. c. 78, that an acceptance may be written before the bill is drawn, though that statute makes it essential to the acceptance of an inland bill that it should be in writing *on such bill*.

A bill may be accepted after the period at which it is made payable has elapsed, and the acceptor will then be liable to pay on demand. It may also be accepted after a previous refusal to accept.³

Liability of Acceptor.—The acceptor is considered, in all cases, as the party primarily liable on the bill. He is to be treated as the principal debtor to the holder, and the other parties as sureties liable on his default.⁴ The acceptor of a bill stands, for most purposes, in the same situation as the maker of a note, and therefore most of the following observations will apply to the latter also. The liability of the acceptor does not attach by merely writing his name, but upon the subsequent delivery of the bill. Hence it follows, that if the drawee has written his name on the bill with the intention to accept, he is at liberty to cancel his acceptance at any time before the bill is delivered, or at least before the fact of acceptance is communicated to the holder.⁵

An acceptance is a conclusive admission of the ability of the drawer to make the bill, and the genuineness of his signature; for which reason the acceptor is liable though the bill be forged. The acceptance is also *prima facie* evidence of the party having effects of the drawer to the amount of the bill.

The acceptor's liability can only be discharged by payment, by waiver, or by release.

Payment we shall consider hereafter.

With respect to the mode by which it may be *waived or discharged*, it is a general rule of law, that although a simple contract may, *before breach*, be waived or discharged without a deed and without consideration; yet after breach there can be no discharge, except by deed or upon sufficient consideration.⁶ To this rule contracts on bills form an exception, and the liability of the acceptor, though complete, may be discharged by an express renunciation of his claim on the part of the holder. But nothing short of an *express* discharge will do.⁷ If the

¹ Mar. 16, Holt's N.P.C.

² Jackson v. Hudson, 2 Camp. 447.

³ Wynne v. Raikes, 5 East, 414.

⁴ Fentum v. Poock, 5 Taun. 192.

⁵ Cox v. Troy, 5 B. & A. 474.

⁶ Com. Dig., Action on the Case in As-

sumpsit, G.; Fitch v. Sutton, 5 East, 280.

⁷ Dingwall v. Dunster, Doug. 235; Black v. Pile, and Walpole v. Pulteney, there cited; Farquhar v. Southey, 1 M. & M. 14. A right to sue the drawer may be waived.

Delatorre v. Barclay, 1 Stark. 7.

renunciation be not express, and for the whole amount, there must be a consideration.¹ Receiving interest from the drawer will not discharge the acceptor.

The cancellation of the acceptor's name by the holder is a waiver of the acceptance. Where a third person cancels, it is a question for the jury whether that cancellation were with the assent of the holder.²

The liability of the acceptor, as such, may also be waived or extinguished by taking from him a co-extensive security by specialty. But if a new security recognize the bill or note as still existing, it is not extinguished.³ Where one of three partners, after a dissolution of partnership, undertook, by deed made between the partners, to pay a particular partnership debt on two bills of exchange, and that was communicated to the holder, who consented to take the separate notes of the one partner for the amount, strictly reserving his right against all three, and retained possession of the original bills, it was held, that the separate notes having proved unproductive, he might still resort to his remedy against the other partners, and that the taking under these circumstances the separate notes, and even afterwards renewing them several times successively, did not amount to satisfaction of the joint debt.⁴ But, in general, the taking a separate bill of one of two joint acceptors of a former bill is a relinquishment of all claim on the former security.⁵

A release (which is an acquittance under seal, and to the validity of which, being a deed, no consideration is essential) by the drawer to the acceptor will discharge the acceptor from his liability to the drawer, though the bill is not due, and is in the hands of a third party.⁶ A release to one of several acceptors or other parties jointly liable on a bill or note, is a discharge of all.⁷ But a covenant not to sue, though it may be pleaded as a release to the party to whom it is given, does not so far operate as to discharge another party jointly liable.⁸ The legal operation of a release as to third parties jointly liable may, in some cases, be restrained by the terms of the instrument.⁹

A discharge under the Lords' Act, though it was a satisfaction as between the holder of a bill and the acceptor, did not discharge the acceptor from his liability to a previous party who had been obliged in consequence to pay the bill. But a discharge under the Insolvent Debtors' Act releases the insolvent from his liability, not only to the creditor mentioned in the schedule, but to indorsees.

VIII. OF PRESENTMENT FOR PAYMENT.

A personal demand on the drawee or acceptor is not necessary. It is sufficient if payment be demanded, at his usual residence or place of business, of his wife or other agent.¹⁰ And it is sufficient if payment be demanded of an agent who has been authorized to pay, or has usually paid bills for the drawee. The bankruptcy or insolvency of the drawee is no excuse for a neglect to present for payment. If the drawee has

¹ Parker v. Leigh, 2 Stark. 228.

² Sweeting v. Halse, 9 B. & C. 365.

³ Twopenny v. Young, 8 B. & C. 208.

⁴ Bedford v. Deakin, 2 B. & A. 210.

⁵ Evans v. Drummond, 4 Esp. 92; Reed v. White, 5 Esp. 122.

⁶ Scott v. Lifford, 1 Camp. 249.

⁷ Co. Lit. 232, a.

⁸ Dean v. Newhall, 8 T. R. 168.

⁹ Solly v. Forbes, 2 B. & B. 38.

¹⁰ Matthews v. Haydon, 2 Esp. 509; Brown v. M'Dermot, 5 Esp. 265.

shut up his house, the holder must inquire after him, and attempt to find him out. If he is dead, presentment must be made to his personal representatives; and if he have none, then at his house.¹

When a bill is drawn at a certain number of days after date or after sight, those days are reckoned exclusively of the day on which the bill is drawn or accepted, and inclusively of the day on which it falls due. "After sight" is equivalent to "after acceptance;" and with respect to notes, it means after presentment for sight. By the custom of trade, in bills and notes, a month is deemed to be a calendar or solar month.² The inequality of the respective months is not taken into the account. If a bill at one month be drawn on the 31st of January, it will be due on the 28th of February, or 29th if leap year, and, reckoning the days of grace, will be payable on the 3d of March.³

Days of grace are so called because they were formerly allowed the drawee as a favour; but the laws of commercial countries have long since recognized them as a right. The number of these days varies in different places.

The three days of grace allowed in this country are reckoned exclusive of the day on which the bill falls due, and inclusive of the last day of grace. Where there are no days of grace, and the bill falls due on a Sunday, Christmas-day, Good Friday, public fast or thanksgiving day, or where the last of the days of grace happens on such a day, the bill becomes payable on the day preceding; and if not then paid, must be treated as dishonoured. A presentment for payment before the expiration of the days of grace is premature, and will not enable the holder to charge the antecedent parties.

Days of grace are allowed on promissory notes as well as on bills. They are allowed, whether the bill or note be made payable on a certain event or at a certain day, or at a certain number of years, months, weeks, or days after date or after sight, or at usance. But they are not allowed on checks, or on bills or notes payable on demand.⁴ Whether days of grace are allowed on bills payable at sight seems undecided; the weight of authority inclines in favour of such an allowance.⁵

Foreign bills are usually drawn payable at one, two, or more usances. *Usance* (or usage) signifies a certain known established time which it is the usage of the countries between which the bills are drawn to appoint for payment of them; it varies with respect to different places, in some cases being one month, in others two or more, and in others less than a month.⁶ When a month is the ordinary usance, a half usance is fifteen days.

Bills and notes payable on demand, and checks, must be presented within a reasonable time. What is a reasonable time seems to be a question of law.⁷ A man taking a bill or note payable on demand, or

¹ Chitty, 246.

² 3 B. & B. 187.

³ Marius, 75; Kyd, 4.

⁴ Wiffen v. Roberts, 1 Esp. 261.

⁵ Brown v. Harraden, 4 T. R. 148.

⁶ Bayley, 187.

⁷ Beawes, 266; Kyd, 10; Bayley, 198;

Dehens v. Harriott, 1 Show. 163; Coleman v. Sayer, Barn. Rep. 303; Janson v. Thomas, Bayley, 79; Selw. N.P. 7, ed. 344.

⁸ Usance between France and London is

30 days;—between Germany, Holland, or the Netherlands, and London, one calendar month;—between Sweden and London, 75 days;—between Portugal and London, two calendar months;—and between Italy and London, three calendar months.

⁹ Tindal v. Brown, 1 T. R. 168; Darbyshire v. Parker, 6 East, 3; Parker v. Gordon, 7 East, 396; Haynes v. Birks, 3 Bos. & Pul. 599; Appleton v. Sweetapple, Bayley, 192.

a check, is not bound, laying aside all other business, to present or transmit it for payment the very first opportunity. It has long since been decided, in numerous cases, that though the party by whom the bill or note is to be paid lives in the same place, it is not necessary to present the instrument for payment till the morning next after the day on which it is received.¹ And later cases have established, that the holder of a check has the whole of the banking hours of the next day within which to present it for payment.²

Presentment for payment should be made during the usual hours of business, and, if at a banker's, within banking hours.³ If the party who is to pay the bill be not a banker, presentment may be made at any time when he may reasonably be expected to be found at his place of residence or business, though it be eight o'clock in the evening.⁴

The consequence of not duly presenting a bill or note is, that all the antecedent parties are discharged from their liability, whether on the instrument or on the consideration for which it was given. The acceptor or maker, however, still continues liable. And, indeed, presentment is never necessary for the purpose of charging him, the action itself being held to be a sufficient demand, and that though the instrument be made payable on demand.⁵ But though the absence of demand be no defence, yet if the acceptor or maker pays after action without any previous demand, it seems, the court would take the question of costs into consideration.⁶

Where a bill or note was made or accepted payable at a particular place, it was formerly a point much disputed, whether a presentment at that place was necessary in order to charge the acceptor or maker. At length the 1 & 2 Geo. IV. c. 78 declared, that an acceptance payable at a particular place is a general acceptance, unless expressed to be payable there "*only, and not otherwise or elsewhere.*" On this statute it has been decided, that the acceptance is general, though the bill be made payable at a particular place by the drawer, if not so made payable by the acceptor.⁷

This statute does not extend to promissory notes.⁸ If, therefore, a note be in the body of it made payable at a particular place, it is still necessary to aver and prove presentment there.⁹ But if the place of payment be merely mentioned in a memorandum, that is held to be only a direction, and not to qualify the contract; and consequently a pre-

¹ Ward v. Evans, 2 Ld. Raym. 928; Moore v. Warren, 1 Stra. 415; Fletcher v. Sandys, 2 Stra. 1248; Turner v. Mead, 1 Stra. 416; Hoar v. Da Costa, 2 Stra. 910; Appleton v. Sweetapple, Bayley, 192.

² Pocklington v. Sylvester, Chitty, 274; Robson v. Bennett, 2 Taun. 388; Rickford v. Ridge, 2 Camp. 537.

³ Parker v. Gordon, 7 East, 385; Elford v. Teed, 1 M. & S. 28; Jameson v. Swinton, 2 Taun. 224.

⁴ Barclay v. Bailey, 2 Camp. 527; Morgan v. Davison, 1 Taun. 114.

⁵ Rumball v. Ball, 10 Mod. 38; Framp-ton v. Coulson, 1 Wils. 38.

⁶ McIntosh v. Haydon, 1 R. & M. 363.

⁷ Selby v. Eden, 3 Bing. 611; S. C. 11 Moo. 511; Fayle v. Bird, 6 B. & C. 581; 9 Dowl. & R. 639.

⁸ Notwithstanding this act, and independently of the decision in Gibb v. Mather, if a bill be accepted, payable at a particular place (though not expressed to be payable there *only, and not otherwise or elsewhere*), the addition of the place where payable is not surplusage; for, upon default made at that place, the right of the holder to sue the previous parties to the bill is complete.—Mackintosh v. Haydon, Ryan & Moody, 362; Hawkey v. Borwick, 4 Bing. 135; S. C. 12 Moo. 478. Before the act, the holder *must* have presented there. Now, he *may* present effectually there; and (as was supposed until the decision in Gibb v. Mather) may also present effectually to the acceptor himself.

⁹ Sanderson v. Bowes, 14 East, 500; 16 East, 112; 2 B. & B. 165.

sentment there is not essential to charge the maker. And an averment in the declaration, that the note was made payable there, has even been held a fatal mis-description.²

But though, as between the holder and the acceptor of a bill, presentment for payment is not strictly necessary in order to charge him, unless the acceptance has made it expressly payable at a certain place and *not otherwise or elsewhere*, yet the rule is different as between the holder and the drawer and indorsers; for their liability is only conditional, to pay if the acceptor does not pay according to the tenor of the bill upon the holder using due diligence to obtain payment. It is a part of the holder's due diligence to present on the very day and at the very place mentioned upon the bill or note (no matter whether the acceptance be general or qualified, nor whether the place be mentioned in the body of the note, or how otherwise); and though, upon these distinctions, it may not be his duty to the acceptor or maker to present, yet it is his duty to the drawer and indorsers; and if he does not perform it, they will be discharged. And although the drawee, acceptor, or maker be bankrupt, or have notoriously stopped payment, that circumstance will not make any difference in the holder's duty to present the bill or note for payment.

A person who has guaranteed the due payment of a bill may be released from responsibility by the neglect of the holder duly to present it for payment, if he can show that he was thereby prejudiced.

Neglect of presenting for payment is excused, in the case of a bill or note payable on demand, if the holder, before the period at which he should have presented it, put it into circulation.³ And advantage from such neglect is waived by any antecedent party who subsequently, *with notice of the laches*, promises to pay the bill, or makes a partial payment on account of it.⁴

IX. OF PAYMENT.

Payment should be made to the holder and real proprietor of the bill for payment to any other party is no discharge to the acceptor unless, indeed, the money paid finds its way into the holder's hands, and the holder has treated it as received in liquidation of the bill.

There are some cases in which payment to a wrongful holder is protected, and others in which it is not. If a bill or note payable *to bearer* (either originally made so, or become so by an indorsement in blank) be lost or stolen, we have seen that a *bonâ fide* holder may compel payment. But not only is the payment to a *bonâ fide* holder protected, but payment to the thief or finder himself will discharge the maker or acceptor, provided such payment were not made with a knowledge of the infirmity of the holder's title, or under circumstances which might reasonably awaken the suspicions of a prudent man. But if such a payment be made under suspicious circumstances, or without

² Price v. Mitchell, 4 Camp. 200; Williams v. Waring, 10 B. & C. 2. But in a case where the body of the note was printed, except the amount, the names of the parties, and the date—a memorandum of the place where it was payable being also printed—it was held that a special presentment was necessary.—Trecothick v. Edwin, 1 Stark, 468.

³ Exon v. Russell, 4 M. & S. 505.

⁴ Camidge v. Allenby, 6 B. & C. 382; S. C. 2 Dowl. & R. 391.

⁵ Vaughan v. Fuller, Stra. 1246; Blissard v. Hirst. Burr. 2670; Goodall v. Dolley, 1 T. R. 712; Rogers v. Stephens, 2 T. R. 713; Anson v. Bailey, B. N. P. 276.

reasonable caution, or out of the usual course of business, it will not discharge the payer. But the same degree of caution is not necessary in the case of a payee as is necessary in the case of a *discount*,¹ for the acceptor or maker is compellable to pay to an innocent holder, whereas a discount is in all cases perfectly optional. If payment be made before the bill or note is due, or after it is due, or, in case of a check, long after it is drawn, that is a payment out of the usual course of business. If the bill or note be not payable to bearer, but transferable by indorsement only, and be paid to a wrong party, the payer is not discharged.

If the bill be paid, the payer has a right to demand its being delivered up to him; but if it be not paid, the holder should keep it. Yet it has been held, that an agent is justified, by the usage of trade, in delivering it up on receiving a check, though that check is afterwards dishonoured.² But the drawer and indorsers, in such a case, would be discharged, for they have a right to insist on the production of the bill, and to have it delivered up on payment by them.³ If the holder of a check receive bank-notes instead of cash, and the banker fail, the drawer is discharged.⁴

A bill is not discharged and finally extinguished until paid by the acceptor; nor a note until paid by the maker.

It does not appear to be settled, whether part payment by the drawer to the holder will discharge the acceptor *pro tanto*, or whether the holder may, nevertheless, recover the whole amount from the acceptor, and hold an equivalent to the amount received from the drawer, as money received of the acceptor to the drawer's use.⁵ It is conceived, that the holder can only recover of the acceptor the amount of the bill minus the sum paid by the drawer. The acceptor is the principal, and the drawer is the surety; it should seem, therefore, that a payment by the drawer discharges the acceptor's liability to the holder *pro tanto*, and makes the acceptor liable to the drawer for money paid to his use. Besides, had the drawer paid the whole bill, nominal damages only could have been recovered by the holder of the acceptor.

The acceptor of a bill, whether inland or foreign, or the maker of a note, should pay it on demand made at any time within business hours on the day it falls due. And if it be not paid on such demand, the holder may instantly treat it as dishonoured.⁶ But the acceptor has the whole of that day within which to make payment; and though he should in the course of that day refuse payment, which entitles the holder to give notice of dishonour, yet if he subsequently on the same day makes payment, the payment is good.⁷

A payment after action brought will not prevent the holder from proceeding for his costs.⁸

¹ 2 C. & P. 221.

² Russell v. Hankey, 6 T. R. 12.

³ Powell v. Roche, Chitty, 287; 6 Esp. 76.

⁴ Vernon v. Boverie, 2 Show, 296.

⁵ In Johnson v. Kennion, recognized in Walwyn v. St. Quintin, 1 B. & P. 658, it was held that the holder was entitled to recover the whole amount; but in Bacon v. Searles, 1 J. C. Bla. 88, it was considered that he could recover only the difference,

and the report of the case of Johnson v. Kennion was reflected on. See also Pierson v. Dunlop, Cowp. 571.

⁶ Ex parte Moline, 1 Rose, 303; Burbridge v. Manners, 3 Camp. 193; Leftley v. Mills, 4 T. R. 170; 3 B. & P. 602.

⁷ Hartley v. Case, 1 C. & P. 556. A plea of tender after the day of payment is insufficient.—Hume v. Peploe, 8 East, 168.

⁸ Toms v. Powell, 6 Esp. 40; 7 East, 536.

A plea of tender after the day of payment is insufficient on the part of the acceptor. But a *drawer* or *indorser* is not bound to pay till notice and request; and therefore a plea of tender after the bill became due might be good, if pleaded by a drawer or indorser. And as a drawer or indorser has a reasonable time to pay, he might, it should seem, plead a tender even after request, and of principal only without interest.¹

A release at maturity, like a payment at maturity, operates as a complete extinction of the bill. But a premature release will not, any more than a premature payment, protect the releasee from liability to a subsequent holder without notice.

If the holder constitute any one of the parties liable to him his executor, and die, the appointment is equivalent to payment and a release.²

There are many circumstances under which a legacy by a debtor to his creditor, of equal or greater amount than the debt, will be considered a satisfaction of the debt. But a legacy to the holder of a *negotiable* bill or note can never be considered as a satisfaction of the debt on that instrument.³

It is usual to write a receipt on the back of bills, and it has been said that it is the duty of bankers to make some memorandum on bills or notes which have been paid. A receipt on a bill or note duly stamped does not require an additional stamp.⁴ A receipt on the back of a bill imports *prima facie* that it has been paid by the acceptor. And a receipt on a distinct piece of unstamped paper, though it cannot be looked at as evidence of the payment, may be shown to a witness who has signed it, to refresh his memory, and enable him to speak to the fact of payment.⁵ Letters by the general post, acknowledging the safe arrival of any bills of exchange, promissory notes, or any other securities for money, are exempted from stamp duty.⁶

X. OF NOTICE OF DISHONOUR.

In general, it is incumbent on the holder of a bill or note dishonoured, whether by non-acceptance or by non-payment, to give notice of that fact to the antecedent parties. The requisites of notice and the consequences of neglect being much the same in both cases, under the general head of *notice of dishonour* will be considered notice of non-acceptance and notice of non-payment.

1. *As to the Mode of giving Notice.*—The notice of dishonour, which is commonly substituted in this country in the place of a formal protest (such formal protest being essential in other countries to enable the holder to recover), does not require all the precision and formality which accompanied the regular protest for which it has been substituted; but it should at least inform the party that the bill has been dishonoured, and that the holder looks to him for payment. Thus, a letter was written by the attorney of the indorsee to an indorser to

¹ Walker v. Barnes, 5 Taun. 240; Sow-
ard v. Palmer, 8 Taun. 277; 2 Moo. 274.

² Freakley v. Fox, 9 B. & C. 130.

³ Carr v. Eastabrook, 3 Ves. 561.

⁴ 55 Geo. III. c. 184, Sched. Receipts.

—A receipt may be explained: Graves v.
Key, 3 B. & Ad. 313.

⁵ Maugham v. Hubbard, 8 B. & C. 14;
2 Man. & R. 5.

⁶ 53 Geo. III. c. 184.

the following effect: "A bill for 683l., drawn by K. on J. & Co., and bearing your indorsement, has been put into our hands by A., with directions to take legal measures for the recovery thereof, unless immediately paid to us;" it was held that this letter was not a sufficient notice of dishonour, as it did not inform the party *that the bill had been dishonoured*. Again, the notice must not so misdescribe the instrument as that the party may, perhaps, be led to confound it with some other. Thus, a notice in the following terms: "I give you notice, that a bill for &c., at &c., *drawn* by you upon &c., lies at &c., dishonoured," was held not sufficient to sustain an action against an indorser who was not the drawer.¹

Personal service of the notice is not necessary, nor need it even be in writing. A message sent to a counting-house, within the usual hours of business, is sufficient, though no person be in attendance.²

Putting a letter into the post is the most common and the safest mode of giving notice; it is not necessary to prove that the letter was received; and any miscarriage will not prejudice the party giving notice.³ It has been ruled that, in London, delivery of a letter to a bellman in the street is not sufficient, and that it should be sent either to the General Post Office, or to an authorized receiving-house.⁴ It is not sufficient that the letter be directed, generally, to a person at a large town, as, for example, to "Mr. Hayes, Bristol,"⁵ without specifying in what part of it he resides, unless where such person has dated the bill in an equally general manner.

Though there be a general post, the holder may send notice by a special messenger; and where the communication by post is infrequent, the party may be charged a reasonable sum for the expence of a special messenger.⁶

In the case of a foreign bill, it is sufficient to send notice by the first regular ship bound for the place to which it is to be sent; and it is no objection that, if sent by a chance ship, bound elsewhere, it would have arrived sooner.⁷

2. *As to the Time when Notice of dishonour should be given.*—The general rule is, that notice must be given within a reasonable time, and what is a reasonable time is a question of law, depending on the facts of each particular case.⁸

Where the holder, and the party to whom notice is addressed, live at different places, it is sufficient to send off notice on the day next after the day of dishonour. "It is," says Abbott, C. J., "of the greatest importance to commerce, that some plain and precise rule should be laid down, to guide persons in all cases as to the time within which notice of the dishonour of bills must be given. That time I have always understood to be, the departure of the post on the day following⁹ that in which the party receives intelligence of the

¹ *Beauchamp v. Cash*, 1 D. & R. N.P.C. 3.

² *Cross v. Smith*, 1 M. & S. 545; *Goldsmith v. Bland*, S. P. Chit. 220; *Bayley*, 200; *Bencroft v. Hall*, *Holt's N.P.C.* 476.

³ *Sanderson v. Judge*, 2 H. Bla. 509; *Kufh v. Weston*, 3 Esp. 84; *Perker v. Gordon*, 7 East, 385; *Langdon v. Mills*, 5 Esp. 187; *Dobree v. Eastwood*, 3 C. & P. 250.

⁴ *Hawkins v. Rutt*, *Peake's N. P. C.* 186.

⁵ *Walter v. Haynes*, 1 R. & M. 149.

⁶ *Pearson v. Crallen*, 2 Smith, 404.

⁷ *Muilman v. D'Eguino*, 2 H. Bla. 565.

⁸ *Darbishire v. Parker*, 6 East, 8.

⁹ *Williams v. Smith*, 2 B. & A. 496. If both parties live in the same town, or within the limits of the district post, notice should be given so that it may be received on the day following the day of dishonour.

dishonour. If the post does not go out on the next day, notice need not be posted till the day after, or till the next post-day."

A party receiving notice of dishonour need not transmit it till the next post after the day on which he himself receives the notice.¹

It has been doubted² whether, as the acceptor of an inland bill has, as in the case of other debts, the whole of the day on which the bill falls due, notice of nonpayment *can* be given till the day after. But it is now settled that notice may be given at any time after demand on the day the bill becomes due. "The other party," observes Lord Ellenborough, "cannot complain of the extraordinary diligence used to give him information."³

Notice of dishonour may be given on the same day, though there be no actual refusal, if the house where the bill is payable be shut up and no one be there.⁴

A banker with whom a bill is deposited to receive payment is, for the purpose of notice, to be considered as a distinct holder, and has a day to give notice to his customer, and the customer another day to give notice to the antecedent parties.⁵ Upon the same principle, where the holder of a bill employed an attorney to give notice to an indorser, and the attorney wrote to another professional man, requesting him to ascertain the indorser's residence, and received an answer to his letter, conveying the desired information on the 16th of the month, which information he communicated to his principal on the 17th, and on the 18th forwarded the letter containing the notice of dishonour, it was held sufficient.⁶

Sunday, Christmas Day, Good Friday, a public thanksgiving or fast-day, or any festival on which a man is forbidden by his religion to transact any secular affairs (for the law merchant respects the religion of different people), is not to be reckoned in computing the time when notice of dishonour should be given.⁷ If a man receive a letter containing notice of dishonour on such a day, he is not bound to open it on that day, and will be considered as having received notice on the next day.

It lies on the plaintiff to show that notice was given in due time.

3. *By whom Notice should be given.*—The object of notice is twofold: first, to apprise the party to whom it is addressed of the dishonour; and secondly, to inform him that the holder, or party giving the notice, looks to him for payment.⁸ Hence it follows that notice can only be given by some party to the instrument, and that a stranger is incompetent to give it.⁹ And it has been held by Lord Eldon, that notice by the first indorser, who had not himself received notice from the second indorser, and who was not therefore obliged to take back the bill, was insufficient as between the second indorser and the drawer. But it is otherwise if the first indorser has himself received due notice.¹⁰ And notice by the holder, or by a party liable to be sued and entitled to sue

¹ Geill v. Jeremy, 1 M. & M. 61.

² Leftley v. Mills, 4 T. R. 170.

³ Burbridge v. Manners, 3 Camp. 193; *Ex parte Moline*, 19 Ves. 216; *Hume v. Peplow*, 8 East, 169.

⁴ *Hine v. Allely*, 4 B. & Ad. 624.

⁵ *Robson v. Bennett*, 2 Taun. 388; *Langdale v. Trimmer*, 15 East, 291.

⁶ *Firth v. Thrush*, 8 B. & C. 387; 2 Man. & Ry. 259.

⁷ 39 & 40 Geo. III. c. 42; 7 & 8 Geo. IV. c. 15; *Lindo v. Unsworth*, 2 Camp. 602; *Tasell v. Lewis*, 1 Ld. Raym. 743.

⁸ *Tindall v. Brown*, 1 T. R. 167.

⁹ *Stewart v. Kennett*, 2 Camp. 177.

¹⁰ *Jameson v. Swinton*, 2 Camp. 572.

on the bill, will enure to the benefit of all antecedent or subsequent parties. So that a notice by the last indorser to the drawer will operate as a notice from each indorser to the drawer; and if the payee has duly received notice, a notice by him to the drawer will be equivalent to a notice from each indorser and the holder to the drawer.¹

4. *To whom Notice is to be given.*—It is the safest course for the holder to give notice himself to all the parties against whom he may wish to proceed; for if he merely give notice to his immediate indorser, and it be not regularly transmitted to the antecedent parties, they are discharged.² Even though the neglect of one is compensated by the extraordinary diligence of another, laches once committed discharges all the antecedent parties, and subsequent notices are invalid, for they are given by parties who are no longer liable on the bill.

As notice may be given by leaving it at a counting-house, notice to an agent for the general conduct of business must of consequence be sufficient notice to the principal,³ but notice to a man's attorney is not sufficient.⁴

Where a bill is accepted payable at a particular place, it is not necessary in an action against the acceptor, to have given him notice of the dishonour. The effect of such an acceptance is a substitution of the house, banker, or other person therein mentioned for the house or residence of the acceptor, and consequently the presentment at the house, or to the party named in the acceptance, is equivalent to presentment at the house of the acceptor.

Where parties are jointly liable on a bill, notice to one is sufficient.⁵

If a man assign a bill without indorsement, he is not entitled to notice of non-acceptance.⁶ Therefore it seems that a man merely guaranteeing the payment of a bill, but not a party to it, is not discharged by the neglect of the holder to give him notice of dishonour, unless he has been actually prejudiced by such neglect.⁷

Though a man indorse a bill, yet if he also give a bond conditioned for its payment, absence of due notice of dishonour is no plea to an action on the bond.

5. *Consequences of neglect to give due notice.*—The law presumes that if the drawer has not had due notice, he is injured, because otherwise he might immediately have withdrawn his effects from the hands of the drawee, and that if the indorser has not had timely notice, his remedy against the parties liable to him is rendered more precarious. The consequence, therefore, of neglect of notice is, that the parties to whom it should have been given are discharged from all liability, whether on the bill or on the consideration for which it was given.⁸

It was once considered that the omission to give due notice did not discharge the parties from liability, unless they could prove that some particular loss or injury had arisen to them from the neglect or delay, as the intermediate failure of the acceptor, &c. But the settled

¹ Bayley, 209.

² Marsh v. Maxwell, 2 Camp. 210, n.; Smith v. Mullett, 2 Camp. 208.

³ Crosse v. Smithe, 1 M. & S. 555.

⁴ Ibid, 554.

⁵ 1 Camp 83; 1 M. & S. 359.

⁶ Van Wart v. Woolley, 3 B. & C. 439; S. C. 1 M. & M. 520; Swinyard v. Bowes,

5 M. & S. 62.

⁷ Warrington v. Furber, 8 East, 242; Philips v. Astling, 2 Taun. 206; Swinard v. Bowes, 5 M. & S. 62; Holbrow v. Wilkinson, 1 M. & S. 11; Van Wart v. Woolley, 3 B. B. & C. 439; 5 Dowl. & R. 347.

⁸ Bridges v. Berry, 3 Taun. 130.

rule now is, that the omission to give regular notice of dishonour is an *absolute* and *positive* release or discharge of the parties entitled to receive it, unless they choose to waive the laches. There is an irresistible legal inference that an injury has resulted to them; no inquiry on the subject is allowed (except in the instance of want of effects in the hands of the party primarily liable); and even proof by the holder that no prejudice had occurred to the defendant (as that the acceptor had previously become insolvent &c.) will not cure the defect.

If, indeed, the drawer of a bill or check, or the payee of a note, had not any effects in the hands of the drawee of the bill or check, or maker of the note, either at the time the instrument was drawn, or when it became due, or at any time during the intermediate period, and the instrument was drawn for his own accommodation, he is not entitled to take advantage of the want of notice of dishonour. This exception was introduced by the decision in *Bickerdike v. Bollman*, where no notice had been given under circumstances of the above nature. And the reasons for it are, that under such a state of facts the drawer of the bill or check, or payee of the note, has not sustained any injury. He is not only assumed to have known and expected that the instrument would be dishonoured, but had no credit to withhold or funds to withdraw; and more especially he is not prejudiced, because the notice would be useless to him if given, for he would have no remedy over upon the instrument against the drawee or maker, if he took it up.

But this exception, though sanctioned, is not favoured, and has received considerable qualification from subsequent authorities.

In the first place, it is *presumed* that the drawer and payee respectively had effects with the drawee of the bill and maker of the note. It is for the holder to prove the negative, viz., the absence of effects or consideration, in order to dispense with the proof of notice. And the exception does not apply if the party (the drawer of the bill, or payee of the note) had any funds with the drawee of the bill or maker of the note, though much less than the amount of the instrument, or became his creditor at any time during its currency, that is, before its dishonour;—or if there were effects when the instrument was drawn, although the balance of accounts, when it became due, was in favour of the acceptor or maker, or he was then a creditor of the drawee or maker to a larger amount than the value of the goods in hand, at least if the latter had not consented that the effects should be applied in payment of the debt;—or if there were reasonable grounds for an expectation on the part of the drawer that the bill or note would be honoured, either by reason of his having sold and consigned effects (for the price whereof he drew) to the drawee or maker, or transmitted effects to an agent for the purpose of enabling him to provide for the payment, or on account of the nature and state of the accounts or transactions or cross-dealings between the parties;—and in these instances of a reasonable confidence or trust that the instrument will not be dishonoured, notice must be given, although from circumstances the anticipated assets were not received or realized at the time provided for payment.

A person who draws or indorses a bill, or indorses a note, for the

accommodation of the acceptor or maker, or payee, or prior indorser, has, on paying the instrument, a remedy over thereon against the acceptor or maker or prior party. It follows, that a person thus lending his name is entitled to notice of dishonour, and is exonerated by laches, although he had no effects with the acceptor or maker, for he may have been prejudiced by the neglect, and it is a legal conclusion (not allowed to be rebutted) that he is so.

And as the indorser of a bill &c. has no concern with the accounts between the drawer and the acceptor, he (the indorser) is entitled to notice, although the drawer had no effects in the hands of the acceptor. The indorser is discharged from liability under such circumstances, if due notice is not given to him. And it seems he would be equally exonerated in such case, although he was aware of the facts, and gave no value for the instrument, but lent his name merely to assist a prior party; unless he received from such party a deposit of assets, enabling him to pay the instrument. It seems to be necessary to give notice to every party to the instrument who has a reasonable ground to expect that another person may pay it, and who will have a remedy over if he himself take it up.

Proof of notice of nonpayment cannot be dispensed with by showing that the instrument was lost or stolen or destroyed before it became due, and that a new bill was demanded; or that the acceptor or maker was dead, or had notoriously become insolvent or bankrupt, or was a fictitious person (the defendant not being privy to the fraud). And although in some cases a delay in giving notice may be justified by accidental circumstances, over which the holder had no controul, rendering it impracticable to give due notice; yet the mistake of the holder in directing a letter containing the notice will not be excused.

Nor is notice excused by proof that the drawer had been told, before the dishonour by the acceptor, that the latter would be unable to pay the bill, and that it was understood between them that the former would have to provide for it; or by shewing that there was a parol agreement when the instrument was made, that payment should be deferred until certain estates of the acceptor were sold and realized sufficient funds, so that the drawer knew that the bill was not duly honoured. Knowledge of dishonour is not equivalent to due notice thereof from a party to the bill.

There can be no doubt that the drawer or an indorser may dispense with the necessity of giving him notice; but such dispensation ought, it seems, to be by some express and unequivocal act or expression. Therefore proof of presentment and notice (and of protest, when necessary) may be dispensed with, or supplied, by evidence that the defendant (having full knowledge of the facts or laches, though ignorant that their legal effect was to discharge him) unequivocally promised payment to any subsequent party to the bill or note, or made a partial payment on account.

Ignorance of a party's residence will excuse neglect to give notice of dishonour, so long as that ignorance continues without neglecting to use the ordinary means for acquiring information. Due diligence has, however, been held to be a question of fact. After the residence of the party is discovered, the holder has the same time to give notice as he would have had in the first instance.

The death or dangerous illness of the holder or his agent, or other accident rendering notice impossible, may excuse it. But where an indorser, left home on account of the dangerous illness of his wife at a distance, and a letter containing notice of dishonour of a bill lay unopened at his shop during his absence till after the proper time for giving his indorser notice, Lord Ellenborough held that these circumstances afforded no excuse for the delay.¹

If the drawer of the bill make it payable at his own house, this is evidence to go to the jury that it is an accommodation bill, of the dishonour of which it is not necessary to apprise the drawer. "I cannot understand," says Lord Tenterden, "why the drawer should with his own hand make the bill payable at his own house, unless he was to provide for the payment of it when at maturity."²

Waiver of Notice.—The consequences of neglect of notice will be waived by a subsequent promise to pay, or by payment of part, or by an acknowledgment of liability,³ though after action brought.⁴

It makes no difference that such promise, payment, or acknowledgment was made under a misapprehension of the law, for every man must be taken to know the law.⁵ But if the promise &c. be made under a misapprehension of fact, as if the bill had been presented for acceptance, and acceptance had been refused, a promise to pay, in ignorance of that circumstance, is no waiver of the consequences of laches.⁶ But a promise to pay will entirely dispense with proof of presentment or notice, and will throw on the defendant the double burthen of proving laches, and that he was ignorant of it.⁷ The promise must be unconditional.⁸ Where it is only as to part of the sum, the plaintiff can only avail himself of it *pro tanto*. A drawer of a bill for 200*l.*, who had not received due notice of dishonour, said, "I do not mean to insist on want of notice, but I am only bound to pay you 70*l.*" Abbott, C. J. "The defendant does not say that he will pay the bill, but that he is only bound to pay 70*l.* I think the plaintiff must be satisfied with the 70*l.*"⁹ The acknowledgment or promise may be made by the attorney for the defendant, or by his clerk who has the management of the case.¹⁰ It need not be made to the plaintiff, but may be made to another party to the bill, or to a stranger.¹¹ A promise to pay made by the drawer in expectation that a bill will be dishonoured, but before it is dishonoured, does not dispense with notice; for it is to be understood as a promise on condition that due notice is given.¹²

If a party sued upon a bill &c. suffer judgment by default, he admits the cause of action, and waives the defence of laches. So the payment

¹ Turner v. Leech, Chit. 213.

² Sharp v. Bailey, 9 B. & C. 44.

³ Vaughan v. Fuller, 2 Stra. 1246; Horford v. Wilson, 1 Taun. 12; Lundie v. Robertson, 7 East, 231; Brett v. Levell, 13 East, 213; Wood v. Brown, 1 Stark. 217; Hopes v. Alder, 6 East, 16; Whitaker v. Morris, 1 Esp. N.P. 60; Rogers v. Stephens, 2 T. R. 713; Dixon v. Ellison, 5 C. & P. 437; Margetson v. Aitken, 3 C. m P. 338.

⁴ Hopley v. Dufresne, 15 East, 275.

⁵ Bilbie v. Lumley, 2 East, 469.

⁶ Goodall v. Dolley, 1 T. R. 712; Blesard v. Hurst, 5 Burr. 2672; 1 B. & P. 236; 2 Camp. 333.

⁷ Taylor v. Jones, 2 Camp. 105; Stevens

v. Lynch, 12 East, 38; S.C. 2 Camp. 332.

⁸ Dennis v. Morris, 3 Esp. 158; Cumming v. French, 2 Camp. 106, n. And see Rouse v. Redwood, 1 Esp. 156; Standage v. Creighton, 5 C. & P. 406; and Borrodale v. Lowe, 4 Taun. 93, where it is said that an indorser can only be made liable by an express promise.

⁹ Fletcher v. Froggat, 2 C. & P. 569.

¹⁰ Standage v. Creighton, 5 C. & P. 406.

¹¹ Potter v. Rayworth, 13 East, 417; Gunson v. Metz, 1 B. & C. 193; Fletcher v. Froggat, 2 C. & P. 569.

¹² Roscoe v. Hardy, 12 East, 434.

of money into court upon account of a bill admits the facts stated in such court, and the holder's title, and consequently precludes the defendant from relying at the trial upon the defence of laches.

Though a party may waive the consequences of laches in respect of himself, he cannot do so in respect of antecedent parties.

No laches can be imputed to the crown; and therefore if a bill be seized under an extent before it is due, the neglect of the officer of the crown to give notice of the dishonour will not discharge the drawer or indorsers.¹

XI. OF PROTEST AND NOTING.

A *protest* is, in form, a solemn declaration, written by a notary under a fair copy of the bill, setting forth that payment or acceptance (as the case may be) has been demanded and refused; the reason (if any) assigned; and that the bill is therefore protested.

At the time of such refusal of acceptance or payment, it is usual for the notary to make a minute on the bill itself, consisting of the month, the day, the year, and the charges for minuting, subscribed with the initials of the notary's name.² This is the preparatory step to protest, and is called *noting*.

In the case of inland bills, protest is unnecessary in any case. It was formerly thought requisite in order to enable the holder to recover interest, damages, and costs; but a recent decision has established that it is superfluous even for that purpose.³ An inland bill, however, is often *noted*, without any intention of protesting it; by which practice, in case of trial, satisfactory evidence can be conveniently afforded of its presentment and dishonour.

But with respect to a foreign bill, if, on presentment of it for acceptance or payment, it be not duly honoured, it is incumbent on the holder immediately to protest it, and to send a copy of the protest, or some other memorial of it, with the notice, to the drawer, especially if he reside abroad; though if he reside in this country, it does not appear to be absolutely necessary.

The protest should be made by a notary public, and should be begun by the ceremony of noting, before explained, on the day on which acceptance or payment is refused;⁴ though it may be completed at any time before the commencement of a suit.⁵

Besides the protest for non-acceptance and non-payment, there may also be a protest for *better security*. This is usual when the acceptor absconds or becomes insolvent before the bill is due, or when, in consequence of the acceptor's credit having been publicly impeached, the holder has any reason to believe that it would not be paid. But though the holder is entitled to make this protest, the drawer and indorsers are not compellable to give fresh security, and the holder must still wait until the bill becomes due before he can sue any party; though, after such a protest, there *may* be a second acceptance for honour.⁶

The causes which excuse a neglect to protest a foreign bill are, if the drawer had no effects in the hands of the drawee, and no reason-

¹ West on Extents, 28, 29.

² Kyd, 87.

³ Windle v. Andrews, 2 Barn. & Ald.

⁴ B. N. B. 272.

⁵ Chaters v. Bill, 4 Esp. 48; but see Vandewal v. Tyrrell, 1 M. & M. 87.

⁶ Ex parte Wackerbath, 5 Ves. 574.

able expectation that the bill would be honoured;¹ or if the drawer has absolutely admitted his liability by promising to pay.

When the protest is made for a qualified acceptance, it should not state a general refusal to accept, otherwise the holder cannot avail himself of the qualified acceptance.²

XII. OF ACCEPTANCE AND PAYMENT SUPRA PROTEST

When acceptance is refused, and the bill is protested for non-acceptance, or where it is protested for better security, any person may accept it *supra protest* for the honour of the drawer or any one of the indorsers. The method is as follows:—The acceptor *supra protest* personally appears before a notary public with witnesses, and declares that he accepts such protested bill in honour of the drawer or indorser, as the case may be, and that he will satisfy the same at the appointed time; and then subscribes the bill with his own hand, thus—"Accepted *supra protest*, in honour of A. B." &c.; or, as is more usual, "Accepts, S. P." A general acceptance *supra protest*, which does not express for whose honour it is made, is considered as made for the honour of the drawer.³

The undertaking of the acceptor *supra protest* is not an absolute engagement to pay at all events, but only a collateral conditional engagement to pay if the drawee does not.⁴

At maturity the holder should again present it to the drawee for payment, who may, in the meantime, have been put in funds by the drawer for that purpose.* If payment by the drawee be refused, the bill must be protested a second time for non-payment, and then the acceptor *supra protest* may be sued.⁵

If the bill be drawn payable at a certain period after sight, and accepted *supra protest*, a second presentment for payment, and protest and notice, are still essential for the purpose of enabling the holder to sue either drawer or acceptor *supra protest*, or enabling the latter to sue the party for whose honour he has accepted; and the time which the bill has to run is computed, not from the date of the exhibition to the drawee, but from the date of the acceptance *supra protest*.⁶

The acceptor *supra protest* becomes liable to all parties on the bill subsequent to him for whose honour the acceptance was made.⁷

By acceptance *supra protest*, the party for whose honour it was made, and all parties antecedent to him, become liable to the acceptor *supra protest* for all damages which he may incur by reason of his acceptance.⁸ The acceptor *supra protest*, where the bill has been protested for better security, has his remedy also against the acceptor;⁹ but in case of bankruptcy of both drawer and acceptor, if the acceptance were for the accommodation of the drawer, the acceptor *supra protest* must first resort to the drawer's estate. But it has been since held that, in such a case, the acceptor *supra protest* has no claim on the assignees of the acceptor.¹⁰

¹ Legge v. Thorpe, 12 East, 171.

² Bentinck v. Dorrien, 6 East, 199;

Sproat v. Matthews, 1 T. R. 182.

³ Chitty, 242.

⁴ Hoare v. Casenove, 16 East, 391.

⁵ Ibid.

⁶ Williams v. Germaine, 7 B. & C. 468;

S. C. 1 Man. & R. 394, 403.

⁷ 16 East, 391.

⁸ Beawes, 47.

⁹ Ex parte Wackerbath, 5 Ves. 574.

¹⁰ Ex parte Lambert, 13 Ves. 179.

When a bill accepted *supra protest*, or having a reference thereon in case of need, was protested for want of payment, it was formerly a matter of doubt with commercial men as to the day on which such bill should be presented for payment to the acceptors or acceptor for honour, or to the referees or referee; but such doubt is now removed by the 6 & 7 Wm. IV. c. 58, which enacts, that it shall not be necessary to present such bill of exchange to such acceptors or acceptor for honour, or to such referees or referee, until the day following the day on which it becomes due, and that if the place of address on such bill of exchange of such acceptors or acceptor for honour, or of such referees or referee, shall be in any city, town, or place other than in the city, town, or place where such bill shall be made payable, it shall not be necessary to forward such bill of exchange for presentment for payment to such acceptors or acceptor for honour, or referees or referee, until the day following the day on which such bill shall become due. And by sect. 2 it is declared, that if the day following the day on which such bill shall become due be a Sunday, Good Friday, or Christmas-day; or a day appointed for a public fast or thanksgiving, it shall not be necessary that such bill be presented for payment to such acceptors or acceptor for honour, or referees or referee, until the day following such Sunday, Good Friday, Christmas-day, or day of fast or thanksgiving.

A party paying *supra protest* has his action against the party for whom the payment was made, and all other parties to whom that party could have resorted for reimbursement.¹ And where a party pays a bill generally for honour without a protest, he, as an indorsee, may sue any party.² The party paying *supra protest* has also his remedy against the acceptor,³ but not if it were an accommodation acceptance; at least if the acceptance *supra protest* were for the honour of the drawer.⁴ It is necessary that the protest should be drawn up before payment.⁵

XIII. OF INDULGENCE.

If the holder of a bill or note &c., by any agreement or transaction with any party to the instrument, place himself under a *legal obligation* to give him time for payment, so that the legal remedy is suspended, such of the other parties to the instrument as would, on taking it up have a right of action thereon against the party indulged, and who have not consented to the agreement, are discharged from all liability in respect of the bill &c., and the debt for which it was given, although there may have been a proper presentment for payment and due notice of dishonour.

A party liable on a bill sometimes bears to the holder the relation of principal debtor, sometimes of surety only. It is a general rule of law, that a discharge of the principal is a discharge to the surety. In inquiring, therefore, into the effect of a discharge or indulgence by the holder to parties liable on a negotiable instrument, we shall consider—

1. *What parties to a bill are principals, and what parties are sureties.*—Suppose the bill to have been accepted and indorsed for value, the acceptor is the principal debtor, and all the other parties

¹ Bayley, 259.

² *Martens v. Winnington*, 1 Esp. 112.

Ex parte Wackerbath, 5 Ves. 574.

⁴ Ex parte Lambert, 15 Ves. 179.

⁵ *Vandewall v. Tyrrell*, 1 M. & M. 87.

are sureties for him, liable only on his default. But though all the other parties are, *in respect of the acceptor*, sureties only, they are not as *between themselves* merely co-sureties, but each prior party is a principal in respect of each subsequent party. A discharge, therefore, to the prior parties, the principals, is a discharge to the subsequent parties, the sureties; but a discharge to the subsequent parties, the sureties, is not a discharge to the prior parties, the principals.

Where a bill is payable to the order of a third person, the payee is a subsequent party, and so a surety for the drawer. He stands in the same situation as the first indorsee and second indorser of a bill drawn payable to the indorser's order.¹

It follows, therefore, that a discharge to the acceptor is a discharge to all the parties to the bill;—for, if they were still liable, they could either sue the acceptor, or they could not. If they could, the discharge to the acceptor would be frustrated; if they could not, they must pay the bill without a remedy over, which would extend their liability beyond their contract. So a discharge to an indorser is no discharge of the prior indorsers, for they have no remedy against the discharged indorser; but it is a discharge of the subsequent indorsers,—for if the holder could notwithstanding recover against them, and they could recover against the prior discharged indorser, his discharge would be frustrated; if they could not, they must pay the bill without a remedy over.²

It was formerly held, that where a bill was accepted without consideration for the accommodation of the drawer, the drawer was to be considered the principal debtor, and the acceptor as his surety; and therefore, that time given to the drawer would discharge the acceptor,³ but time given to the acceptor would not discharge the drawer.⁴ But this distinction has since been over-ruled;⁵ and, *in courts of law*, the acceptor, in all cases of accommodation bills as well as others, is considered the principal debtor, though the holder at the time of making the agreement, or even of taking the bill, knew the acceptance to have been without value.⁶

As the acceptor is in all cases the principal debtor on a bill, so the maker is the principal debtor on a note. The indorsers of a note severally stand, as principals or sureties, in the same situation as the indorsers of a bill.

When of a joint and several note one maker is in reality principal and the other surety, it is doubtful whether in any case evidence is admissible to show that one is principal and the other surety, and consequently that the surety is discharged by the time given to the principal.⁷

¹ Claridge v. Dalton, 4 M. & S. 232.

² Smith v. Knox, 3 Esp. 46; Claridge v. Dalton, 4 M. & S. 232.

³ Laxton v. Peat, 2 Camp. 185.

⁴ Collett v. Haigh, 3 Camp. 281.

⁵ Fentum v. Pococke, 5 Taun. 192; Carstairs v. Rolleston, 5 Taun. 551.

⁶ "I think," says Parke J., "that the decision in Fentum v. Pococke was good sense and good law." Price v. Edwards, 10 B. & C. 584; Harrison v. Courtauld, 3 B. & Ad. 36; Nichols v. Norris, 3 B. &

Ad. 42, n. The doctrine laid down in Fentum v. Pococke, has, however, been doubted *in equity* by Lord Eldon, (Ex parte Gledinning, Buck 517; Bank of Ireland v. Beresford, 6 Dow. 235); and by Sir John Leach, when master of the rolls.

⁷ Price v. Edmunds, 10 B. & C. 578; Perfect v. Musgrave, 6 Price. But evidence to that effect has been admitted. Garratt v. Jull, S. N. P. 393; Hall v. Wilcox, 2 M. & M. 58. In Rees v. Berrington, 2 Ves. Jun. 540, Lord Loughborough

2. *As to what transactions between the creditor and the principal debtor will discharge the surety.*—The holder is not obliged to use active diligence in order to recover against the acceptor.¹ He may defer suing him as long as he pleases; he may even promise not to press him, or not to sue him. Thus, where the executrix of an acceptor verbally promised to pay the holder out of her own estate, provided he would forbear to sue, and he forbore accordingly, it was held that the agreement being invalid under the Statute of Frauds, the drawer was not discharged.² But if the holder once destroy or suspend his right of action against the acceptor, the drawer and indorsers are at once discharged.

Payment by the principal of course discharges the surety.

The acceptor is bound to pay on the day the bill or note falls due, and therefore he cannot plead in his own discharge a subsequent tender.³ But an indorser has a reasonable time within which to pay the bill; and if he pay, or tender payment, within a reasonable time, and before writ issued, he discharges himself.⁴ And therefore payment by the acceptor or maker, though after the note has been dishonoured, if within a reasonable time, or with interest, and before action brought against the indorser, or a tender of such payment, though it would not discharge himself, would, it should seem, discharge the indorser.

A release to the acceptor or maker discharges the indorsers.

So will a general covenant not to sue, for that will enure as a release; or a covenant not to sue within a particular time.⁵

So also will a release in law. If the holder makes the acceptor his executor, the indorsers are discharged.

A written or verbal agreement, on good consideration, not to sue the acceptor at all, or not to sue him within a specified time, discharges the indorsers; but if such agreement be without consideration, or otherwise void in law, the indorsers are not discharged.⁶

The taking of a new bill from the acceptor, payable at a future day, discharges the indorsers.⁷

says, "Where two are bound jointly and severally, the surety cannot aver by pleading that he is bound as surety." But in equity, a surety may aver and prove that he was only a surety, though the bond were joint and several: *Heath v. Key*, 1 Y. & J. 434; *Nisbett v. Smith*, 2 Bro. C. C. 581; *Skip v. Hucy*, 3 Ask. 91. The authorities are contradictory; but on principle it would seem that at law, at least, such evidence is inadmissible; for it is parol evidence to make a written contract conditional, which on the face of it is absolute. The evidence does not show absence of consideration, as in the case of an accommodation acceptance. Besides, the introduction of such evidence would affect an innocent indorsee with stipulations of which he had no notice.

¹ *Orme v. Young*, Holt N. P. 84; *Eyre v. Everest*, 2 Russ. 381; 3 Mer. 278; *Trent Navigation v. Harley*, 10 East, 48.

² *Philpott v. Bryan*, 4 Bing. 717.

³ *Hume v. Peplow*, 8 East, 168.

⁴ *Walker v. Barnes*, 5 Taun. 240; *Sow-*

ard v. Palmer, 2 Moo. 274; 8 Taun. 277.

⁵ At law, a parol agreement by the creditor not to sue the principal is no discharge to the surety of a liability he has contracted by deed. *Davey v. Prendergast*, 5 B. & A. 187, recognized in *Price v. Edmunds*, 10 B. & C. 582; *Bulsteel v. Jarrold*, 8 Price, 467; *Cocks v. Nash*, 9 Bing. 346; but see *Ancher v. Hale*, 4 Bing. 464. But in equity, the creditor's giving time to the principal, although by a parol agreement, is a discharge to the surety of a liability created by deed. *Rees v. Berrington*, 2 Ves. Jun. 540; *Bulsteel v. Jarrold*, 8 Price, 467. As to circumstances under which a court of equity will interfere, see *Heath v. Key*, 1 Y. & J. 434.

⁶ *Arundel Bank v. Goble*, K. B. 1817; *Chitty*, 296; S. C. 2 Chitty's Rep. 335; *Williams v. Whitaker*, 2 Marsh. 383; *Brickwood v. Anniss*, 5 Taun. 614; *Philpot v. Briant*, 4 Bing. 717; 1 Moo. & P. 754.

⁷ *Gould v. Robson*, 8 East, 576; *English v. Darley*, 2 B. & P. 62.

Discharging the acceptor or a prior indorser from execution discharges the other indorsers;¹ but discharging a subsequent indorser from execution affords no defence to a prior indorser.²

Part payment by the principal or by the surety will not discharge the surety.³

A mere offer to give time to the acceptor, not acted upon, will not discharge the drawer.⁴

The taking a cognovit or warrant of attorney from the acceptor, though payable by instalments, will not discharge the indorsers, provided the last instalment is not postponed beyond the period when, in the ordinary course of the action, judgment and execution might have been had.⁵

The obtaining of a judgment against any one party, without satisfaction, is no discharge of any other party.⁶

If the acceptor is a bankrupt, the holder may prove and receive a dividend under the commission; for the acceptor is, in case of bankruptcy, discharged, not by the act of the holder, but by act of law. Upon the same principle, if the acceptor, being charged in execution at the suit of an indorsee, is discharged under the Insolvent Act, the indorsee has his remedy against the drawer.⁷

But if the holder voluntarily accepts a composition, the indorsers are discharged.⁸

Though the taking of a fresh bill from the acceptor in lieu of the dishonoured bill discharges the other parties, it will not have that effect if the second bill or second security, whatever it be, were given as a collateral security merely. A warrant of attorney is only a collateral security.⁹

¹ "It is," says Lord Eldon, "a question fit to be tried at law, whether if a party takes out execution on a bill of exchange, and afterwards waives that execution, he has not discharged those who were sureties for the due payment of the bill. The principle is, that he is a trustee of his execution for all parties interested in the bill." *Mayhew v. Crickett*, 2 Swan. 190. But it has been decided, that the withdrawing of an execution against the goods of an acceptor will not discharge the drawer, and that the rule, that giving indulgence to an acceptor without the consent of the drawer discharges such drawer, does not apply after judgment. *Pole v. Ford*, 2 Chitty, 190; but see *English v. Darley*, 2 B. & P. 62.

² *Hayling v. Mullhall*, 2 Bla. 1235. See *English v. Darley*, 2 B. & P. 62.

³ *Walwyn v. St. Quentin*, 1 B. & P. 652.

⁴ *Hewitt v. Goodrich*, 2 C. & P. 468; *Badnall v. Samuel*, 3 Price, 521.

⁵ *Jay v. Warren*, 1 C. & P. 532; and see *Lee v. Levi*, 6 Dowl. & R. 475; 4 B. & C. 390; *Hulme v. Coles*, 2 Simon, 12; *Stevenson v. Roche*, 9 R. & C. 707; *Price v. Edmunds*, 10 B. & C. 578.

⁶ *Claxton v. Swift*, 2 Show. 441—494; *Lutw.* 882.

⁷ *Macdonald v. Bovington*, 4 T. R. 825; *Nadin v. Battie*, 5 East. 147; and see Eng-

lish v. Darley, 2 B. & P. 62. If a creditor execute a deed of composition, having indorsed away bills on the debtor, the deed is no defence to an action on the bills when they are returned to the creditor.—*Margetson v. Aitken*, 3 C. & P. 338.

⁸ *Ex parte Wilson*, 11 Ves. 410; *Ex parte Smith*, Co. Bl. 168—171; *Ellison v. Dezell*, 1 S. N. P. 355.

⁹ Where a bill having been dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first, and the payee discounted the second bill and indorsed the first to the plaintiff, it was held that the second bill was merely a collateral security, and that the receipt of it by the payee did not amount to giving time to the acceptor of the first bill, so as to exonerate the drawer. "In cases of this description," says Abbot, C. J., "the rule laid down is, that if time be given to the acceptor, the other parties to the bill are discharged; but in no case has it been said, that taking a collateral security from the acceptor shall have that effect. Here the second bill was nothing more than a collateral security." *Pring v. Clarkson*, 1 B. & C. 14; 2 Dowl. & R. 78.

¹⁰ *Norris v. Aylett*, 2 Camp. 329.

3. *How the discharge of the surety may be prevented.*—It has been repeatedly held, that a discharge by the creditor to the principal debtor will not discharge the surety, if there be an agreement between the creditor and the principal that the surety shall not be discharged.¹ But this stipulation must appear on the face of the instrument giving time, and cannot be proved by parol.

No indulgence to an acceptor or other prior party will discharge an indorser if he previously consent to it. Thus, where the acceptor, having been arrested by the holder, offered him a warrant of attorney for the amount of the bill, payable by instalments, and the holder mentioning the offer to the drawer, the drawer said, "You may do as you like, for I have had no notice of the non-payment," it was held, that this amounted to an assent, and that the drawer (who, in fact, had had notice) was not discharged by the indulgence.²

4. *How it may be waived.*—Whenever the surety, with knowledge of the facts, assents either by words or acts to what has been done, such subsequent assent will be a waiver of his discharge. Therefore, where time had been given, and the drawer, aware of the fact, but ignorant of the law, and conceiving himself still liable, said, "I know I am liable, and if the acceptor does not pay it I will," the drawer was held to have waived his discharge.³ But where a bill was renewed, and an indorser said, "it was the best thing that could be done," it was held, that this was no recognition of his liability.⁴

XIV. HOW FAR A BILL OR NOTE IS CONSIDERED AS PAYMENT.

Though it is a general rule of law, that one simple contract cannot be extinguished by another similar executory contract,⁵ for this is merely substituting one cause of action for another, yet the delivery of a valid bill or note suspends the creditor's remedy for a debt; and if

¹ It is alleged on behalf of this doctrine, that the reason why a discharge of the principal in ordinary cases discharges the surety is this, that if the surety were still liable, he could not reimburse himself from the principal without taking from the principal the benefit of his discharge; but that that reason does not hold, where, by agreement between the creditor and the principal, the rights of the creditor against the surety, and consequently of the surety against the principal, are expressly reserved.

It is conceded, that this reason why a discharge of the principal should be a discharge of the surety, does not, in the supposed case, apply. But there are other reasons which do apply. The liability of the surety ought not to be extended beyond his contract; and if the necessary consequence of the stipulation between the creditor and the principal be to extend the liability of the surety, the surety ought to be discharged. Now, that is the necessary consequence. A surety contracts that his principal shall be primarily liable, and that he, the surety, shall have the chance of voluntary or compulsory payment by the principal. But when the principal is discharged, these chances are taken from the surety; his contract, which was conditional, is made absolute.

Besides, the contract of the surety is merely incidental to the contract of the principal; and when the subject no longer exists, no longer, it should seem, can the incident. The surety contracted for the performance of a particular obligation by the principal; that obligation is extinct; so, therefore, it should have seemed, are contracts for its fulfilment. — *Burke's case*, 6 Ves. 809; *Boulton v. Stubbins*, 18 Ves. 20; *Ex parte Glendinning*, Buck, 517; *Ex parte Carstairs*, *ibid*, 560; *Harrison v. Courtauld* 3 B. & Ad. 36; *Nichols v. Norris*, *ibid*, 48, n.

² *Clark v. Devlin*, 3 B. & P. 363.

³ *Stevens v. Lynch*, 12 East, 38.

⁴ *Whitall v. Masterman*, 2 Camp. 179; 3 B. & P. 363; 1 T. R. 167; 2 B. & P. 61.

⁵ If, in payment of a debt, the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on his original debt, until such bill or note becomes payable, and default is made in the payment; but if a bill or note is of no value, as if, for example, drawn on a person who has no effects of the drawer's in his hands, and who, therefore, refuses it, in such case he may consider it as waste paper, and resort to the original demand, and sue the debtor on it. — *Stedman v. Gooch*, 1 Esp. 3; *Keerslake v. Morgan*, 5 T. R. 513.

he either receive the money on the instrument, or be guilty of laches, it operates as a complete satisfaction.¹ The taking a bill or note amounts to an agreement to give the debtor credit for the time it has to run.

But if the party who gave the bill knew at the time that it was of no value, the holder, on discovering the fraud, may immediately sue such party on his original liability; or if the bill were given for goods delivered at the time, he may disaffirm the contract, and sue in trover for the goods. Thus, where a vendee, under terms to pay for goods on delivery, obtained possession of them by giving a check which was afterwards dishonoured, Lord Tenterden said, "If the vendee had reasonable ground to expect that the check would be paid, the transaction was not fraudulent, and the property would pass to him: if he had not reasonable ground for so expecting, the transaction was fraudulent, and the vendors are entitled to recover their property in an action of trover."²

A bill given in discharge of a debt, and then lost, is payment;³ but not if proved to be destroyed.

If, in lieu of dishonoured bills, other bills are given, and the first remain in the hands of the holder, if the latter bills are not paid, the liability of parties on the former revives.⁴ The holder of the old bill cannot sue on it till the new one is at maturity.⁵

The taking a bill or note from a party bound by a contract under seal does not extinguish or suspend the remedy on the specialty, unless the bill or note is actually paid. Thus, where one of three joint covenantors gave a bill of exchange for part of a debt secured by the covenant, it was held that the bill only operated as a collateral security not affecting the remedy on the covenant, even though judgment had been obtained on the bill.

Where a tenant gave a note of hand for arrears of rent, it was held that the landlord might nevertheless distrain, for the note was no alteration of the debt till after payment.⁶ Even a bond given for rent does not extinguish it; for rent, though on a parol lease, is of as high a nature as an obligation.⁷

If the debtor, instead of paying the creditor, directs him to take a bill of a third person, which the creditor does, and the bill is dishonoured, the liability of the original debtor revives;⁸ and it is not necessary to give the original debtor notice of the dishonour.⁹ But if the debtor refer his creditor to a third person for payment generally, and the creditor, having the option of taking cash, elects to take a bill, which is dishonoured, the original debtor is discharged.

¹ 3 & 4 Anne, c. 9, § 7.

² *Hawse v. Ramsbottom*, 1 R. & M. 414; *Puckford v. Maxwell*, 6 T. R. 52; *Owenson v. Morse*, 7 T. R. 64; *Bishop v. Shillito*, 2 B. & A. 29; *Taylor v. Plumer*, 3 M. & S. 362; 2 B. & P. 518; *Gladstone v. Hadwen*, 1 M. & S. 517; *Noble v. Adams*, 7 Taun. 59; *Earl of Bristol v. Wilsmore*, 1 B. & C. 514; *Kilby v. Wilson*, 1 R. & M. 178.

³ *Woodford v. Whiteley*, 1 M. & M. 517.

⁴ *Ex parte Barclay*, 7 Ves. 597; *Bishop v. Rowe*, 1 M. & S. 362; *Dillon v. Rimmer*, 1 Bing. 100; *S. C.*, 7 Moo. 427.

⁵ *Kendrick v. Lomax*, 2 C. & J. 405.

⁶ *Harris v. Shipway*, 1744; *Ewer v. Lady Clifton*, C. B. Trin. T. 1735, S. P. C. N. P. 182; *Palfrey v. Baker*, 3 Price, 572. But it does not appear in the two first cases whether the bill were not due and unpaid at the time of the discharge; in *Palfrey v. Baker* it was due and dishonoured.

⁷ 11 Vin. Ab. 289; *B. N. P.* 182.

⁸ *Marsh v. Pedder*, 4 Camp 287; *Ex parte Dixon*, cited 6 T. R. 143; *Taylor v. Briggs*, 1 M. & M. 28.

⁹ *Swinyard v. Bowes*, 5 M. & S. 62.

Where a debtor *indorses* a bill to his creditor, the creditor cannot sue for his debt without proving presentment of the bill and notice of dishonour.¹ But where he *does not indorse it*, it seems sufficient for the creditor, when suing for the principal debt, to show that the bill still remains in his hands, without proving² presentment or notice of dishonour;³ for that is presumptive evidence of dishonour, sufficient to throw it on the defendant to show that he has been paid.

Where a bill or note is delivered without indorsement, not in payment of a pre-existing debt, but in payment or exchange for goods or other sureties sold at the time, such a transaction amounts to a *sale* of such bill or note, and to an election by the transferee to take it as money with all its risks, and consequently to complete payment by the transferor.⁴

The taking of a bill or note in payment will in general determine a lien, especially if negotiated; but if it remain in the vendor's hands, and is dishonoured, the goods not being delivered, it should seem that the lien revives.

On the sale of real property, the taking and negotiating a note or bill does not amount to a relinquishment of the lien on the land.

XV. OF A LOST BILL OR NOTE.

Though the finder of a lost bill or note acquires no property in it, so as, on the one hand, to enable him to defend an action of trover against the rightful owner, or, on the other, to sue the acceptor or maker, yet if the finder transfer a lost bill or note which may pass by delivery, without any accompanying circumstances that might awaken the suspicions of a prudent man, his transferee is entitled both to retain the instrument against the loser, and to compel payment from the parties liable thereon.

It is advisable, therefore, in the case of bills being lost or stolen, that the loser should not only immediately give notice of the loss to the parties liable on the bill, that they may be prevented from taking it up without due inquiry, but give a public notification thereof, to prevent the transfer of them into the hands of *bonâ fide* holders. For though it is true, that where there has been no notification, if a man discounts a bill with knowledge or actual suspicion of the loss, he must refund;⁵ yet if the loser have neglected to publish his loss, and the receiver takes the note not dishonestly, but negligently, then the negligence of the loser equals the negligence of the receiver, and *potior est conditio possidentis*.⁷ If, however, due notice has been given of

Kearslake v. Morgan, 5 T. R. 513; Bridges v. Berry, 3 Taun. 130.

² Goodwin v. Coales, M. & R. N.P.C. 221.

³ Bishop v. Rowe, 3 M. & S. 362.

⁴ Cambridge v. Allenby, 6 B. & C. 383; Ward v. Evans, 2 Ld. Raym. 930; Brown v. Kewley, 2 B. & P. 518.

⁵ Ex parte Loring, 1 Rose, 19; Grant v. Mills, 2 V. & B. 306.

⁶ See the observations of Best, C. J., in Snow v. Peacock, 8 Bing. 411.

⁷ Snow v. Peacock, 8 Bing. 411; 11 Moo. 284; Strange v. Wigney, 6 Bing. 677. Negligence of the loser not connected with negligence of the receiver, will not protect

the latter; see Easley v. Crockford, *infra*. Thus, where the plaintiff was robbed of his pocket-book, containing an indorsed bill, and then advertised the pocket-book, saying nothing of the bill, but on the contrary, stating in the advertisement that the contents of the pocket-book were of no use to any but the owner, the Court of C. P. held that he was not entitled to recover against a negligent receiver; for that his notice that the contents of the pocket-book were of no use to any but the owner, tended rather to mislead than to assist parties to whom the bill might be offered: Beckwith v. Corral, 3 Bing. 444.

the loss, then, though the receiver took the instrument *bond fide* and without suspicion, yet if he failed to exercise proper care and caution, as if he discounted or changed a bill of considerable amount for a stranger without inquiry, he must refund.¹ The caution required of a person discounting increases with the amount.

The party who has lost or destroyed a bill must, nevertheless, make application to the drawee for payment at the time it is due, and give notice of dishonour, for the bill might still have been paid with or without an indemnity, and the prior parties, by not having been advised of the dishonour, may have been prevented from pressing their respective remedies against parties liable to them.²

There are three cases in which a plaintiff cannot produce a bill: it may be in the defendant's hands; it may be destroyed; or it may be lost.

If it be in the defendant's hands, the plaintiff may give him notice to produce it; and if the defendant will not do so, the plaintiff may give secondary evidence of its contents.

So, if it can be proved that the instrument has been destroyed, secondary evidence of its contents has been held admissible.³ But it should seem, from the judgment of the Court of Queen's Bench in a very recent case, that this doctrine is now overruled, and that the owner of a destroyed bill cannot, at law, recover against the other parties.

It is, however, perfectly clear, that if a bill or note made or become payable to bearer be lost, no action will lie for the loser against any one of the parties to the instrument, either on the bill or note itself or on the consideration. But if a bill or note not negotiable, or only transferable by indorsement, be lost, it has been held that an action will lie either on the bill or on the consideration.⁴

If a bill is lost after action brought, and defendant suffer judgment by default, the court will, on a copy verified by affidavit, refer it to the master to see what is due.⁵ But if, in such a case, the defendant resists the action, and puts the plaintiff to prove the bill, the loss may be no excuse for the non-production of it.⁶

¹ Gill v. Cubitt, 3 B. & C. 466; 5 Dow. & R. 324. Strange v. Wigney, 6 Bing. 677; S. C. 4 Mos. & P. 470.

The plaintiff went to a public meeting in London with more than £500 in his pocket, and entertaining some apprehensions of the company in which he found himself, kept his hand on his pocket, but, notwithstanding that precaution, was robbed, and among other property lost a Bank of England note for £200, payable to bearer. He advertised his loss in the newspapers. Nearly two years after, this note was traced to the possession of the defendant, who received it, as he said, in payment of a bet on the Derby stakes, but could not recollect from whom. The plaintiff sued him in trover; and the court held, that the negligence of the plaintiff not being connected with the defendant's conduct, could not be set up as an answer to his claim, and that the defendant had not exercised due caution in taking the note.—*Kasley v. Crockford*, 10 Bing. 243.

² Thackray v. Blackett, 3 Camp. 164.

³ "If a bill be proved to be destroyed," says Lord Ellenborough, "I should feel no difficulty in receiving evidence of its contents, and directing the jury to find for the plaintiff. Even on a trial for forgery, the destruction of the instrument charged by the indictment to be forged is no bar to the proceedings: I remember a case before Mr. J. Buller, where the prisoner had destroyed a bank-note he was accused of having forged, by swallowing it; and the learned judge who presided held, that he might have been convicted without the production of the bank-note; and this doctrine was approved of by the whole profession."—*Pierson v. Hutchinson*, 2 Camp. 211; 6 Esp. 126.

⁴ *Hansard v. Robinson*, 7 B. & C. 90; S. C. 9 Dowl. & R. 860. But see *Woodford v. Whitely*, 1 M. & M., 517.

⁵ *Long v. Baillie*, 2 Camp. 214, n.

⁶ *Brown v. Messiter*, 3 M. & S. 281.

⁷ *Poole v. Smith*, Holt, 144.

If a lost bill or note be in the hands of a party who has no right to retain it, as if, for example, it be still in the possession of the finder, or of a transferee who has taken it from him under suspicious circumstances, the true owner may bring an action of trover; or, if it has been paid by the acceptor or maker to such wrongful holder, the amount is recoverable in an action for money had and received. And if the maker or acceptor pay it improperly, he will not be allowed it in account with the payee or drawer.

But where no action lies on a lost bill or on the consideration, as where the bill has been indorsed in blank, and where no action can be brought against a wrongful holder, either in trover or assumpsit, the loser is not absolutely without remedy, he may then resort to a court of equity for relief.

The 9 & 10 Wm. III. c. 17, s. 3, enacts, that "in case any such inland bill shall happen to be lost or miscarried within the time before limited for the payment of the same, then the drawer of the said bill is and shall be obliged to give another bill of the same tenor with that first given; the person to whom it is delivered giving security (if demanded) to the drawer, to indemnify him against all persons whatsoever, in case the said bill, so alleged to be lost or miscarried, shall be found again.

Notwithstanding some authorities to the contrary,¹ it is now clearly settled that a court of common law has no jurisdiction under this statute; a court of law not being able to enforce the giving of a new bill, or qualified to judge of the sufficiency of an indemnity.²

On the other hand, the relief administered by courts of equity is not confined within the letter of the statute. It will be afforded not only on *such* bills as are mentioned in the statute, but on others; not only before they are due, but after; not only on bills, but on notes; not only against the drawer, but against the indorser or acceptor; not only may a new bill be required, but payment.³ But the court will not call on a party to renew or pay a lost bill, without providing him with a satisfactory indemnity. To a suit in equity by the last indorsee of a lost bill against the acceptor, the prior indorsers need not be made parties.⁴

Where a debtor remits his creditor a bill or note by a conveyance which the creditor directs, or by post, if that be the ordinary vehicle of transmission, and the bill or note is lost or stolen, the loss will fall on the party to whom the bill was intended to be remitted.⁵

XVI. OF FORGERIES ON BILLS OR NOTES.

If the acceptor or maker pay one who derives his title through a forgery, that will not discharge him. So, if a bill or check be altered and made payable for a larger sum than that originally inserted, should the drawee, banker, or acceptor pay it, he cannot charge the drawer for the difference.⁶ But in case any act of the drawer facilitated or gave occasion to the forgery, he must bear the loss himself.

¹ *Walmsley v. Child*, 1 Ves. sen. 341; *Hart v. King*, 12 Mod. 309.

² *Ex parte Greenway*, 6 Ves. 812; *Davies v. Dodd*, 4 Price, 176; *Toulman v. Price*, 5 Ves. 238; *Bromley v. Holland*, 7 Ves. 19, 20, 249.

³ *Walmsley v. Child*, 1 Ves. sen. 346;

Powell v. Monnier, 1 Atk. 611; *Toulmin v. Price*, 5 Ves. 238; *Ex parte Greenway*, 6 Ves. 812; *Mossop v. Eadon*, 16 Ves. 430.

⁴ *Macartney v. Graham*, 2 Simons, 285.

⁵ *Warwicke v. Noakes*, Peake, 67.

⁶ *Hall v. Fuller*, 5 B. & C. 750; *Smith*

v. Mercer 6 Taun. 76.

It is a general rule of law, that money paid under a mistake *as to facts* may be recovered back. On this principle, if a forged bill or note be discounted, the transferee, on discovery of the forgery, may recover back the money paid, the imagined consideration totally failing.¹ But any fault or negligence on the part of him who pays the money on the bill &c. will disable him from recovering. Thus, where two bills of exchange, falling due at different times, were drawn on a man, and he paid the first without acceptance, and accepted and paid the second, and the signature of the drawer was, some time afterwards, discovered to be a forgery, Lord Mansfield held, that an acceptor is bound to know the handwriting of the drawer, and that it is rather by his fault or negligence than by mistake if he pays on a forged signature.² So, where a forged acceptance of the drawee was made payable at the plaintiff's (the drawee's bankers), and they paid the amount to the defendant as a *bonâ fide* holder, but seven days afterwards, upon discovering the acceptance to be a forgery, informed the defendant of it, and demanded the money; it was held that they could not recover, for that a banker ought to know his customer's handwriting. Where, however, the fault is not entirely on the side of the party paying, he may still recover.

XVII. OF THE ALTERATION OF A BILL OR NOTE.

Any material alteration in a bill or note, after it is once perfect, unless made by the party bound by the bill or note (for he is not allowed to take advantage of his own wrong), or with his consent, renders it absolutely void at common law.³ Thus, where the drawer, without the consent of the acceptor, added to the acceptance the words "Payable at Mr. B.'s, Chiswell Street," it was held that this was a material alteration, discharging the acceptor.⁴ And the same point has been decided since the 1 & 2 Geo. IV. c. 78. "Suppose," says Abbott, C. J., "a bill so altered to be indorsed to a person ignorant of the alteration: his right to sue the indorser would, as the bill appears, be complete upon default made where the bill is payable; whereas, in truth, the acceptor, not having in reality undertaken to pay there, would have committed no default by such nonpayment. I am of opinion therefore, that the alteration is in a material part of the bill, and the acceptor is in consequence discharged."⁵ But it has been held by the same learned judge,⁶ that a similar addition, *with the consent of the acceptor*, would not invalidate the instrument, either at common law or under the stamp act.

But, even if the consent of all parties have been obtained to an alteration in a material part, such alteration, nevertheless, avoids the bill under the *stamp laws*; for it is become a new and different instrument, and therefore requires a new stamp; which stamp cannot, as we

¹ Jones v. Ryde, 5 Taun. 488; Bruce v. Bruce, ib. 495.

² Price v. Neale, 3 Burr. 1354.

³ Shepherd's Touchstone, 68. The law now seems to be, that an alteration by a stranger, whether material or immaterial, will not avoid a deed: Lord D'Arcy's case, 1 Lev. 282; Waugh v. Russell, 5 Taun. 707; Henfre v. Bromley, 6 East, 309; Irvine v.

Elmor, 8 East, 54; French v. Patten, 9 East, 355. And a deed is not vacated if the alteration, though material, were with the consent of the party bound: 2 Lev. 35; Cro. El. 627; Com. Dig. Fait. F. l.

⁴ Cowie v. Halsall, 4 B. & A. 197.

⁵ M'Intosh v. Haydon, 1 R. & M. 362.

⁶ Stevens v. Lloyd, 1 M. & M. 292; and see Jacob v. Hart, 6 M. & S. 142.

have already seen, then be affixed. Any alteration in the date, sum, or time of payment; the insertion of words rendering negotiable an instrument which before was not so; altering the words "*value received*" into an expression of the particular consideration which passed, are respectively *material* alterations which avoid the bill under the stamp acts.¹

There are, however, two cases in which an alteration, though in a material part, will not vacate the instrument: 1st. Where such alteration is made before the bill is issued or become an available instrument; and 2dly, Where it is altered to correct a mistake, and in furtherance of the original intention of the parties.

1. A bill or note may be altered in any manner before it is issued by the drawer or maker, even though he has signed it; for whilst in the drawer's or maker's own hands, though complete in form, it wants parties, inasmuch as, without a delivery of it, there is no contract constituted—it is a mere unaccepted, uncommunicated proposition. But the moment a privity upon the bill or note is created between the drawer or maker and some other person named in it, or to whom the drawer gives by delivery an interest in it, then the case as to alteration stands differently. The question therefore is, what shall be deemed such an issuing or creation of privity. The delivery of the bill or note to the payee, or indorsing and delivering it to a person not named in it, where the amount is payable to the drawer's or maker's own order (so that such delivery, in either case, is upon a consideration sufficient to give such payee or indorsee a valid claim to recover the amount from such drawer or maker) constitutes such an issuing or privity. An exchange of drafts, notes, or acceptances, is such an issuing. So likewise if the bill be accepted by the drawee and returned to the drawer, even though it be not issued by the drawer to any other person, if so accepted for value; but if accepted for the accommodation of the drawer, then it would not be deemed issued till passed away to a third person. Nor if also indorsed by the payee for accommodation purposes; for in such case the drawer, acceptor, and payee are all to be deemed as parties concerned together in making the bill, the same, in effect, as three persons making a note for the purpose of issuing. Therefore, even in such a case as a bill drawn, accepted, and indorsed amongst accommodation parties, it may, with the concurrence of all, be altered before it goes forth to the world, as by altering a bill payable to bearer into one payable to order. But such an alteration will make the bill a nullity against those who do not concur; though such unconsenting party may, by subsequent acquiescence, ratify the alteration, and thereby restore the validity of the instrument.

2. If, again, the alteration were merely to correct a mistake, and to make the bill what it was originally intended to be, it will not avoid it under the stamp act. Thus, where the drawer intended to make the bill negotiable, and indorsed it over, but had omitted the words "*or order*," their subsequent insertion, in pursuance of the original intention, was held not to vacate the bill.² So, where a bill having been dated by

¹ Wilson v. Justice, Bay. 110; Bowman v. Nichol, 5 T. R. 557.

² Bathe v. Taylor, 15 East, 412; Walton v. Hastings, 4 Camp. 223; 1 Stark. 215;

Outhwaite v. Luntley, 4 Camp. 179; Knill v. Williams, 10 East, 431.

³ Kershaw v. Cox, 3 Esp. N. P. C. 246; 10 East, 437; Jacobs v. Hart, 2 Stark, 45.

mistake 1822 instead of 1823, the agent of the drawer and acceptor, to whom it had been given to be delivered to the indorsee, without their knowledge or consent, corrected the mistake; it was held that such alteration did not vacate the bill.¹ A *bonâ fide* holder of a bill of exchange accepted payable to ——— or order, may insert his own name as payee, and indorse it, and the bill may be declared on as payable to the party who has inserted his name.

Whether the intent of the alteration were to vary the original contract, or merely to correct a mistake, is a question of fact for the jury.²

An altered bill will be void in the hands of an innocent indorsee, as well as in the hands of parties cognizant of the alteration.³

An alteration which avoids an instrument under the stamp laws, though it destroys the security, does not extinguish the debt.⁴ But an alteration by an indorsee avoiding an instrument at common law destroys the debt due from the indorser to him.

Where an alteration appears on the face of the bill, it lies on the plaintiff to show that it was made under such circumstances as not to vitiate the instrument.⁵ But it is said that, in practice, the circumstance of erasures appearing on the face of the bill will not impose on the plaintiff the necessity of explaining them, unless there are other grounds of suspicion against his claim.⁶

XVIII. OF THE REMEDY BY ACTION ON A BILL OR NOTE.

A right of action enures immediately to the holder against all the antecedent parties, either on the non-acceptance or non-payment of a bill or note; and if it were transferred to him by mere delivery on account of a precedent consideration, the party who delivered it may be also sued.

Two forms of action may be brought on a bill or note, *debt* and *assumpsit*. But debt will only lie where there is a privity of contract between the parties. The action of *assumpsit*, therefore, on account of its universal applicability, is by far the most usual remedy.

When a bill is dishonoured, the holder has his option to sue on the bill or on the consideration. It is advisable to sue on the bill; first, because it reduces the debt to a certainty; secondly, because less evidence is necessary; thirdly, in an action on the bill, proof of payment lies on the defendant; but in an action on the consideration only, if defendant show that a bill was given, plaintiff must prove that the bill was not paid. Of course it is best, where possible, to join a count on the bill with a count on the consideration.

Wherever several parties are liable to the holder of a bill, he is not obliged to single out one only, but may proceed at once in distinct and concurrent actions against them all, or against as many as he may think fit; but a real satisfaction of the debt by any one will discharge all the others from the debt.

Brutt v. Picard, 1 R. & M. 37.

Atwood v. Griffin, 1 R. & M. 425.

* Outhwaite v. Luntley, 4 Camp 179.

* Sutton v. Toomer, 7 B. & C. 416.

* Johnson v. Duke of Marlborough, 2

Stark, 313; Henman v. Dickenson, 4 Bing, 183; Bishop v. Chambre, 1 M. & M. 116.

* Chitty, 106

A distinction, however, must be taken between a mere formal *technical* satisfaction, or extinguishment of the debt as to one party and a complete and *real satisfaction* by receipt of the sum due. There can be but one satisfaction of a bill or note (for *satisfaction* implies a discharge of the bill or note itself, and consequently of all the parties to it); and if there be one payment, to the holder, of all the principal, interest, and costs upon it, that satisfies the bill, though such satisfaction be made but by one party, and there were a dozen liable. So it may be proved under fiats of bankruptcy against all the parties, but it can only be once satisfied; for all the proofs together will not enable the holder to have more in the whole than 20s. in the pound, whatever sum each estate may pay to its creditors. But *extinguishment* is generally used in a different sense, meaning only a discharge of a particular claim. A holder may discharge, or in other words extinguish his debt and his remedy upon the bill as to this or that party who was liable to him, yet not satisfy it, nor yet extinguish his claims as to others. Thus the taking in execution the person of the acceptor is, *as to him*, an extinguishment of his debt to the holder, but has no effect on the liability of other parties.¹ And though the debt of the acceptor to the holder is thereby extinguished, yet even *his* liability on the instrument is not all taken away: he is still liable to an antecedent holder. But a discharge under the Insolvent Debtors' Act is a discharge as against all indorsees or holders of any negotiable security.² A joint maker of a promissory note, however, who is a *mere surety*, is not within these words; and if he pay the debt after his principal's discharge under the act, he can, notwithstanding such discharge, sue his principal.³ But the Bankrupt Act enables every surety or person liable for the debt of a bankrupt to prove under the fiat;⁴ and therefore, though an indorser or surety have a bill or note returned to him after the certificate, he cannot prove.⁵

Taking security of a higher description, as a bond or judgment, for the money due upon a bill or note, extinguishes the holder's claim upon the bill or note as against the party giving that security; but it does not satisfy it as against other parties.⁶

So, obtaining judgment on a bill or note is an extinguishment as between the parties, but not a satisfaction as between other parties and the plaintiff, not even as between parties subsequent to him against whom the judgment is obtained and the plaintiff.⁷ But taking a warrant of attorney is not even an extinguishment of the debt between the parties. "Till judgment is entered up," says Lord Ellenborough, "the warrant of attorney is merely a collateral security, and cannot merge the original debt."⁸

And the actual taking a party in execution,⁹ and discharging him on

¹ As to the consequences of taking a party in execution, and then discharging him, see *ante*, p. 713.

² 1 Geo. IV. c. 57, s. 46.

³ *Powell v. Eason*, 8 Bing. 28; 1 Moo. & Scott, 68.

⁴ 6 Geo. IV. c. 16, s. 52.

⁵ *Bassett v. Dodgin*, 9 Bing. 653; *S. C.* 2 Moo. & Scott, 777; and see *Ex parte Read*, 2 G. & J.

⁶ *Bac. Ab. Extinguishment, D.*; Bayley, 335.

⁷ Bayley, 335; *Claxton v. Swift*, 2 Show. 441, 494; *S. C. Lutw.* 882.

⁸ *Norris v. Aylett*, 2 Camp. 329.

⁹ *Hayling v. Mullhall*, Black. 1235; *English v. Darley*, 2 Bos. & Pul. 61; *Clark v. Clement*, 6 T. R. 525; *Mayhew v. Crickett*, 2 Swanst. 190.

a letter of licence, is no satisfaction as to any of the antecedent parties, though it is (as we have seen) as to the subsequent parties. And it has been held that waiving a *fieri facias* against the acceptor does not discharge any of the other parties.¹

If a party be liable on a bill in two or more capacities, he may be the object of several actions on the same bill, at the suit of the same plaintiff. Thus, where a party was sued jointly with others as a drawer, and separately as the acceptor of a bill, the court, considering him liable in the two characters, and the plaintiff entitled to both remedies, which could not be comprised in the same declaration, refused to stay the proceedings in either as vexatious.²

Though, after the principal sum due on a bill has been once paid by any one of the parties, or levied upon the goods of any one, the holder cannot recover it again from any other of the parties, yet, if other actions were pending at the time of payment, he may proceed in them for costs, without reserving any part of the principal sum.³

By 3 & 4 Wm. IV. c. 42, § 12, in all actions upon bills of exchange or promissory notes, or other written instruments, the parties to which are designated by the initial letter or letters, or some contraction of the Christian or first name or names, it shall be sufficient, in every affidavit to hold to bail, and in the process or declaration, to designate such persons by the same initial letter or letters, or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full.

• It has been held, that where particulars of the plaintiff's demand are given, and do not state the consideration paid for the instrument, such particulars will preclude the plaintiff from giving the consideration in evidence, should he fail on the special count.⁴

If the holder bring concurrent actions against the acceptor, the drawer, and the indorsers, the court will stay the proceedings in any one of those actions (except the action against the acceptor) on payment of the amount of the bill and costs in that particular action; but they will not stay proceedings in an action against the acceptor, except upon the terms of paying the costs in all the other actions, he being the original defaulter.⁵ For though no action lies against the acceptor for these costs,⁶ yet when he comes to ask a favour, as a stay of proceedings, the court may with propriety put him under terms. But if the actions commenced against the other parties are merely conclusive, in order to charge the acceptor with a heavier sum for costs, proceedings against him may be stayed without payment of those costs.⁷

After a party has once levied the amount of the debt on the goods of one party, the court will grant a rule to restrain him from levying it over again on the goods of another, and have intimated that they would punish a plaintiff who should take out execution on both judgments.

If the bill or note was obtained by the plaintiff from the defendant

¹ Pole v. Ford, 2 Chit. Rep. 125.

² Wise v. Prowse, 9 Price, 393.

³ Toms v. Powell, 7 East, 536; S. C. 6 Esp. 40; 3 East, 316; 3 Camp. 331; Holt's N. P. C. 6.

⁴ Wade v. Beasley, 4 Esp. 7.

⁵ Smith v. Woodcock, 4 T. R. 691; Windham v. Withers, Str. 515; Golding v. Grace, 2 Bla. 749.

⁶ Dawson v. Morgan, 9 B. & C. 618.

⁷ Hodson v. Gunnor, 2 D. & R. 57.

without consideration, on affidavit to that effect by the defendant, the court will stay the proceedings; but where there are contradictory affidavits, the court will not interfere in this summary way, but put the defendant to insist on it as a defence on the trial.¹

A tender after the bill became due is no defence by the acceptor. But a drawer or indorser may tender principal, without interest, within a reasonable time after request.

If the plaintiff proceed in assumpsit, and the defendants suffer judgment to go by default, the court may assess the damages;² but, in order to inform the conscience of the court, a writ of inquiry is commonly issued.³ In actions on bills or notes, however, it is the practice of the plaintiff, instead of executing a writ of inquiry, to apply to the court in term or to a judge in vacation, on an affidavit of the nature of the action, for a rule or summons to show cause why it should not be referred to the master in the Queen's Bench, or to the prothonotaries in the Common Pleas, to see what is due for principal and interest, and why final judgment should not be signed for that sum without executing a writ of inquiry, upon which the court or judge will make the rule absolute on an affidavit of service, unless good cause be shown to the contrary.⁴ The same practice now obtains in the Exchequer.⁵

Indorsers, who have to pay costs of actions against them, cannot sustain an action for those costs against the acceptor,⁶ nor, it is conceived, against any other party.

As to accommodation bills: in common language, a bill accepted or indorsed without any consideration moving to the party making himself liable on the bill, is called an accommodation bill; but, in strictness, an accommodation bill is not merely a bill accepted and indorsed without value received by the acceptor, but a bill accepted without value by the acceptor *to accommodate* the drawer &c., i. e. that the drawer may raise money upon it, or otherwise make use of it. This distinction is of importance; for a party accepting a bill merely without consideration (as if, for example, he does not know the state of accounts between himself and the drawer), and afterwards sued on that bill, cannot charge the drawer with the costs of defending the action;⁷ whereas the acceptor of an accommodation bill properly so called, who is compelled by an action to pay it, has a claim upon the drawer for all the expenses of the action.⁸ But an accommodation acceptor has no right to charge the party accommodated with the costs of an action to which the accommodation acceptor had evidently no defence.⁹

Of the Sum Recoverable.—The amount of the damages which the plaintiff is entitled to recover necessarily depends on the liability of the parties to the instrument. In general, the sum for which the bill

¹ Turner v. Taylor, Tidd, 530.

² Tidd, 570.

³ Unless, upon a writ of inquiry, the plaintiff produce the bill, he will recover only nominal damages: Marshall v. Griffin, R. & M. N. P. C. 41.

⁴ Rashleigh v. Salomon, 1 H. Bla. 252; Andrews v. Black, H. Bla. 529; Longman

v. Fenn, H. Bla. 541; Chilton v. Harbourn, 1 Anst. 249.

⁵ Biggs v. Stuart, 4 Price, 134.

⁶ Dawson v. Morgan, 9 B. & C. 618.

⁷ Bagnall v. Andrews, 7 Bing. 217; S. C.

⁸ Moo. & P. 339.

⁹ Ex parte Marshall, 1 Atk. 262.

¹⁰ Roach v. Thompson, 1 M. & M. 487.

is payable may be recovered, with interest, and such expences as may have been occasioned by the dishonour of it.

With respect to the *principal money*, or that sum which is payable on the face of the bill or note, many instances occur, in which, although the plaintiff may not have given full value for the bill &c., he may nevertheless recover the whole sum, holding the overplus beyond his own demand as trustee for some other party to the bill &c. entitled to receive such overplus.

If the plaintiff take a verdict for more than he is entitled to recover, the court will either make him correct the verdict, and pay the costs occasioned by his misconduct, or grant a new trial.

Interest.—The general rule of law was, that interest was not recoverable unless there had been an express stipulation that interest should be paid, or unless such were the usage of trade, yet on bills of exchange interest was in most cases allowed. Now, by the 3 & 4 Wm. IV. c. 24, interest is recoverable on all debts payable by virtue of a written instrument, and on all other debts after demand in writing, giving notice in writing that interest will be claimed from the date of the demand.

If the principal has been paid, the plaintiff may still proceed for interest, and the jury are bound to give it, if the charge has not been incurred by the negligence of the plaintiff.¹

Where a note is made payable on demand with lawful interest, it carries interest from the date.² In cases where the instrument does not express that it is payable with interest, if made payable on demand, interest runs, not from the date of the bill or note, but from the time of the demand.³ If made payable at a certain period after date or sight, interest runs from the day it became due, and without proof of demand.⁴ The drawer or indorser of a bill or note is liable to pay interest only from the time that he receives notice of the dishonour. "The drawer cannot," says Mansfield, C. J., "find out by inspiration who is the holder; and till he finds that out, he cannot pay the bill. When he has found out who is the holder, he is bound to pay the bill within a reasonable time. If he does not, he is liable to damages for not performing his contract; those damages are the interest on the bill."⁵

Interest was formerly computed only to the commencement of the suit, but it is now carried down to final judgment.

Where money is paid into court on a security carrying interest, interest must be paid, not merely to the commencement of the action, but to the time of the payment into court;⁶ or the plaintiff may proceed in the action for the difference. But in trover the rule is, that the plaintiff is entitled to damages equal to the value of the article converted *at the time of the conversion*. And therefore, in trover for bills or notes, interest is only to be calculated down to the time of conversion.

¹ Laing v. Stone, 1 M. & M. 229, n.

² Per Abbot, C. J., Weston v. Tomlinson, Chitty, 422; Hopper v. Richmond, 1 Star. 508.

³ Blaney v. Bradley, 2 Bla. 761; Cotton v. Hosemanden, Pract. Reg. 357.

⁴ See last note; 3 Ves. 134, 5 Ves. 803; Lithgow v. Lyon, 1 Coop. Ch. Ca. 22;

Lowndes v. Collins, 17 Ves. 27.

⁵ Walker v. Barnes, 5 Taun. 240; S. C. 1 Marsh. 36.

⁶ Kidd v. Walker, 2 B. & Ad. 705.

⁷ Mercer v. Jones, 3 Camp. 477. But now, by the 3 & 4 Wm. IV. c. 42, the jury may give damages over and above the value of the goods at the time of the conversion.

A banker, in charging interest to a customer who has overdrawn his account, should compute it, not from the date, but from the payment of the customer's check.¹

Of Re-exchange.—Re-exchange is the expense incurred by the bill being dishonoured in a foreign country in which it was payable, and returned to the country in which it was made or indorsed, and there taken up; the amount of it depends on the course of exchange between the two countries. The nature of the transaction is this: A merchant in London draws on his debtor in Lisbon a bill in favour of A, for so much in the currency of Portugal, for which he receives of A its corresponding value at the time in English currency. Sometimes a bill for that amount in Portuguese currency can be purchased in London for less, sometimes it will fetch more, English money, according to the course of exchange. Suppose the rate of exchange to fall when the bill becomes due; that is, suppose it requires in London more English money to purchase a bill on Lisbon for the same sum, and that in Lisbon, to replace it, a larger bill must be drawn on London. A, the holder, has a right to the payment of that sum in Portuguese currency at Lisbon. The bill is dishonoured; he is therefore entitled to recover of the drawer, not only the value which he formerly gave for the bill, but as much as he must draw a bill for in Lisbon on London, in order to replace, at the time and on the spot, the sum that he was entitled to receive.² The drawer of a bill is liable to the re-exchange, though the bill be returned through never so many hands;³ but the acceptor is not liable to the re-exchange.⁴

Other damages not necessarily arising from the dishonour, as postages &c., are not recoverable, unless specially stated in the declaration.⁵ But it has been held that postage is recoverable under the count for money paid.⁶

An action not only lies *on* a bill, but *for* a bill. Trover or detinue may be brought.

Trover will lie, though at the suit of one who is no party to the bill, or at the suit of the payee or acceptor, against a defendant to whom the plaintiff's agent has wrongfully assigned it, though the defendant has a right of action on the bill against the agent.⁷

In an action of trover a verdict may in all cases be given for the full amount of the bill; but if the defendant deliver up the bill, nominal damages may be entered on the record.

¹ Goodbody v. Foster, Camb. Summer Ass. 1831. Lyndhurst, C. B.

² De Tastet v. Baring, 11 East, 265.

³ Mellish v. Simeon, 2 H. Bla. 378.

⁴ Napier v. Schneider, 12 East, 420; Woolsey v. Crawford, 2 Camp. 445.

⁵ Kendrick v. Lomax, 2 C. & J. 410.

⁶ Dickinson v. Hatfield, 2 M. & M. 141.

⁷ Treuttel v. Barandon, 8 Taun. 100.

⁸ Goggerley v. Cuthbert, 2 N. R. 170;

Evans v. Kymer, 1 B. & Ad. 528.

CHAPTER XXIV.

Of Wills and Testaments, and of Administration.

WE propose to consider in the present chapter two other methods of acquiring personal estate, viz., by will or testament, and by administration; and, from the manner in which these are connected, it appears to be more convenient to treat of them jointly than separately. We shall consider—1. What a will is, and the form of it; 2. Who may make a will; 3, 4. Of what, and to whom, devises and bequests may be made, and herein of rules for the construction of wills; 5. The mode of execution and attestation of wills; 6. Their revocation and republication; 7. Lapsed legacies; 8. The proof, or probate; and 9. Intestacy, with its consequences.

I. WHAT A WILL IS, AND THE FORM OF IT.

The short and plain definition of a will or testament is, that it is the legal declaration of a man's intention of what he wills to be performed after his death, until which event it remains ambulatory and inoperative. This latter quality forms the distinguishing characteristic of wills; for though a disposition by deed may postpone the possession or enjoyment, or even the vesting, of property until the death of the disposer, yet this result must be produced by the express terms, and does not follow from the nature of the instrument itself.

Wills and testaments are divided into two sorts: 1. Written; and 2. Verbal, or *nuncupative*, that is, by word of mouth. The latter species, however, is now nearly abolished; for no valid will of this description can be made since the 1 Vict. c. 26 came into operation (1st January 1838), except by soldiers in actual service, or marines and seamen while at sea, who, it is expressly provided, may dispose of their personal property as before the passing of that act. It may nevertheless be useful to state the restrictions which were placed upon parol wills by the Statute of Frauds. That statute declares, that no parol or nuncupative will shall be good, where the estate thereby bequeathed exceeds the value of 30*l.*, unless the following requisites be complied with: 1. That it be proved by three or more witnesses, who were present at the making; 2. That it be proved that the testator at the time made the persons present to bear witness that such was his will; and 3. That the will was made in the last sickness of the testator, and in the house in which he dwelt, or in which he had been resident ten days, or that he was surprised and taken sick when absent from home, and died before his return. In addition to these provisions it is required by the 20th section, that the substance of the testimony be committed to writing within six days, or otherwise it is not to be received after six months; and by the 21st section, that the will shall not be proved until fourteen days after the death of the testator, nor then until the widow or next of kin have been called upon to contest it if they think proper. By the 23d section, the wills of soldiers in actual military service, and of mariners or seamen being at sea, with respect to their personal estate, are exempted from the provisions of the act. This exemption is still in force,

except with respect to the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize and bounty money, and allowances. In consequence of the frauds to which those persons are liable, such wills are required by subsequent statutes (which are consolidated and amended by the 11 Geo. IV. & 1 Wm. IV. c. 20) to be attested by their commanding officers or other official persons, and to be executed with more solemnities than are necessary to the validity of any other will. Thus it appears, that, previous to the year 1838, a parol will might have been made by any person whomsoever, disposing of leasehold or other personal estate, where the value of the whole property bequeathed by it did not exceed 30*l.* without any form or solemnity; and where the value of the property exceeded 30*l.*, provided the requisitions of the 19th and 20th sections of the Statute of Frauds were complied with. And any soldier in actual service, and mariner or seaman at sea, may still make a parol will,¹ without any restriction as to value, with the exception of petty officers or seamen in the royal navy, or non-commissioned officers of marines, or marines, so far as respects their wages, pay, prize-money, bounty-money, and allowances, or other moneys payable in respect of service in her majesty's navy.²

Wills of personal estate in writing might be made in any form, and without any solemnity. Any scrap of paper or memorandum, in ink or in pencil, mentioning an intended disposition of the testator's property, was admitted as a will, and held to be valid, although written by another person, and not read over to the testator or even seen by him, if proved to have been made in his life-time according to his instructions. A letter, or deed poll, or even an agreement or other instrument between parties, has repeatedly been held to have a testamentary operation in regard at least to copyhold and personal estate. But an important alteration in this respect has been introduced by the 1 Vict. c. 26, which will be more particularly noticed when we come to treat of the execution and attestation of wills.

II. WHO MAY MAKE A WILL.

Regularly, every person has full power and liberty to make a will, who is not under some special prohibition by our law or by custom. We shall proceed to point out some of these prohibitions.

By the 14th section of the 34 & 35 Hen. VIII. c. 5, it was provided, that wills or testaments made of any manors &c. by any woman covert, or person within the age of twenty-one years, or idiot, or by a person of non-sane memory, shall not be taken to be good or effectual at law. These disqualifications extended equally to the bequeathing of *personal* estate, except that infants of a certain age (namely, males of fourteen, and females of twelve years of age) might dispose of personalty by will; and such a will was valid notwithstanding the testator or testatrix attained majority and died without having done any act to confirm the will; and infants were enabled by the 12 Car. II. c. 24, § 8, to appoint guardians by will. But now, by the 1 Vict. c. 26, § 7, no person under twenty-one years of age can make a will of any kind; and though the 12 Car. II. is not repealed thereby, yet as the explanation of the word "will" in the

¹ 1 Vict. c. 26, s. 11.

² *Id.*, s. 12.

first section extends to the appointing of guardians by an infant's will, the power of an infant father to appoint a guardian to his child by will is taken away.

Nothing in the new act gives greater validity to the wills of *married women* than they had before it was passed. By the 8th section it is enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of that act.

The disability of coverture may be dispensed with at the pleasure of the contracting or disposing parties, so far at least as the right of disposition is concerned; as in the instance of a power of disposition by will reserved to a woman upon her marriage, to be exercised by her notwithstanding her coverture. A woman whose husband has been banished for life by act of parliament may dispose by will of her real and personal estate; for as he is civilly defunct, she is restored to her rights and privileges as a feme sole.

A feme covert, where lands are conveyed to trustees, may have power to appoint the disposition of the lands held in trust for her after her death; which *appointment* must be executed like the will of a feme sole. And it has been held, that the appointment of a feme covert is effectual against the heir at law, though it depend only upon an agreement of her husband before marriage, without any conveyance of the estate to trustees.

The will of an *idiot* is of course void. The validity of a *lunatic's* will depends upon the state of his mind at the time; for if made during a lucid interval, it will be good, notwithstanding any subsequent mental infirmity. Mental imbecility arising from advanced age, or produced by excessive drinking, may also destroy the testamentary power.

Persons born *blind, deaf, and dumb*, are incapable of making a will. Blindness or deafness alone, however, produces no such incapacity. A will made by a blind person need not be read over to him previously to its execution.¹

Bodies politic and aggregate cannot, in their politic capacity, devise or bequeath the lands or goods of their corporations; and the law is the same as to sole corporations, such as masters or wardens of hospitals; they cannot devise the lands or goods of their houses.²

A will made by a person under *restraint, duress, or menace of imprisonment*, will not be good. There must, however, be actual proof of some undue importunement of or restraint upon the testator.

Traitors and *felons* are likewise incapable of making a will of goods and chattels, as, on the conviction of the party, these become forfeited to the crown.³ But if such persons, being indicted, die before conviction, their wills both of lands and chattels will be good.

A disposition by will of goods and chattels by a *felo de se* is void, because they are forfeited by the act and manner of his death.

A person *outlawed* in a personal action forfeits his goods and chattels, and is consequently incapable of making a will of them. His lands, however, are not forfeited, and therefore would pass by his will; and such person may appoint executors, as he may have debts upon contract which are not forfeited to the crown.⁴

¹ Longchamp v. Fish, 2 B. & P. 415.

will, see 39 & 40 Geo. III. c. 88.

² As to the right of the king to make a

³ Ante, 628.

⁴ Godolph. 38.

III. WHAT MAY BE DEVISED OR BEQUEATHED.

A testamentary power over some proportion of moveables and other personal property existed in very early times. Formerly, the owner could not dispose of more than one-third if he left a wife and children, or of more than one-half if he left a wife and no child; and these restrictions continued in the city of London, the principality of Wales, and the province of York, until they were abolished by statute. At the present time the owner of personal estate in any part of England and Wales is allowed to bequeath the whole of it.

It may be useful here briefly to state what interests in real estate might or might not be the subject of a devise before the new Wills Act. With the exception, then, of estates held in joint tenancy or by entireties, and of estates tail and estates in *quasi* entail, all freehold estates might be devised.¹ A joint tenant of real or personal estate could not, unless he survived his companion in the tenancy, devise or bequeath his interest in such estate, because the title of his companion by survivorship would have precedence of that of the devisee or legatee. If, on the other hand, the testator survived his companion in the tenancy, the validity of the devise or bequest depended upon the nature of the property. If it were a freehold interest, the estate devolving by survivorship would not pass by the will, the testator not having a sole or devisable interest in such share at the time of making the will; and any divided part or share which might, after the execution of the will, have been allotted to the testator on a partition of the property, would not pass thereby; though such an interest in personal property (for reasons which we shall presently see) would pass by a general residuary bequest. A right of entry,² or of action,³ was not devisable; neither was a condition; the rule being that the heir alone could take advantage of a condition. With respect to estates tail and estates in *quasi* entail, they have never been devisable; but since tenants in tail have been allowed to bar entails, they can acquire a power of testamentary disposition by converting their estates into fee simple or absolute estates.

If a testator had freehold and leasehold property in the same place, and devised all his lands and tenements in that place, his freehold lands *only* would pass thereby, unless there were other words importing a different intention. It has recently been decided, that a devise of messuages or tenements "with the appurtenances" to uses applicable only to freehold property, comprised leasehold property; a clear intention to that effect being collected from the circumstance of the leasehold property having been blended in enjoyment with the freehold.

A considerable alteration has been introduced by the new act, 1 Vict. c. 26.

By sect. 3, it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so

¹ Under the words "lands, tenements, and hereditaments," in the 34 & 35 Hen. VIII., are included advowsons, rents, tithes, manors, franchises, annuities, &c., all which

are therefore devisable by will.

² *Baker v. Haching*, Cro. Car. 387. *Doe v. Tench*, 1 Nev. & Ryl. 130.

³ *Goodright v. Forrester*, 8 East, 564

devised, bequeathed, or disposed of, would devolve upon the heir at law or customary heir of him, or (if he became entitled by descent) of his ancestor, or upon his executor or administrator. And the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that (being entitled as heir, devisee, or otherwise to be admitted thereto) he shall not have been admitted thereto, or notwithstanding that the same (in consequence of the want of a custom to devise or surrender to the use of a will or otherwise) could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same (in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom) could not have been disposed of by will according to the power contained in this act if this act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

By sect. 4, it is provided, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person claiming by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the estate had been surrendered to the use of the will of such testator. Provided also, that where the testator was entitled to have been admitted to such real estate, and might, if admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person claiming in consequence of such will shall be entitled to be admitted, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due in respect of the admittance of such testator, and also of all such stamp duties, fees, and sums of money as would have been lawfully due in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate,

and afterwards surrendered the same to the use of his will; all which shall be paid in addition to the stamp duties, fees, fine, or sums of money payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

By sect. 5, when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or his steward, or the deputy of such steward, shall cause the will, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of the manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will. And when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same; and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine &c. as he is now entitled to against the customary heir in case of a descent.

By sect. 6, if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie* (whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament), it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall be applied and distributed in the same manner as the personal estate.

IV. TO WHOM DEVISES OR BEQUESTS MAY BE MADE.

A devise of lands to a corporation, whether aggregate or sole, either for its own benefit or as trustee, is void, and the lands descend to the heir or residuary devisee, and either beneficially or charged with the trust, as the case may be. Such devises are, however, authorized by some acts of parliament. The statute of 43 Eliz. c. 4, has been held to render valid appointments to corporations for charitable uses. The devises to such uses are now prevented by the 9 Geo. II. c. 36; yet the 4th section of the latter statute, excepting out of its operation gifts to the colleges in the two English universities, and to the colleges of Eton, Westminster, and Winchester, seems to have had the effect of validating devises to these corporations. By the statute 43 Geo. III. c. 107, persons are enabled to devise lands to the governors of Queen Anne's Bounty; and the statute 43 Geo. III. c. 108 authorizes, under certain limitations, the devise of lands for the erection or repair of churches or chapels, for the enlargement of churchyards, or of the residence or glebe for the use of any minister of the church of England.

The 9 Geo. II. c. 36, commonly called the Mortmain Act, (stated *ante*, p. 568), though it extended to every description of property that savoured of the realty, yet leaves the disposition of personal estate (other than chattel interests in land) quite unrestrained, except where directed to be laid out in land; so that, with this modification, a person may well bequeath the whole of his personal estate to charitable purposes. Previously to the passing of the 3 & 4 Wm. IV. c. 15, a bequest for the benefit of a Roman Catholic school was void. Now, however, under that act, such a bequest is valid.

An *alien* may be a devisee of real estate; but, upon office found, such real or personal estate will belong to the crown.¹

A *bastard* cannot, as we have already observed,² take any thing under a will under the description of "children," this description being held to mean *primâ facie* legitimate children. Lord Eldon said, in a well-known case upon this subject, "The rule cannot be stated too broadly, that the terms 'child,' 'son,' 'issue,' and every word of that species, must be taken *primâ facie* to mean legitimate child, son, or issue.³ If, however, the intention of a testator that illegitimate children should take, be clearly apparent from the terms of the will itself, or can be shown by necessary and irresistible implication (for mere conjecture will not be sufficient), they would then be entitled under a gift to 'children.'" In the case of Lord Woodhouselee v. Dalrymple (2 Mer. 419), where the gift was to the children of a person who had previously died leaving no other than illegitimate children (which fact appeared to have been known to the testator), such children were held to take under the bequest. It has, however, been decided, that, under a gift to the children of a deceased person, the existence of legitimate children is fatal to the claim of the illegitimate. A gift to the children of a living person described as consisting of a definite number will include illegitimate children, if they are required to complete the numerical description. Of course a gift to illegitimate children by names which they have acquired by reputation is good. A bequest to unborn illegitimate children,⁴ describing them by reference to the father, is altogether invalid. What would be the effect of such a gift if all reference to the father were omitted, and the children were described with reference to the mother only, does not appear to be decided.⁵

It may be useful in this place to state very briefly the rules by which the courts are guided in construing certain terms of frequent occurrence in wills of personal estates, as "next of kin," "relations," "executors and administrators," "family," "house," and "heir."

Next of Kin.—Gifts to next of kin have raised the inquiry, whether they are confined to the nearest in blood of the testator, or whether they extend to persons who are not strictly nearest in blood, as the representatives of the next of kin. According to the most recent case upon this subject (*Elmsley v. Young*, 2 Myl. & Keen, 780), the latter is the proper and sound construction of such a gift.

¹ As to the effects of denization and naturalization, see *ante*, 228.

² *Ante*, 333.

³ *Wilkinson v. Adams*, 1 Ves. & Bea. 433.

⁴ As to a bequest to illegitimate children *en ventre sa mère*, see *ante*, 333.

⁵ See *Blundell v. Dunn*, cited 1 *Mad.*

Relations—This is a word in itself of vague and indefinite description; and in order to give some certainty to it, it has been held that those should take under the description of “relations,” who would have been entitled to take under the Statutes of Distribution; and this construction has been adopted where the terms used are “*near relations*.” A gift to *nearest* relations is, however, confined to the next of kin properly so called, exclusive of persons whom the statutes admit by right of representation, unless a contrary intention appear. Relations by the half-blood will take under a gift to next of kin and relations; not so, however, with respect to relations *by affinity*. A bequest to the “most deserving” of the testator’s relations, or to the testator’s “poor relations,” receives the same construction as a gift to relations simply. Sometimes a gift is made to a person for life, and after his decease to the testator’s relations: this gift takes effect in favour of the relations living at his decease, to the exclusion of those who may come *in esse* during the life of A. Sometimes, however, a question arises, at what period the objects of this residuary gift are to be ascertained. Upon this point some difference of opinion exists. The following appears to be the result of the authorities, viz. that a gift to relations or next of kin, preceded by a gift for life, with a power of selection in the legatee for life, applies to relations or next of kin *at his decease*; and that a gift to relations or next of kin, preceded by a life interest and power of distribution in the legatee for life, applies to relations or next of kin at the testator’s decease.¹

Representatives, Executors, and Administrators.—The term “personal representatives” is to be understood in the ordinary sense of executors and administrators, unless controlled by the context of the will. It has been construed to mean descendants,² and also next of kin.³ The words “legal representatives,” used in relation to personal estate, have also been held to mean next of kin. Where a bequest is to A for life, and after his death to his executors or administrators, or to A and his legal representatives; in either case A would take an absolute interest in the subject matter of the bequest. Not so, however, if the bequest were to A for life, and after his decease to his next of kin.

In a recent case, where a testator gave a legacy of 2000*l.* to A. B., and, in case A. B. should die in his life-time, directed that the legacy should go and be paid to his executors or administrators; A. B. died in the life-time of the testator, having made a will by which she appointed C. D. her residuary legatee; C. D., upon the death of the original testator, filed a bill against A. B.’s executors, claiming the legacy; and the lord chancellor held (reversing a decision of the master of the rolls, who had decreed that the executors of A. B.’s will held the legacy in trust for C. D.), that the executors held the legacy in trust for *the next of kin* of A. B.⁴ In the case just stated, the claim of the executors to the beneficial interest in the legacy was altogether excluded; the question was, for whom *they were trustees*; and indeed, in all such cases, unless an intention that they should take *beneficially* be expressed in terms too clear to admit of any question, they will be considered as *trustees*.

¹ *Harding v. Glyn*, 1 Atk. 469. *Pope v. Whitcombe*, 3 Mer. 689.

² *Styth v. Munro*, 6 Sym. 49.

³ *Baynes v. Otty*, 1 Myl. & R. 462.

⁴ *Paten v. Hills*, 1 Myl. & R. 470.

Family, and House.—These terms are of equivocal import, often varying their meaning according to the subject matter. The word “family” has sometimes been construed to mean children; in other instances it has been treated as synonymous with relations.¹

Heir.—This term (though, generally speaking, of well-defined and technical meaning) sometimes denotes, in relation to personal estate, those who would by law succeed thereto on the decease of an intestate owner, and who in a popular sense may be considered the heir in respect of such property.² But in a recent case, where a pecuniary legacy was given by a testator to his heir, the court construed the word in its legal and ordinary sense, and held that the heir at law, and not the next of kin, was entitled to the legacy;³ and the construction would be the same although the description should apply to a plurality of persons.

General Rules of Construction.—There is no subject upon which there has been more litigation than on the construction of wills; and in chancery alone many hundred decisions have been reported.⁴ We shall conclude this section by reciting a few general rules for the construction of deeds and wills.

1. That the construction be favourable, and as near the mind and apparent intent of the parties as the rules of law will admit. The construction must also be reasonable, and agreeable to common understanding.

2. That where the intention is clear, too great a stress be not laid on the strict and precise signification of words. Therefore, by a grant of a remainder, a reversion may well pass, and *è converso*. Another maxim of law is, that “*mala grammatica non vitiat chartam*; neither false English nor bad Latin will destroy a deed.

3. That the construction be made upon the entire deed, and not merely upon disjointed parts of it; and therefore that every part of it should be (if possible) made to take effect, and no word but what may operate in some shape or other.

4. That the deed be taken most strongly against the agent or contractor, and in favour of the other party. As if tenant in fee simple grants to any one an estate for life, generally it shall be construed an estate for the life of the grantee. For the principle of self-preservation will make men sufficiently careful not to prejudice their own interest by a too extensive meaning of the words; and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them. But here a distinction must be taken between an indenture and a deed poll; for the words of an indenture executed by both parties are to be considered as the words of them both; for though delivered as the words of one party, yet they are not his words only, because the other party hath given his consent to every one of them. But in a deed poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him. And in general this rule, being a rule of some strictness and rigour, is the last to be resorted to, and is never to be relied upon but where all other rules of exposition fail.

¹ See *Grant v. Lynan*, 4 Russ. 292.

² *Vaux v. Henderson*, 1 J. & W. 388, n.

³ *Mounsey v. Blamire*, 4 Russ. 384.

⁴ See *Chit. Eq. Ind., tit. Wills, Construction of.*

5. That if the words will bear two senses, one agreeable to and the other against law, that sense be preferred which is most agreeable thereto. As if tenant in tail lets a lease "to have and to hold during life" generally, it shall be construed to be a lease for his own life only, for that stands with the law; and not for the life of the lessee, which is beyond his power to grant.

6. That in a deed, if there be two clauses so totally repugnant to each other that they cannot stand together, the first shall be received and the latter rejected; wherein it differs from a will; for there, of two such repugnant clauses, the latter shall stand. This distinction is owing to the different natures of the two instruments; for the *first* deed, and the *last* will, are always most available in law. Yet in both cases we should rather attempt to reconcile them. This, however, is somewhat varied by modern decisions; for where in a will the same estate is devised to A in fee, and afterwards in another part to B in fee, they take as joint tenants, or as tenants in common, according to circumstances.

7. That a devise be most favourably expounded, to pursue if possible the will of the devisor, who, for want of advice or learning, may have omitted the legal or proper phrases; and therefore many times the law dispenses with the want of words in devises that are absolutely requisite in all other instruments. Thus, a fee may be conveyed without words of inheritance, and an estate tail without words of procreation. By a will an estate may pass by mere implication, without any express words to direct its course. As where a man devises lands to his heir at law after the death of his wife; here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication; for the intent of the testator is clearly to postpone the heir till after her death, and if she does not take it nobody else can. If, however, the devise be by a stranger, the heir, and not the wife, will take during the life of the wife. So also where a devise is of Blackacre to A, and of Whiteacre to B in tail, and if they both die without issue, then to C in fee; here A and B have cross remainders by implication, and on the failure of either's issue the other or his issue shall take the whole, and C's remainder over shall be postponed till the issue of both shall fail. But, to avoid confusion, no such cross remainders were allowed between more than two devisees. This, however, is now somewhat altered, and there may be any number of cross limitations by implication. And in general, where any implications are allowed, they must be such as are necessary (or at least highly probable), and not merely possible implications. And herein there is no distinction between the rules of law and of equity; for the will, being considered in both courts in the light of a limitation of uses, is construed in each with equal favour and benignity, and expounded rather on its own particular circumstances than by any general rules of positive law.¹

Wills are not construed so strictly as deeds; and a devise of freeholds need not be under seal as a deed.¹

To these rules of construction may be added the following sections of the 1 & 2 Vict. c. 26:—

By sect. 25, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be *comorised* or be in-

¹ No will need now be under seal. (1 & 2 Vic. c. 26, sec. 9.) But the fact of a will being sealed will not avoid it.

tended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the life-time of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

And, by sect. 26, a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates, or any of them to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

And, by sect. 27, a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will: and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, (as the case may be) which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appear by the will.

And, by sect. 28, where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

And, by sect. 29, in any devise or bequest of real or personal estate, the words "die without issue," or "die without leaving issue," or "have no issue," or any words which may import either a want or failure of issue of any person in his life-time or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the life-time or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise. Provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

And, by sect. 30, where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole

estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

And, by sect. 31, where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

V. THE EXECUTION AND ATTESTATION OF WILLS.

We shall first see how the law stood before the 1 Vict. c. 26, and which is still applicable to all wills made before the 1st January, 1838, and afterwards show the alterations made by that statute.

With respect to a compliance with the act of 29 Car. II., the statute required a will to be in writing; but it has been adjudged sufficient if it be printed, provided it be signed by the testator. So as to signature, it has been held sufficient if the testator wrote his own name at the beginning thus, "I, John Stiles, do make this my last will and testament," without any signature at the end. But where a testator, whose will was prepared on five sheets of paper, had signed the first three, but was unable to sign the others, though it was evident he had intended to sign them, it was held to be incomplete, and therefore inoperative. But if, being unable to sign the remaining sheets, he had signed the last only, without signing the intermediate ones, it would have been sufficient, as showing an intention of abandoning his previous purpose of signing each intermediate sheet. As to signature, a mere mark by a marksman, if intended as a signature, had all the effect which the statute intended.

Lord Hardwicke seems to have thought that sealing, without signing, in the presence of a third witness, the will having been duly signed in the presence of two, would be sufficient.

It was held that where the testator was blind, it was not necessary to read over the will previous to its execution in the presence of the attesting witnesses; and indeed it seems sufficient if the testator acknowledged his signature in the presence of the witnesses, without actually signing it before them.

As to the *attestation*, it must have been in the presence of the testator; and many nice cases have arisen as to what was a sufficient presence. It seemed sufficient if the testator were in such a position as that he could see them sign it. If the testator were insensible at the time of the witnesses' attestation, though in his presence, it was invalid. The witnesses need not all have attested at once (as already shown), nor in the presence of each other; nor need their attestation have expressed that they subscribed their names in the presence of the testator.

These observations would not apply to executions and attestations under powers; since whatever was expressed as requisite in the deed

giving the power, must have been strictly observed, except in some few instances under the statute 54 Geo. III. c. 168, to remedy defective executions of powers.

The attesting witnesses cannot take any interest under the will; but if any be given thereby, it lapses into the residue. Formerly, the courts were so strict that they would not allow any legatee, nor, of consequence, a creditor where the legacies and debts were chargeable on the real estates, to be competent witnesses, but the whole will, so far as related to real property, was held to be void. This occasioned the statute 25 Geo. II. c. 6 to be passed, which restored both the competency and credit of such legatees, by declaring all legacies or any interest given to witnesses void; and it restored the competency of creditors, leaving their credit, like that of all other witnesses, to be considered under all the circumstances of the case by the judge or jury before whom the will may be contested. A will therefore is not now affected, though it contains a charge on real estate to pay debts, and all the three attesting witnesses are creditors.

Wills of personal estate were not subjected to the same formal mode of execution as those of real estate. If a will of personal estate were written in the testator's own hand, though it had neither name nor seal, and though there were no witnesses to it, the law determined it to be good. Several cases are to be met with in the ecclesiastical reports, in which papers have been received as testamentary, the execution of which was wholly prevented by the death of the testator. Wills of copyhold estates were not required to be executed in the same manner as wills of freehold estates. In *Carey v. Askew* (3 B. C. C. 59) it was decided, that the mere draft of a will, the signing and publication whereof were prevented by the death of the testator, and which had been proved in the ecclesiastical court, was a good will of copyholds; and in *Doe v. Danvers* (7 East. 299) unsigned instructions, taken down upon the oral dictation of the testatrix, whose death prevented the execution of the will prepared from them, were held to carry a customary freehold which the testatrix had surrendered to the use of "her will in writing." There are instances, however, of the prerogative court having refused to admit to probate papers which the testator had signed, but had not proceeded to attest as he had evinced an intention to do. But the case was different where the testator was prevented from perfecting the paper by inevitable accident, as sudden death, insanity, &c.

By the 1 Geo. I. c. 19, § 12, and other acts of parliament, a will disposing of stock in the public funds must be in writing and attested by two or more credible witnesses, though stock would pass in effect by an unattested will, and the executors would be trustees for the legatee. If a will related to personal estate *only*, a legacy might be given to a witness to such will, notwithstanding the 25 Geo. II. c. 6.

Considerable alteration has been effected in these respects by the new act, as will be seen by the following sections, which, it will be remembered, only apply to wills made since the 1st January, 1838:—

By sect. 9, no will shall be valid unless it be in writing, and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by some other person in his

presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, who shall attest and subscribe the will in the presence of the testator; but no form of attestation shall be necessary.

And by sect. 10, no appointment made by will in exercise of any power shall be valid, unless the same be executed in manner hereinbefore required. And every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

And, by sect. 13, every will executed in manner hereinbefore required shall be valid without any other publication thereof.

And, by sect. 14, if any person who shall attest the execution of a will shall, at the time of execution thereof or at any time afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

And, by sect. 15, if any person shall attest the execution of any will, to whom or to whose wife or husband any beneficial devise, legacy, estate, gift, or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

And, by sect. 16, in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

And by sect. 17, no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

VI. OF THE REVOCATION AND REPUBLICATION¹ OF WILLS.

To be revocable is the essential property of every will; and wills have been always liable to be revoked, either expressly or by implication arising from some act affording ground to presume that the intention of the testator had changed.

We shall here again first state the law as it existed prior to the 1 Vict. c. 26, and afterwards the alterations made by that statute.

A will might be *revoked* by burning, cancelling, tearing, or obliterating it by the testator, or in his presence and by his consent.

A revocation by obliteration, or the like, was held not to take place where the testator being angry tore his will in pieces, but was prevented

¹ Publication is now unnecessary.—See 1 & 2 Vic. c. 26, sec. 13, *supra*.

destroying it further, partly by force and partly by entreaty, and becoming calm expressed himself glad that the will was no worse. But where the testator threw his will into the fire, and it was snatched out by a bye-stander unknown to the testator, it was held a sufficient revocation.

So it might be revoked *impliedly*, by such a change in the situation of the testator's family as arises from a *subsequent marriage and the birth of a child*. A marriage alone was not sufficient; neither was the birth of a child, if the will were made after the marriage. A marriage and the birth of a posthumous child, that is, one born after the testator's death, was a revocation. Now, however, by 1 Vict. c. 26, § 18, every will made by a man or woman shall be revoked by his or her marriage; except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor or administrator, or the person entitled as his or her next of kin under the Statute of Distributions.

With respect to personal property, the Statute of Frauds put an end to mere parol revocations of wills of this description of property. Such wills, however, might be revoked by writing according to the statute, or by a subsequent inconsistent will or codicil; or by burning, cancelling, tearing, or obliterating.

When two wills are found, in order to invalidate the first in date, the second should expressly revoke it, or the provisions of the two should be clearly repugnant to each other.

Wills as to personalty, like devises of freehold estates, were also revoked by an alteration of the testator's circumstances, and even in some cases where the will would not be revoked with respect to freehold estates. A *second marriage and the birth of a child* was a revocation with respect to personal estate, although there were children of a prior marriage; and it has lately been decided, that, without any subsequent marriage, *the birth of children with other circumstances* might afford sufficient ground for the revocation of a will.

A will of personal estate is also necessarily rendered inoperative with respect to a specific bequest where the testator afterwards parts with the property which he has given; such an occurrence is said to be an *ademption* of the legacy.

The revocation of wills with respect to money in the funds is governed by the same rules which exist in regard to other personal property.

Wills of copyholds might be revoked by mere parol declarations; a testamentary appointment of a guardian might also be revoked by parol.

Republication of a will (which is in fact a re-execution, being a repetition of those ceremonies which were essential to the original efficacy of the will) gave to it the same effect as it would have had if made at the date of the republication, instead of at the date of its original execution; and it revived or made valid a will which had been revoked or become void. It caused any lands acquired after the execution of a will to pass under a general devise of the testator's estates; as, for instance, if a man devised all his real estates to A and his heirs, and afterwards purchased freehold or copyhold lands of inheritance, and then republished his will, the purchased estates would pass to the

devisee by the republication. In some cases republication would give an interest to persons born after the execution of the will, by extending to them a description which could not be applied to them unless the date of the will had been altered by such republication.

In consequence of the provisions of the Statute of Frauds, a will of real estates could not be republished otherwise than by a re-execution with the solemnities required by the statute, or by a codicil executed and attested in the same manner as the Statute of Frauds required with respect to a will; while a will might be republished with respect to copyholds and personalty without any attestation, and even by mere parol declaration. It was seldom necessary, however, to inquire into the republication of wills of personal estate, because a residuary bequest embraced all the property of which the testator died possessed, and was not generally susceptible of any enlargement by republication.

Republication had not the effect of reviving either a lapsed devise or an adeemed legacy; as, for example: If a testator devised lands to A and the heirs of his body, and A died leaving issue in the life-time of the testator, who subsequently republished his will, the republication did not entitle the heir in tail of A to the property devised to his ancestor. Nor if a pecuniary legacy given to a child were adeemed or satisfied by a subsequent advancement to the legatee, such legacy is not revived by a republication of the will, or by means of a codicil not indicating an intention to revive the legacy.

If any interlineations were made in a will of real estate, they would have no operation unless the will were afterwards republished.

Upon this branch of the subject the new law, operating from January, 1838, is contained in the following sections:—

By sect. 18, every will made by a man or woman shall be revoked by his or her marriage; except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the Statute of Distributions.

And, by sect. 19, no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

And, by sect. 20, no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

And, by sect. 21, no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect (except so far as the words or effect of the will before such alteration shall not be apparent), unless such alteration shall be executed in like manner as is hereinbefore required for the execution of the will. But the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the

will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

And by sect. 22, no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same. And when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

And by sect. 23, no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised (except an act by which such will shall be revoked as aforesaid) shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

And by sect. 24 it is enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

And though this act does not extend to any will made before the 1st January, 1838, yet, by section 35, every will re-executed or republished, or revived by any codicil, shall, for the purposes of this act, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived.

VII. OF LAPSED LEGACIES.

In general, where a legatee dies before the testator, or before the condition upon which the legacy is given is performed, the legacy becomes a lost or lapsed legacy, and sinks into the residue of the estate, as if the bequest had never been made. As, for instance—

Where one bequeathed money to trustees, in trust for a daughter till she should attain twenty-one years of age, and then to pay the same to her; and if such daughter should die under twenty-one, leaving a child or children, then in trust for them; but if she die under twenty-one without children, then in trust for the testator's nieces. The daughter attained twenty-one, married, had two children, and died in the life-time of the testator. It was determined that the daughter's children took nothing by the will.

But if a man by his will gives 100*l.* a-piece to his children, payable at their respective ages of twenty-one years, and directs that if any of them die before twenty-one, then the legacy given to the child so dying shall go to the surviving children, and one of the children dies in the father's life-time; though the rule is, that where the legatee dies in the life-time of the testator his legacy shall lapse, yet it only means that it shall lapse as to the legatee himself so dying, and that wherever, as in this case, the legacy is further devised or given over after the death of the legatee to other persons in being, it immediately on the death of the legatee vests in them, and it shall not be in the power of any court to divest or call it back again.

In all cases a bequest may be so framed as to prevent the death of the legatee from causing a lapse of the legacy. But a mere declaration that the devise or bequest shall not lapse, does not *per se* prevent it from being defeated by the death of the object in the testator's life-time, since negative words do not amount to a gift; and the only mode of excluding the title of those on whom the law, in the absence of disposition, casts the property is by giving it to some one else.¹

A legacy to A and his executors and administrators is construed simply as an absolute gift; the circumstance, that in the instance of personal estate words of limitation are not requisite to carry the absolute interest, not having been considered sufficient to denote an intention to make the executors or administrators of the legatee substituted and independent objects of gift.

And where the legatee happens to be dead when the will is made, the words of limitation are equally inoperative to vest the subject in the representatives of the deceased person.

The insertion of the word "*or*" between the name of the devisee or legatee and the words of limitation will not in general vary the construction; though in a late case (*Girdlestone v. Doe*, 2 Sim. 225) a bequest of 40*l.* a year to A for life, and after his decease to B "*or*" his heirs, was held not to give B the absolute interest, but to create a substitutional gift in case of B dying in the life-time of A. And in a more recent case (*Gittings v. Macdermott*, 2 Myl. & Keen, 69) the lord chancellor was of opinion, that a gift "*to A and B or to their heirs*" might be read "*to A and B, and if either predecease then to his heirs,*" so as to prevent a lapse. So where a testator bequeathed a legacy to A *or* to his heirs, executors, administrators, or assigns; A died in the life-time of the testator;—the bequest over was held void for uncertainty.

Where a gift is made to a plurality of persons as joint tenants, no lapse will occur, unless *all* the objects die in the testator's life-time; any one joint tenant existing when the will takes effect will be entitled to the entire property. If, however, the gift is made to persons as tenants in common, the failure of the gift as to one object would not entitle the others to the whole, without an express gift over of the share of the deceased object in such event. If an estate is devised to A, charged with a sum of money in favour of B, the charge will not be affected by the death of A in the life-time of the testator, but the estate will descend to the testator's heir at law, subject to the charge.

If a *contingent* legacy is left to any one, that is, a legacy the payment of which depends on some chance mentioned by the testator, as *if* the legatee attain the age of twenty-one, and he dies before attaining that age, though after the death of the testator, this is also a lapsed legacy. But a legacy or bequest to any one, to be paid when he attains the age of twenty-one years, is what the law calls a *vested* legacy, that is, an interest which commences at the death of the testator, although the legacy is not to be paid till some future time. And in this case, though the legatee die before that age, his representatives shall receive it out of the testator's personal estate at the time at which it would have become payable in case the legatee had lived. This distinction is borrowed from the civil law, and has been adopted in our courts.

¹ All lapsed devises of real estate are now included in the residuary devise.—1 & 2 Vic. c. 26, sec. 25.

In all cases of legacies which are vested on the testator's death, though payable at a future day, where they are charged on land, or consist of money in the funds, both of which yield an immediate and constant profit, the legatee is entitled to have interest on the legacy paid to him from the testator's death to the time of payment of the legacy. But if the legacies are charged only on the personal estate generally, which cannot be immediately got in, they will then carry interest only from the end of one year after the death of the testator, which time the executor or administrator is allowed for the purpose of settling his affairs. If a father bequeaths legacies or portions to his daughters or younger children, to be paid at their respective ages of twenty-one years, or any other time certain, without making any provision for their maintenance in the meantime, and dies, in this case they will be entitled to have interest for their portion from his death till paid, because the father was obliged to have provided for them if he had lived; but if such portions had been bequeathed to them by a stranger, to be paid at such an age, their legacies would not carry interest in the mean time, because he, being a stranger, was under no such obligation to provide for them.

When a legacy is given to one conditionally only, as in case he do or omit any particular act, the legacy is not due or payable until the condition is performed; and therefore if the legatee dies before performance of it, the legacy is in general extinguished.

Where a legacy of money or other personal estate is given to one who is an infant at the testator's decease, without appointing the legatee's age of twenty-one years or any other certain time for the payment of it, this legacy cannot be paid before the legatee is twenty-one years old, he not being capable before that time of giving the executor a legal discharge for the same. It is often the course for executors in such instances to pay the legacy to the father or guardian of the infant, in order to disburden themselves of the trouble of the executorship. This can only be safely done where such parent or guardian, being a person in good circumstances, will sufficiently indemnify the executor by bond against any future demand of the legacy by the infant, who is entitled to payment of the same from the executor when he comes of age, notwithstanding such former payment to his father or guardian.

With respect to the destination of a lapsed legacy which arises altogether from real estate, some difference of opinion appears to exist. Some judges have been of opinion that it devolves to the heir as an undisposed of portion of the real fund, while others have thought that it would fall into the residue of such fund for the benefit of the devisees.¹ The general rule may be thus stated:—When the produce of real and personal estate is blended, as where a testator mixes the produce of real estate to arise from a sale after his death with his personal estate as a common fund, and gives pecuniary and residuary legacies out of such fund, then if a legacy lapses or fails, the heir shall have the benefit of such lapse or failure so far as the legacy would have been payable out of real estate, and the next of kin of so much as would have been payable out of the personal estate.

¹ See *Hutcheson v. Hammond*, 3 B. C. C. 128, 148; and *Noel v. Lord Henley* 7 Pri. 240; S. C., 1 Daniel 212, 322.

The 25th section of the 1 Vict. c. 26 provides, that, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the life-time of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

By the 1 Vict. c. 26, § 32, where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the life-time of the testator, leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

And, by sect. 33, where any person, being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the life-time of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

VIII. OF THE OPERATION OF THE RESIDUARY CLAUSE; AND HEREIN OF THE DOCTRINE OF CONSTRUCTIVE CONVERSION.

According to the old law, applicable only to wills made before the 1st January, 1838, a will of real estate operates only on the property of which the testator was seised at the time of its execution. A residuary devise can have no wider extent of operation than if the testator, instead of devising the rest of his estate, had given by name the land he had not previously disposed of. Such a devise, therefore, cannot be enlarged by subsequent events, so as to include a subject not originally within it; for instance, if a devise in fee of particular lands lapses by the death of the devisee in the testator's life-time, the residuary devisee will not take such lapsed estate. If, however the particular devisees in a will dispose of less than the testator's entire estate in the subject matter, the residuary devise will attach on the remaining estate, precisely in the same manner as if such interest had been in terms given to the residuary devisee. Thus, if lands of inheritance are devised to A for life or in tail, the reversion in fee expectant upon such estate for life or in tail will pass under a residuary devise; and if the particular devise disposes of the fee simple in certain events only, a residuary clause would carry the fee in the alternative event.

A will of *personal estate*, as we have already had occasion to remark, comprises all the property belonging to the testator at the time of his decease; and the construction is the same although there be no words pointing at future acquisitions. Upon questions of this nature the courts have held, that where a person gives all his property, it shews that he did not mean to die intestate; and not meaning to die

intestate as to what he had at the time of making his will, they have inferred that he did not mean to die intestate as to what he should have at the time of his death. In fact, very special words will be required to confine a residuary bequest to the property belonging to the testator at the date of his will. A residuary bequest will comprise as well legacies which are originally void as those which lapse by the death of the legatees in the life-time of the testator. If, however, the disposition of any part of the residue fails, intestacy is produced to the extent of such failure. The result of the whole is, that there cannot be an intestacy as to any part of a testator's personal estate, unless in the event of the disposition of any part of the residue failing, and then only to the extent of such failure.

As to constructive conversion. It is a well-known principle of courts of equity, to consider that as done which is agreed to be done. Upon this principle rests the doctrine of constructive conversion. Thus, if money be directed to be laid out in the purchase of land, or if land be directed to be sold and turned into money, although no change has *actually* taken place in the nature of the property, yet it is considered as constructively converted; and accordingly the money in the first case is considered as land, and subject to all the incidents of land, as tenancy by the curtesy, &c.; and in the other case the land will be considered as money, and, as such, subject to the legacy duty. These results will follow in whatever manner the direction to change or convert the property is given, whether by will, by way of contract, or otherwise, and whether the money is actually deposited or only covenanted to be paid, and whether the land is actually conveyed or only agreed to be conveyed. The owner may make land money, or money land. Therefore if a person takes under a deed or will property which is thereby directed to be converted, he takes it in the character which the deed or will has fixed upon it. In order to this result, however, the direction to convert must be absolute. If property directed to be converted is devised or bequeathed to a person in such a manner as to give him the absolute interest in such property, such person may elect to take it either in its actual or in its converted state. The party must be personally competent to change the nature of the property, and must have evinced an intention to do so. What amounts to such election has been the subject of much dispute; it has, however, been decided, that it may be made by parol. The intention to elect ought always to be clearly and unequivocally expressed.

IX. OF THE PROOF OR PROBATE OF WILLS; AND HEREIN OF THE LOCAL LAW BY WHICH WILLS ARE REGULATED.

A will, so far as it relates to freehold estates in fee simple, is not required by the law to be proved in the ecclesiastical court, and the original only is evidence; nor does the law afford any means of proving it, unless it becomes necessary to give it in evidence in some action or suit; and then, if disputed, it is proved in the courts of law in the same manner as a deed. At law, the validity of such a will can be disputed only in some action to recover the property devised, as some rent or profit arising out of it, or to assert some right depending on the ownership of it. But a will relating to leasehold estates and

other personal property admits of and requires a species of authentication, called *probate*. With respect to the court in which this probate should be obtained, we shall offer a few observations presently. Wills of personal property cannot be disputed in any court of law or equity, the ecclesiastical courts having sole cognizance thereof. A court of law or equity will not recognize a will until it has been authenticated by a court entitled to grant probate of it; and they receive the probate, while unrevoked, as conclusive evidence of the validity of the will, in all actions and suits, so far as regards the title to personal estates.¹ Therefore, whenever a will is to be given in evidence in any action or suit in reference to the title to personal property, it is necessary only to produce the probate. But the probate of a will is no evidence to make a title to lands by devise, because the ecclesiastical court has no power to authenticate any such devise.

There are two modes of proving wills in the spiritual courts: one in common form; the other in solemn form.

A will is proved in *common* form, upon the oath of the executor or administrator himself and of the witnesses to the will, before the ordinary or his deputy. If, as we before remarked, there are no witnesses to the will, proof will be required of the hand-writing of the testator.² A will proved in this form may afterwards be disputed as if no probate of it had been granted.

When a will is proved in *solemn* form, the next of kin or persons entitled under another will, the existence of which is suggested to the court, are cited to appear and see the will proved; and the citation contains an intimation, that if the person cited do not appear, the probate will be granted. After citation, the witnesses are examined by an officer of the court, who takes their evidence on written depositions, and the next of kin or other opposing parties are at liberty to have the witnesses cross-examined, and to have their own witnesses examined upon interrogatories. When all the evidence has been taken and is satisfactory, probate is ordered by a sentence of the judge, which is conclusive as against the persons who were properly cited, and those claiming under them. A will is rarely proved in solemn form, unless the validity of it is disputed, or some doubt is created by the instrument itself. An executor may, however, have it proved in this manner, when, on account of the nature of the evidence by which the will must be supported, he may think it advisable, to prevent any question respecting its validity from arising at a future time.

When it is intended to dispute the validity of a will, a *caveat* is usually entered, the effect of which is to prevent the grant of probate, or letters of administration with the will annexed, until notice has been given to the party entering the caveat, who is then at liberty to oppose the will.

In determining what is the proper court in which to obtain probate of a will, the nature of the property and other circumstances must be considered. The following are some general rules upon the subject. With respect to a leasehold estate, probate must be obtained from the court which has jurisdiction over the place where the estate is situated;—with respect to a bond or other specialty (except a judgment or recog-

¹ Wills of chattels real, and of such terms of years as vest in executors, must be proved in the ecclesiastical court.

² If without witnesses, and made since

the operation of the New Wills Act, it would not now be admitted as a will at all. 1 & 2 Vic. c. 26, sec. 9.

nizance), from the court which has jurisdiction over the place where the deed or other security was found at the death of the testator ;—with respect to a judgment or recognizance, from the court which has jurisdiction over the place where it was entered up or acknowledged ;—with respect to a simple contract debt, from the court which has jurisdiction over the place where the person by whom it is payable resides ;—with respect to money in the funds, and shares in public companies, from the court which has jurisdiction over the place where the dividends are payable ; and with respect to money and moveable chattels, from the court which has jurisdiction over the place where they are found, except as to things about the person of the testator dying *in itinere*, and then from the court having jurisdiction over the testator's last place of domicile. The prerogative court has jurisdiction to grant probate or letters of administration when the deceased leaves effects in more than one diocese of the province ; but this jurisdiction is exercised only when he leaves *bona notabilia*, or effects to the value of 5*l.*, out of the diocese in which he died.

There seem to be several undecided questions respecting this law of *bona notabilia*. It is not settled, whether, to constitute *bona notabilia* there must be goods of the value of 5*l.* or other proper value in each of two dioceses, or whether it is sufficient if the goods in both dioceses amount together to such value. Where a will is proved in one diocese, and there are effects in another the value of which is not sufficient to constitute *bona notabilia*, it is doubted whether a title to such effects can be made without a prerogative probate or administration, because it is considered that the probate or letters of administration of one diocesan court can have no effect in respect of property out of its jurisdiction. It is doubted whether the archbishop is entitled to grant probate or letters of administration where the deceased person died out of the kingdom, or without leaving effects in the diocese where he died, and all his property happens to be in one diocese. It is however settled, that if the deceased die in one province, leaving property in one diocese only of the other province, a diocesan probate is sufficient with respect to such property ; and it is the better opinion (as to which we shall say more presently) that when the deceased died abroad, or without having property within the jurisdiction in which he died, a prerogative probate or administration is unnecessary, unless he left *bona notabilia* within two jurisdictions in the province. The rule above stated as to *bona notabilia*, which prevails with respect to dioceses, extends also to peculiars. If there are *bona notabilia* in two episcopal peculiars, whether in different dioceses or in the same diocese, the probate or letters of administration must be granted by the prerogative court. If the deceased left goods in each of the two provinces of Canterbury and York, two or more probates must be obtained, because the jurisdictions of the two archbishops are entirely distinct. But whenever all the effects comprised in the will are in any number of subordinate jurisdictions within the same province, one probate from the prerogative court is sufficient.

It has frequently been decided, that a will thirty years old proves itself, the same as a deed ; and that therefore it need only be produced. Whenever the production of a will is necessary in a court of law, the

original must be obtained from the ecclesiastical court in which it was proved; and it is the practice of that court to send it by one of their own officers.

Sometimes when the title to real estate depends upon a will, it is necessary to prove it in chancery against the heir. So a will may be proved in chancery if there be any doubt of the sanity of the testator. In such cases it is the general practice of that court never to decree the will proved unless all the witnesses are examined. This rule appears to admit of some exceptions; as, for instance, in the case of *Lord Carrington v. Payne* (5 Ves. 404), where one of the witnesses to the will was abroad, the master of the rolls held that it was not necessary to have his examination, but it was the same as if he was dead; he observed, however, that the heir did not make a point of it, but submitted it to the court. Evidence of the fact of absence, and of the witness's hand-writing will be sufficient, in addition to that of the testator's hand-writing; which, however, is not necessary if any attesting witness remains to prove the execution. Again, if a witness be rendered incompetent to give evidence, either by insanity or from infamy of character, or interest arising after the execution of the will, or if he cannot be found after strict and diligent inquiry; in either of these cases the evidence of such witness will be dispensed with.

By what local law Wills are governed.—A will of lands is generally governed by the law of the place where the property is situate. Thus, lands in England, belonging to a British subject domiciled abroad dying intestate, will descend according to the English law. In regard to personalty, however, whether in case of testacy or intestacy, the devolution of the property is regulated by the law of the place where at his death the testator resided. If a foreigner is domiciled in England, his personal property, if he died intestate, will be distributed according to the English law of succession; and any will he may have left, though made in his native country, must be construed according to the law of England. If a British subject becomes domiciled abroad, the law of the place which at his death constituted his domicile, will govern the distribution of his property in England if he died intestate; and if he left a will, will determine the validity and regulate the construction of such will. It has recently been decided, that the property of a deceased Englishman domiciled in India is not rendered liable to the legacy duty by the circumstances of its being remitted to bankers in England, and of a suit respecting the distribution of the property being instituted in the Court of Chancery here; and that the property of a foreigner residing abroad, though situate in England and bequeathed to legatees in England, is not liable to the legacy duty. Domicile is not lost by mere abandonment; it is not to be defeated *animo* only, but *animo et facto*, and necessarily remains until another domicile be acquired, unless the party die *in itinere* towards an intended domicile. Thus, where a person who was born, educated, and established in Spain, where he died, had, as it appeared, occasionally claimed the privileges of a British subject, and visited England, he was held to be domiciled in Spain, and the disposition of his property was consequently to be governed by the law of that country.

With respect to the question of domicile,¹ where an Englishman or Scotchman divides his time equally between the two countries, the reader is referred to the case of *Somerville v. Somerville*, 5 Ves. 750.

As to the administration of the effects of a person dying intestate, this subject has been so far anticipated as to render it unnecessary in this place to add any thing to what has been already observed;² and the law upon the customs of London and York will also be found in another part of this work.³

In concluding this chapter, we propose to offer a few observations upon *ambiguities in wills*, and the *admissibility of parol and other extrinsic evidence in aid of their interpretation*. A devise or bequest may, as we have already seen, fail by reason of its uncertainty. This may arise either from the absence of declared intention, or the contradictory nature of the expressions used by the testator; it may also arise from the indefiniteness and obscurity as to the event on which the devise is to take effect. Sometimes it arises from the circumstance of there being a plurality of persons answering to the terms of the gift, as if the gift be to the testator's brother, and it appear that he has several brothers. At the same time, we may observe, that inaccuracy in *some parts* of a devise will not have the effect of defeating it. Thus, if the local description of the subject of the devise be incorrect, and the reference to the occupancy be correct, the devise will not be void by reason of the error in the description, as this may be corrected by the reference to the occupancy. So if a devise be to James the son of the testator's brother William, and William's only son is named Thomas, Thomas would clearly be entitled.

With respect to the *admissibility of parol evidence to explain ambiguities in wills*. Notwithstanding the rules of law which make void a devise for uncertainty, there are certain special cases (which we shall presently see more at length) in which extrinsic evidence is admitted to explain ambiguities appearing upon a will. The general principle of law, however, is, that parol declarations of testators cannot be received in evidence to control their written wills, whether of real or personal estate, or to give an import to their language which it would not otherwise bear. Thus, where the uncertainty is palpable on the face of the will, parol evidence cannot in any way be admitted to remove it. As, if a testator devise to one of the sons of A, evidence cannot be received to show which son was intended as the object of the testator's bounty, but the devise will altogether fail. In the case of *Hunt v. Hat* (3 B.C.C. 311), where the bequest was to Lady (a blank being left for the name); Lord Thurlow refused to admit parol evidence to supply the name; but in a case where the bequest was to Price, son of Price, parol evidence was admitted for the purpose of supporting the claim of a son of the testator's niece of the name of Price.

In one case, where the christian and surname were both wrong, evidence was admitted to correct them.⁴ This decision, however, has not been universally acquiesced in. Although parol evidence is not admissible for the purpose of explaining a patent ambiguity, yet

¹ As to what constitutes domicile, see *Bempole v. Johnson*, 3 Ves. 198.

² *Ante*, 424, 558.

³ *Ante*, 428.

⁴ *Beaumont v. Fell*, 2 P.W. 141.

wherever the ambiguity is not apparent on the will itself, but wholly arises out of the circumstances disclosed by evidence *dehors* the will, it may be removed by parol evidence; as in a case where a testatrix devised to J. C. of Calcot, and there were two persons of that name, evidence was received to show which was intended by the testatrix.¹ So where a testator bequeathed, on a certain event, 500*l.* to Robert C., his nephew, the son of Joseph C.;—the testator had in fact two brothers, John and Thomas, who had each a son called Robert, but he never had a brother named Joseph;—parol evidence was admitted to show which of the nephews was intended.² And in the case mentioned above, where the bequest was to the testator's brother, and he had several brothers, evidence would be admitted for the purpose of ascertaining the object. But although parol evidence may be admitted as between the claims of several persons to whom part only of the description is applicable, yet it cannot be received to support the claim of such a person in opposition to that of another exactly or more nearly answering to all the particulars of the devise. Sometimes, from the nature of the expressions used by a testator, the question arises, whether a legatee is entitled to a legacy in money or stock; and in cases of this description evidence explanatory of the state of the testator's property when he made his will is admissible.³ So also if a testator bequeaths a specific legacy of stock, in terms which do not accurately designate any of the existing public stocks; but if the testator had, at the making of his will, the particular stock he professes to bequeath, of course evidence would not be admitted to show that he meant any other stock.

It is a question frequently of considerable difficulty, whether legacies given by the same or different instruments are cumulative or substitutional. The principle of the numerous cases upon this subject appears to depend upon this, whether from the whole of the instruments taken together, an intention on the part of the testator to substitute the one legacy for the other can be collected. Upon this principle, a sum given to a person by a codicil has been held to be substitutional for a sum of equal amount given to the same person by the will; and this although the legacy given *by the codicil* was only conditional, and that given by the will was absolute. It was formerly considered, in cases of this nature, that whichever way the presumption leaned, parol evidence was admitted to rebut the presumption. In a recent case, however, evidence of two descriptions was offered; one portion consisting of declarations by the testator of his meaning and intention, which the lord chancellor refused to admit; the other relating to the amount of the property and circumstances of the family of the testator; and with this the lord chancellor did not consider it necessary to deal, as he thought that, if it were admitted, it would not alter the construction to be put upon the instruments then under consideration; his lordship, however, expressed himself with regard to this kind of evidence in a manner calculated to lead to the inference, that he would not have admitted it even if it had been material so to do.⁴

¹ Jones v. Newman, 1 Blac. 60.

² Careless v. Careless, 1 Mer. 384.

³ See upon this point the following cases:—Tonnereau v. Poyntz, 1 B. C. C.

472; Geacock v. Faulkner, *ib.* 295; and Boys v. Williams, 3 Sim. 563.

⁴ Guy v. Sharp, 1 Myl. & R. 389.

CHAPTER XXV.

Of Bankruptcy.

THE laws of bankruptcy are considered as calculated for the benefit of trade, and founded on the principles of humanity as well as justice. In the ordinary course of legal proceedings, creditors may seize either the person or the effects of their debtor. Each individual must adopt the same process to recover his own demand; there is no participation of the expence, and no measures are taken for the common advantage of the whole; but whatever effects one claimant contrives to get into his possession, he secures for his own benefit, without regard to the interests of the rest. By the bankrupt law, however, a form of proceeding upon principles equally rational and humane is allowed, at the suit of one or more of a trader's creditors, at the common expence, and for the general benefit. The debtor is at once divested of all his property, real and personal, which is transferred to assignees; large powers of inquiry and examination of persons, of seizure and recovery of effects, are given to the court; and the debtor himself is required, under a severe penalty, to discover and deliver up the whole of his property, which is subsequently divided amongst his creditors in proportion to their several debts. If the debtor makes a full discovery of his affairs, and appears to have acted without fraud, he then becomes entitled to a complete discharge both of his person and of any property he may afterwards acquire, and also to a reasonable allowance out of his former estate, proportioned to the amount of the dividend which it may ultimately pay to his creditors.

The subject of bankruptcy has of late years undergone much inquiry and discussion; and many and considerable changes have been introduced both in the law and practice. In 1825, the bankrupt law (which had been previously dispersed among a variety of statutes, from the 35 Hen. VIII. downwards) was consolidated by the 6 Geo. IV. c. 16, and many new and salutary provisions were introduced. The system of its *administration* also was entirely remodelled by the 1 & 2 Wm. IV. c. 56, which took effect from the 11th Jan. 1832; and both the law and practice have recently been still further improved by the 5 & 6 Vict. c. 122, which came into operation on the 11th November, 1842.

Previous to these acts the administration of the bankrupt law was part of the jurisdiction of the lord chancellor, who exercised it by means of commissioners appointed on each particular occasion by a commission under the great seal. There were seventy of these commissioners for London, who were distributed into fourteen lists, or sets, to one of which lists all commissions of bankrupt in London, or within forty miles thereof, were addressed. These lists of commissioners were entirely abolished by the 1 & 2 Wm. IV. c. 56; and a new court was established, called the Court of Bankruptcy, consisting of six commissioners and a Court of Review. The six commissioners, each sitting

singly in a court of his own, execute all the business which the fourteen London lists formerly performed in the prosecution of bankruptcies within forty miles of London; and the Court of Review exercises that superintendence and control, not only with regard to bankruptcies prosecuted in London, but as to those prosecuted elsewhere, which was formerly exercised by the lord chancellor. But perhaps the most important feature in the improved system of administration introduced by that act was the appointment of official assignees, one of whom is now always attached to every bankrupt's estate, to act with the assignees appointed by the creditors. The system thus established as to town fiats having been found by experience beneficial, has been since extended, by 5 & 6 Vict. c. 122, to other parts of the kingdom. As a proper introduction, therefore, to the present subject, we shall speak more particularly of the Court of Bankruptcy and the offices connected with the administration of the bankrupt laws.

I. OF THE COURT OF BANKRUPTCY.

The Court of Bankruptcy, as originally constituted by the 1 & 2 Wm. IV. c. 56, consisted of four judges and six commissioners, who constituted—1. The Court of Review, composed of the four judges, or any three of them; 2. Two Subdivision Courts, each presided over by three commissioners; and 3. Six Commissioners Courts, for the prosecution of fiats addressed to the Court of Bankruptcy, including all cases where the bankrupt resided within forty miles of London. The Court of Review, however, is now reduced to a single judge; and twelve additional commissioners have been recently appointed, under the 5 & 6 Vict. c. 122, to form district courts of bankruptcy for the prosecution of fiats in the country.

The 1 & 2 Wm. IV. c. 56, § 1, enacts, That it shall be lawful for his majesty, by charter or letters patent under the great seal, to establish a court of judicature, to be called "The Court of Bankruptcy," and by a commission under the great seal to appoint one person (being a serjeant, or a barrister-at-law of not less than ten years standing) to be the Chief Judge, and three persons (being serjeants, or barristers-at-law of not less than ten years standing at the bar, or of five years standing at the bar and having previously practised five years as special pleader below the bar) to be other Judges of the said court, and six persons (being barristers-at-law of not less than seven years standing at the bar, or of four years standing at the bar and having previously practised as special pleader for three years below the bar) to be called Commissioners of the said court. And such court shall be a court of law and equity, and shall, together with every judge and commissioner thereof, have and exercise all such rights and privileges of a court of record, or judge of a court of record, and all other rights, incidents, and privileges, as fully to all intents and purposes as the same are used, exercised, and enjoyed by any of the courts of law or judges at Westminster. The 5 & 6 Wm. IV. c. 29 reduced the number of judges to three; and the 5 & 6 Vict. c. 122, § 64, enacts, that after the passing of that act the Court of Review may be formed by *one* judge; and that the judges shall take rank and precedence next after the judges of the superior courts of Westminster Hall.

The judges and commissioners are empowered to receive evidence, either in part or in the whole, by affidavit or by *viva voce* examination.—§ 38.

The court has an official seal, wherewith all proceedings and documents in bankruptcy requiring it are sealed.—§ 28.

The same act provided for the appointment of two *registrars* and eight *deputy registrars*, to attend upon the Court of Review and the six London commissioners; also thirty *official assignees*, one of whom is attached to each bankrupt's estate administered in the Court of Bankruptcy. And under the 5 & 6 Wm. IV. c. 29, an *accountant in bankruptcy* is appointed to superintend the funds belonging to bankrupt's estates.

No judge, commissioner, registrar, or deputy registrar, secretary of bankrupts, official assignee, or other officer appointed under this act, is capable of being a member of the House of Commons.—1 & 2 Wm. IV. c. 56, § 60.

The accountant in bankruptcy, registrars, deputy registrars, official assignees, messengers, and ushers, are exempt from serving on juries or inquests, or in any parochial office.—5 & 6 Vict. c. 122, § 63.

1. COURT OF REVIEW.—The 1 & 2 Wm. IV. c. 56, § 2, provides, that the Court of Review shall always sit in public (except as otherwise directed by that act or by the rules of court), and shall have superintendence and control in all matters of bankruptcy, and shall also have power, jurisdiction, and authority to hear and determine, order, and allow all such matters in bankruptcy as might formerly be brought before the lord chancellor, whether such matters may have arisen in the Court of Bankruptcy or elsewhere (except as therein otherwise provided), and also to investigate, hear, and determine all such other matters within the jurisdiction of the said Court of Bankruptcy as by that act or by the said rules may be assigned and referred to it.

By § 3, all matters in the Court of Review shall be brought on by way of petition, motion, or special case, subject to an appeal to the lord chancellor on matters of law or equity, or on the refusal or admission of evidence only.

By § 4, the Court of Review may direct any issue of fact arising therein to be tried by a jury before the judges thereof, or before a judge of assize, and may issue process to compel the attendance of jurors and witnesses, and enforce the orders and decrees of the said court, and to that end may exercise all the powers vested for such purposes in any of her majesty's courts of record at Westminster.

And by § 33, after any issue shall be tried, a new trial may be moved in the Court of Review; which new trial shall be granted or refused according to the rules of the common law and the practice of the courts at Westminster.

By § 5, all costs of suit between party and party in the Court of Review shall be in the discretion of the court, and shall be taxed by a master in chancery.

By § 17, the Court of Review shall hear and decide upon the petition of the bankrupt disputing his adjudication when presented as therein mentioned, or direct an issue, but subject to appeal (see the section, *post.*)

By § 31, if any commissioner or subdivision court determine any point of law or matter of equity, or decide on the refusal or admission of evidence in the case of any disputed debt, such matter may be brought before the Court of Review by the party who thinks himself aggrieved, and the proof of the debt shall be suspended until such appeal be disposed of, and a sum not exceeding any expected dividends on the debt in dispute may be set apart in the hands of the accountant-general until such decision be made. And in like manner there may be an appeal on the like matter of law or equity from the Court of Review or the lord chancellor.

This court acts, as far as possible, upon the principles and practice which were established before the 1 & 2 Wm. IV. came into operation.

Appeals.—The 1 & 2 Wm. IV. c. 56 has made considerable alteration in the law and practice of bankruptcy in regard to appeals.

By § 3, an appeal lies from the Court of Review to the lord chancellor on matters of law and equity, or on the refusal or admission of evidence only. Appeals to the lord chancellor must be on a special case, approved and certified by the judge of the Court of Review in matters arising in the said court, and by the judge trying the issue in matters arising out of the trial of issues. Such appeals are to be heard by the lord chancellor only, and not by any other judge of the Court of Chancery.

By § 32, if the Court of Review, in any appeal touching any decision in matter of law, shall determine upon the whole merits of any proof of debt, the order of the court shall be final, unless an appeal to the lord chancellor be lodged within one month; and in case of such appeal, the determination of the lord chancellor shall be final touching such proof. But if the appeal, either to the Court of Review or the lord chancellor, be allowed in relation to the admission or refusal of evidence, then the proof of debt shall be again heard by the commissioner or subdivision court, and the said evidence shall be then admitted or rejected accordingly.

And by § 37, in case the lord chancellor shall deem any matter of law or equity brought before him by way of appeal from the Court of Review to be of sufficient difficulty or importance to require the decision of the House of Lords, or in case both parties in any proceeding before the Court of Review shall desire that any such matter may be determined in the first instance by the House of Lords, and not by the lord chancellor, then and in such case the lord chancellor or the Court of Review may direct the whole facts whereupon such question of law or equity shall arise to be stated in the form of a petition of appeal to the House of Lords, and the party appealing may carry such appeal to the House of Lords in like manner as other appeals are preferred to that House: provided always, that the cases to be lodged by the parties in the House of Lords shall be confined in matters of fact, in cases of appeal from the lord chancellor, to setting forth the special case brought up to the lord chancellor from the Court of Review, and in cases of appeal from the said Court of Review, to setting forth a special case to be approved and certified in manner hereinbefore provided touching appeals to the lord chancellor, and to such arguments on the point of law as the parties may be advised to state.

2. SUBDIVISION COURTS.—The 1 & 2 Wm. IV. c. 56, § 6, provides, that the six commissioners appointed under that act may be formed into two subdivision courts, consisting of three commissioners for each court, for hearing and determining the matters and making the examinations therein referred to; and such subdivision courts may sit either in public or private, as they see fit, unless where it is otherwise provided by the act or by the rules of court.

All references or adjournments by a single commissioner to a subdivision court shall be to the subdivision court to which he belongs, unless (in the case of sickness of some of the commissioners of that subdivision court or other sufficient cause) he think fit otherwise to direct.

Any commissioner may adjourn the examination of a bankrupt or other person to be taken either before a subdivision court or the Court of Review, and may likewise adjourn the examination of a proof of debt to be heard before a subdivision court; which court shall proceed with such last-mentioned examination, and finally and without appeal (except upon matter of law or equity, or of the refusal or admission of evidence) determine upon such proof of debts: provided, that in case before the commissioner or subdivision court both parties (the assignees, or the major part of them, and the creditor) consent to have the validity of any debt in dispute tried by a jury, an issue shall be prepared under the direction of the commissioner or subdivision court, and sent for trial before the chief or one or more of the judges; but if one party only applies for such issue, the commissioner or subdivision court shall decide whether or not such trial shall be had, subject to an appeal as to such decision to the Court of Review.—Sect. 30.

3. COMMISSIONERS' COURTS.—Each commissioner holds a separate court, and is attended by a deputy registrar, an usher, and a messenger. An official assignee is also attached to each court.

The powers and duties of the six commissioners appointed under the 1 & 2 Wm. IV. c. 56 are pointed out by the 7th section of the act, which enacts, that in every bankruptcy prosecuted in the Court of Bankruptcy it shall be lawful for any one or more of the said six commissioners to have, perform, and execute all the powers, duties, and authorities by any acts of parliament now in force vested in commissioners of bankrupt, in all respects as if they were specially appointed for the purpose by a separate commission under the great seal: provided, that no single commissioner shall have power to commit any bankrupt or other person examined before him otherwise than to the care and custody of a messenger or other officer of the court, to be by him detained in his custody, and brought up before a subdivision court or the Court of Review within three days after such commitment, for which purpose one of such courts shall be forthwith assembled, to which such examination shall be adjourned.

As to *country flats*:—Formerly when a commission was to be executed in the country, that is, when the bankrupt resided more than forty miles from London, the commissioners were usually nominated by the solicitor who sued out the commission. Afterwards, under the 1 & 2 Wm. IV. c. 56, sets of commissioners were appointed by the lord chancellor for the principal places in the kingdom, from lists of practising

barristers, solicitors, and attorneys in the several counties, furnished by the judges who went the circuits, to one of which lists of commissioners all fiats not directed to the Court of Bankruptcy were directed; and on suing out the fiat the solicitor was required to certify the distance of the nearest place to the bankrupt's residence at which there was such a set of commissioners. But the recent Bankruptcy Amendment Act, 5 & 6 Vict. c. 122, reciting that the distance from London within which fiats in bankruptcy are usually exclusively directed to the Court of Bankruptcy may, in consequence of the increased facility of communication, be without inconvenience considerably extended, and that it is expedient to make better provision for the prosecution of fiats in bankruptcy not directed to the Court of Bankruptcy, provides for the appointment of twelve additional commissioners, with twelve additional deputy registrars, and thirty official assignees for that purpose.

Sect. 50 enacts, that it shall be lawful for her majesty, by a commission or commissions under the great seal, to appoint as many persons as her majesty shall think fit, not exceeding twelve persons, being serjeants or barristers at law of not less than seven years standing at the bar, to be Commissioners of the Court of Bankruptcy, in addition to the present commissioners of the said court, to act in the prosecution of fiats of bankruptcy in the country; and that they and their successors shall take the like oath before the lord chancellor as is at present administered to the commissioners of the said court, and having once taken the said oath, shall not be again required to take the same; and that any one or more of such additional commissioners shall and may form a District Court of Bankruptcy for the purposes of this act; and that every such court shall be authorized to act in the prosecution of fiats in bankruptcy in the country, at such place, and in and for such district as her majesty with the advice of her privy council shall be pleased to direct; and that it shall be lawful for her majesty with the advice aforesaid to describe, and from time to time to alter, the limit and extent of every such district. Provided always, that nothing herein contained shall prevent the lord chancellor, when he shall deem it expedient, from directing any fiat in bankruptcy to the Court of Bankruptcy.

And by sect. 61 her majesty is empowered, under her royal sign manual, from time to time to appoint any number not exceeding twelve deputy registrars, in addition to the present deputy registrars in the Court of Bankruptcy, to act as such in the country, and to attend upon and assist the said additional commissioners of the Court of Bankruptcy in the prosecution of fiats in bankruptcy in the country, in such manner as may be found most expedient for furthering such business, and as the lord chancellor shall from time to time by any order direct.

And by sect. 62, the additional commissioners and deputy registrars appointed under this act shall hold their respective offices during their good behaviour, and shall be subject and liable to such and the like privileges, prohibitions, disabilities, prosecutions, penalties, and punishments as are by the 1 & 2 Wm. IV. imposed or directed with respect to the commissioners and deputy registrars appointed under that act;

and the enactments therein contained in that behalf, except as otherwise directed by this act, shall extend and be applicable to the additional commissioners and deputy registrars to be appointed under this act. And after the passing of this act, on the death, resignation, promotion, or removal of either of the two registrars for the time being of the Court of Bankruptcy, the vacancy thereby occasioned shall be filled up by such one of the deputy registrars for the time being as the lord chancellor shall think fit to appoint.

And by sect. 46 it is enacted, that every fiat in bankruptcy issued after the commencement of this act, not directed to the Court of Bankruptcy, shall be directed to such one of the courts authorized to act in the prosecution of fiats in bankruptcy in the country as herein provided, as the lord chancellor, or as the master of the rolls, one of the vice-chancellors, or one of the masters of the Court of Chancery acting under any appointment of the lord chancellor to be given for that purpose, by such fiat may think fit to nominate, to be prosecuted in such court; and that every such fiat shall be thereupon prosecuted in the court to which the same shall be so directed; and it shall be lawful for such court to proceed thereon in all respects as commissioners of bankrupt acting in the prosecution of a fiat in bankruptcy elsewhere than in the Court of Bankruptcy before the passing of this act, save and except as such proceeding may be altered by virtue of this act; and that in every bankruptcy prosecuted in any such court every such court shall have all the power, jurisdiction, and authority, and be subject to the duty, by any act of parliament now in force vested in or imposed upon such commissioners, in all respects as if such court were commissioners of bankrupt returned and appointed under the said recited act (1 & 2 Wm. IV. c. 56), save and except as may be otherwise directed by this act.

And every fiat in bankruptcy prosecuted in the country, and the proceedings under such fiat, or any part of such proceedings, or copies or minutes of every such fiat and proceedings, or part thereof, at such time and in such manner and form as the lord chancellor shall direct, shall be transmitted by the court acting in the prosecution of such fiat to the Court of Bankruptcy in London, to be there filed and kept among the records of the said court.—§ 47.

And further as to the powers and jurisdiction of the commissioners' courts, both in town and country, it is enacted by sect. 66, that it shall be lawful for the lord chancellor, by any general or other order, whenever he shall think fit, to direct the court authorized to act in the prosecution of any fiat in bankruptcy to hear, determine, and make order in any matter of bankruptcy heretofore within the original jurisdiction of the Court of Review, or any judge of the said court. Provided nevertheless, that any such order shall be subject to be discharged, reversed, or altered by the Court of Review upon an appeal. And any commissioner of the Court of Bankruptcy authorized to act in the prosecution of any fiat directed to the Court of Bankruptcy shall be deemed and taken to be a court authorized to act in the prosecution of such fiat. And all matters and duties by this act directed or authorized to be done and performed by the Court of Bankruptcy shall and may be done and performed by any one or more of the commissioners ap-

pointed by virtue of the recited act. And every court authorized to act and acting in prosecution of any fiat in bankruptcy, or in execution of any duty imposed or to be imposed on such court by this or any other act hereafter to be in force, shall have, use, and exercise all the powers rights, privileges, and incidents of a court of record.

And by sect. 85, the several courts authorized to act in the prosecution of fiats in bankruptcy by the recited act (1 & 2 Wm. c. 56) or by this act shall be auxiliary to each other for proof of debts, and for the examination of witnesses on oath, or for either of such purposes; and the court so acting as auxiliary in the prosecution of any fiat in bankruptcy in the examination of witnesses, shall possess the same powers to compel the attendance of and to examine witnesses, and to enforce both obedience to such examination and the production of books, deeds, papers, writings, and other documents, as are possessed by the court to which such fiat is directed. Provided always, that all such examinations of witnesses shall be taken down in writing, and shall be annexed to and form part of the proceedings under such fiat; and no such proof of debts or examination of witnesses in the prosecution of any fiat shall be taken by any such auxiliary court without the permission in writing of the court to which such fiat is directed.

And by sect. 86, the lord chancellor may authorize any commissioner or deputy registrar of the court in London, or other qualified person, to act for or in aid of any country commissioner or deputy registrar, and *vice versâ*; or any country commissioner or deputy registrar of one district to act for or in aid of any country commissioner or deputy registrar of any other district, as may be required.

Every warrant issued by any court authorized to act in the prosecution of fiats in bankruptcy shall be under the hand and seal of one of the commissioners acting in the prosecution of fiats in bankruptcy in such court; and every summons issued by any such court shall be in writing under the hand of one of such commissioners.—§ 79.

And if in any case it shall be shown by affidavit to the satisfaction of the court authorized to act in the prosecution of any fiat in bankruptcy by which a summons shall have been issued, that the party to whom such summons is directed is keeping out of the way, and cannot be personally served with such summons, and that due pains have been taken to effect such personal service, it shall be lawful for the court by which such summons shall have been issued to order, by indorsement upon such summons, that the delivery of a copy of such summons to the wife, servant, or some adult inmate of the house or family of the party, at his usual or last known place of abode or business, and explaining the purport thereof to such wife, servant, or inmate, shall be equivalent to personal service; and in every such case the service of such summons in pursuance of such order shall be and be deemed of the same force and effect, to all intents and purposes, as if a copy of such summons had been delivered to the party in person.—§ 80.

All bills of charges, fees, and disbursements of any auctioneer, appraiser, broker, valuer, or accountant employed by any assignee or messenger or bankrupt under any fiat in bankruptcy, for business done under such employment, shall be settled by the court authorized to act in the prosecution of such fiat, and the amount of the bills so settled,

and no more, shall be paid to or recoverable by such auctioneer, appraiser, broker, valuer, or accountant.—§ 83.

Affidavits.—All affidavits in matters of bankruptcy, or under or by virtue of any statute relating to bankrupts, shall and may be sworn before the Court of Review, or before either of the subdivision courts in bankruptcy, or any commissioner, or the master or any registrar or deputy registrar of the Court of Bankruptcy, or master in ordinary or extraordinary of the High Court of Chancery, or in Scotland or Ireland before a magistrate of the county, city, town, or place where any such affidavit shall be sworn, or elsewhere before a magistrate, and attested by a notary, or before a British minister, consul, or vice-consul.—§ 67.

Evidence.—And it shall be lawful for the said several subdivision courts, and the court authorized to act in the prosecution of any fiat in bankruptcy, in all matters within the jurisdiction of such respective courts, to take the whole or any part of the evidence either *vivâ voce* on oath, or upon affidavits to be sworn as aforesaid.—§ 68.

And any bankrupt or other person who shall, upon any examination upon oath or affirmation before the court authorized to act in the prosecution of any fiat in bankruptcy, or in any affidavit or deposition or solemn affirmation authorized or directed by this or any other act relating to bankrupts, wilfully and corruptly give false evidence, or wilfully and corruptly swear or affirm any thing which shall be false, being convicted thereof, shall be liable to the penalties of wilful and corrupt perjury.—§ 81.

And all sums of money forfeited under this act, or by virtue of any conviction for perjury committed in any oath hereby directed or authorized, may be sued for by the assignees of the estate and effects of any bankrupt in any of her majesty's superior courts of record, and the money so recovered (the charges of suit being deducted) shall be divided among the creditors.—§ 82.

Costs.—It shall be lawful for the said several subdivision courts, and the court authorized to act in the prosecution of any fiat in bankruptcy, in all matters before such courts respectively, to award such costs as to such courts shall seem fit and just; and in all cases in which costs shall be so awarded against any person it shall be lawful for such court to cause such costs to be recovered from such person in the same manner as costs awarded by a rule of any of the superior courts at Westminster; and the like remedies may be had upon an order of such court for costs as upon a rule of any of the said superior courts for costs.—§ 69.

Practice.—It shall be lawful for the commissioners of the Court of Bankruptcy authorized to act in the prosecution of fiats in bankruptcy in London, or the major part of them, and such of the commissioners to be appointed under this act as shall be nominated by the lord chancellor for that purpose, to make from time to time, subject to the sanction and confirmation of the lord chancellor, general rules and orders for regulating the forms of proceedings (where not provided for by this act) and the practice to be observed in every court authorized to act in the prosecution of fiats in bankruptcy.—§ 70.

Solicitors or Attorneys of the Court.—By the 10th section of the 1 & 2 Wm. IV. c. 56, all solicitors or attorneys practising in the Court

of Bankruptcy must be admitted and enrolled as attorneys thereof; and when so admitted, they may appear and plead for their clients, except before the Court of Review, or upon the trial of issues, and of course except before the lord chancellor.

The solicitor to a fiat cannot be a purchaser of any of the bankrupt's property, either for himself or others, even after he has ceased to be the solicitor. He can acquire no lien on the proceedings; though on the bankrupt's papers which came into his hands before the fiat such lien may vest, but not on those subsequently received by him. He is removable by the majority of the chosen assignees; but the official assignee has no power to interfere therein.

The *Bankrupt Office*, or office of the Secretary of Bankrupts, where the docket is struck and other matters hereafter to be noticed are transacted, is in Quality Court, Chancery Lane. The hours of attendance are from ten to three, and from six to eight clock. The only holidays are Sundays, Christmas-day, Good Friday, and any general fast or thanksgiving day. No docket can be struck but during office hours. The secretary of bankrupts is the officer of the lord chancellor, and therefore the Court of Review has no power to order his attendance, nor any other control over him.

Registrars' Office of the Court of Bankruptcy.—There are two registrars and seven deputy registrars appointed under the 1 & 2 Wm. IV. c. 56. Their office is in Quality Court, Chancery Lane. By these officers the names of all solicitors admitted in the Court of Bankruptcy are enrolled. All fiats to be prosecuted in the Court of Bankruptcy are filed in this office; as are also all petitions, affidavits, and other documents. One of the deputy registrars attends on each commissioner, takes minutes, and draws up and has charge of all proceedings before him, in the same manner as one of the chief registrars attends and does similar duty in and relating to the Court of Review.

The *Enrolment Office* is for the purpose of enrolling and entering of record all such matters and proceedings in bankruptcy as are directed to be entered of record. By the 2 & 3 Wm. IV. c. 114, § 5, all country fiats, the adjudication of the commissioners named therein, appointments of assignees, and bankrupt's certificates, under such fiats, may here be entered of record, upon the application of any person interested; and any one of the judges of the Court of Review may direct, on petition, any deposition or other proceeding under such fiats to be so entered. This office is at the Bankruptcy Court, Basinghall Street.

Bankruptcy Court.—All public meetings under fiats of bankruptcy in London and within the bills of mortality, not only those fixed by the commissioners, but all meetings of creditors held by public advertisement, are required by the 1 & 2 Geo. IV. c. 115 to be held within the building called "The Court of Bankruptcy," in Basinghall Street. A notice of all such meetings is entered in a book kept at the *Registrar's Office* in the same building; which book is open for the inspection of every one, without fee, during office hours, namely, from ten to four. And a daily journal is kept of certain particulars relative to each meeting, according to § 11 of the act, and of which information is required to be given by the solicitor to the fiat

II. WHO MAY BE MADE BANKRUPT.

By the 6 Geo. IV. c. 16, § 2, all bankers, brokers, and persons using the trade or profession of a scrivener (receiving other men's moneys or estates into their trust or custody), and persons insuring ships or their freight or other matters against the perils of the sea, warehousemen, wharfingers, packers, builders, carpenters, shipwrights, victuallers, keepers of inns, taverns, hotels, or coffee-houses, dyers, printers, bleachers, fullers, calenderers, cattle or sheep salesmen; and all persons using the trade of merchandize by way of bargaining, exchange, bartering, commission, consignment, or otherwise, in gross or by retail; and all persons who, either for themselves or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt. But no farmer, grazier, common labourer or workman for hire, receiver-general of the taxes, or member of or subscriber to any incorporated commercial or trading companies established by charter or act of parliament, shall be deemed, as such, a trader liable to become bankrupt.

And by 5 & 6 Vict. c. 122, § 10, all livery-stable keepers, coach proprietors, carriers, ship-owners, auctioneers, apothecaries, market-gardeners, cow-keepers, brick-makers, alum-makers, lime-burners, and millers shall be deemed traders, and subject and liable as traders to this and to the other statutes relating to bankrupts.

Bankers, though not keeping open shop or keeping their books in the usual mode, are included in the act; but not army or navy agents. Under the term *brokers*, stock, ship, and pawnbrokers are included; but it is questionable how far an insurance broker is so. The business of *scrivener* is now very little used; it is a person to whom property is entrusted for the purpose of lending it out to others at an interest payable to his principal, and for a commission or bonus to himself, whereby he gains his livelihood. A person, therefore, having property of another, and so applying it for his own emolument only, is not a scrivener. Neither is an attorney purchasing and selling estates, negotiating loans &c. for his clients, but only charging the regular professional charges; but otherwise if he also contract for a bonus to himself.

The terms *carpenters* and *shipwrights* do not apply in this instance to mere workmen, but mean those who furnish and work up the materials either by themselves or their workmen.

As to *buying and selling*, it must be a buying *and* selling, or at least an intent to sell, otherwise it does not constitute a trader. A man buying goods for his own use, and selling such as he has no use for, is not a trader. So a man is not a trader in respect of selling the produce of his land, even though he may buy some other article to mix with it in order to render it more saleable. But it is otherwise where the produce of the land is merely the raw material of a manufacture, and the manufacture is not the necessary mode of enjoying the land. There must, as before observed, be a buying *and* selling; therefore if a man breeds cattle &c., and sells them, he is not a trader; but otherwise, if he buys them and then sells. So if a man owns or rents land, and

makes bricks thereof, buying other materials to mix therewith, and even sells part of such other materials separately, he is not a trader; but otherwise if he buys the soil, as soil, at so much per load, and makes bricks therewith. And this distinction runs through many like cases.

Buying and letting to hire seems to apply to a person taking a house, furnishing it, and letting it out in apartments; at all events, where such a lodging-house keeper supplied eatables to the lodgers, making thereby the market penny, he was held a trader.

As to the *workmanship of goods and commodities*, this applies to a butcher buying sheep and converting them into mutton, a baker buying flour and making bread, a shoemaker buying leather and making shoes, and all such like cases. There must here also be the act of buying.

A single act of buying and selling is not sufficient, unless there is the intent to continue so doing with a view to gaining, either in part or wholly, a livelihood. And where a man is in a line of life not subject to the bankrupt laws, a trifling act of buying and selling will not constitute him a trader, as a schoolmaster selling books to his scholars, or the owner of a mine buying candles and selling them to his workmen, or the keeper of hounds selling the skins and bones of horses of which the dogs had devoured the flesh. Lastly, we may observe, that though the trading be illegal, as by a smuggler, or a clergyman, or an unlicensed person (where a licence is necessary), yet the party may be made a bankrupt; for no man may take advantage of his own wrong.

Although certain persons, under the exemptions in the above clause, are exempted from the bankrupt laws in certain capacities, yet if they exercise any other trade whereby they make a profit, they may be made bankrupts; as if a farmer purchase more horses than his farm can require, and merely with a view to sell them again.

Having thus considered the subject with reference to the species of trading, let us see what persons as to their *individual* capacity may be made bankrupt; and in this view we may observe, that all persons whatever, being in trade and capable of making a binding contract, are liable to the bankrupt laws. The 135th section expressly directs that the act shall extend to *aliens, denizens, and women*. So peers, members of parliament, servants of ambassadors, clergymen (though prohibited by statute from entering into trade), and public officers (as excisemen &c.) may, if they are traders, be made bankrupt.

A *married woman* can only be made bankrupt in those cases in which she may be sued or taken in execution for her debts, namely, when her husband has abjured the realm, become an exile, been transported, or the like. But a married woman being a *sole trader according to the custom of London* may be a bankrupt with respect to her separate effects in trade.

An *infant* cannot be made a bankrupt, unless he have held himself out as an adult, and *sui juris*, and traded as such; nor can an adult, upon an act of trading during infancy.

An *executor* purchasing goods in order to sell off those of his testator to more advantage, is not liable; but otherwise if he carry on the trade of the testator as trustee.

An *uncertificated bankrupt*, and a man who has twice before been made a bankrupt and has not paid fifteen shillings in the pound, can

acquire no property; and therefore a second commission in the one case, or a third commission in the other, would be void.

A party who has ceased to trade may, in respect of debts contracted during such trading, be a bankrupt, but not in respect of posterior debts.

Persons residing in a foreign country and trading to or from this country, that is to say, buying goods in England and sending them abroad, or buying goods abroad and sending them to England, may, if they come here and commit an act of bankruptcy, be made bankrupts here.

III. ACTS OF BANKRUPTCY.

The act of bankruptcy must be committed in England or Wales, unless where it is otherwise particularly expressed in the statute. It may be committed after the party has quitted trade, provided the petitioning creditor's debt was incurred during the trading; and it is sufficient though after the docket is struck, if before issuing the fiat, or even on the very day it is dated. Neither, before the 5 & 6 Vict. c. 122, was there any limitation as to the time between issuing the fiat and the act of bankruptcy; but by the 7th section of that act it is now enacted, that no person shall be liable to become bankrupt by reason of any act of bankruptcy committed more than twelve months prior to the issuing of any fiat in bankruptcy against him.

A plain direct act of bankruptcy once committed can never afterwards be purged or explained away; as where a trader gave a general order to be denied, and was denied to a creditor accordingly, although he afterwards overtook the same creditor, and told him he was not afraid of him, but of another; this was holden not to have cancelled the act, which was complete at the time of denial. But where the act is in itself doubtful, it may be explained.

An act of bankruptcy must not formerly have been *concerted* or arranged between the bankrupt and the petitioning creditor; though a creditor not privy to such concerted act might avail himself of it. Where, however, the act of bankruptcy was the filing a declaration of insolvency, such concerting was no objection to it. And by the 1 & 2 Wm. IV. c. 56, § 42, it is enacted, that no commission shall be superseded, nor fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication had been concerted between the petitioning creditor and the bankrupt. Although, therefore, the act of bankruptcy was not sufficient if concerted, yet if a sufficient act of bankruptcy had been committed, there was no objection to the fiat issuing under a concerted arrangement between the bankrupt and the petitioning creditor. But now, by 5 & 6 Vict. c. 122, § 8, no fiat shall be deemed invalid by reason of the act of bankruptcy having been concerted between the bankrupt and any creditor or other person, except where a petition to supersede or annul it for such cause had been presented before the passing of that act.

By 6 Geo. IV. c. 16, §§ 3 to 8, the following are declared to be acts of bankruptcy:—

1. If any such trader (as is described in the preceding section) shall *depart this realm*;
2. Or, *being out of this realm, shall remain abroad*;

3. Or *depart from his dwelling house, or otherwise absent himself;*
4. Or *begin to keep house;*
5. Or *suffer himself to be arrested for any debt not due;*
6. Or *yield himself to prison;*
7. Or *suffer himself to be outlawed;*
8. Or *procure himself to be arrested;*
9. Or *procure his goods, money, or chattels to be attached, sequestered, or taken in execution;*
10. Or *make or cause to be made, either within the United Kingdom or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods, or chattels;*
11. Or *make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements;*
12. Or *make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels;*

every such trader doing, suffering, procuring, executing, permitting making, or causing to be made, any of the acts, deeds, or matters aforesaid, *with intent to defeat or delay his creditors*, shall be deemed to have thereby committed an act of bankruptcy.

13. If any such trader, having been arrested or committed to prison for debt, or on any attachment for nonpayment of money, shall, upon such or any other arrest or commitment for debt or nonpayment of money, or *upon any detention for debt, lie in prison for twenty-one days;* or, having been arrested or committed to prison for any other cause, *shall lie in prison for twenty-one days after any detainer for debt lodged against him and not discharged;* every such trader shall be thereby deemed to have committed an act of bankruptcy.

14. If any such trader, *having been arrested, committed, or detained for debt, shall escape out of prison or custody,* he shall be deemed to have thereby committed an act of bankruptcy from the time of such arrest, commitment, or detention.

15. If any trader liable by virtue of this act to become bankrupt shall, *after a docket struck against him, pay to the person who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debt than the other creditors,* such payment, gift, delivery, satisfaction, or security shall be an act of bankruptcy. And if any fiat shall have issued upon the docket so struck, the lord chancellor may either declare such fiat valid, and direct the same to be proceeded in, or may order it to be annulled, and a new fiat may issue, which may be supported by proof either of such last-mentioned or any other act of bankruptcy. And every person so receiving such money, gift, delivery, satisfaction, or security, shall forfeit his whole debt, and also repay and deliver up such money, gift, satisfaction, or security, or the full value thereof, to such persons as the commissioner acting under such or any new fiat shall appoint, for the benefit of the creditors of such bankrupt.

16. By the 1 & 2 Vict. c. 110 (Insolvent Debtors Act), § 39, the filing of a petition in order to take the benefit of that act, by any person in actual custody and within the bankrupt laws, is an act of

bankruptcy from the time of filing the same; and any fiat in bankruptcy issuing against such person and under which he shall be declared bankrupt before the time appointed by the said court and advertised in the London Gazette for such prisoner to be brought up to be dealt with according to the act, or at any time within two calendar months from the time of making any such order as aforesaid (whether upon the petition of such prisoner, or the petition of any such creditor as aforesaid), shall have the effect of divesting the real and personal estate and effects of such person out of the said provisional assignee. Provided always, that the filing of such petition shall not be deemed an act of bankruptcy, unless such person be so declared bankrupt before the time so advertised as aforesaid, or within such two calendar months as aforesaid; but every such order as aforesaid shall be good and valid, notwithstanding any fiat in bankruptcy under which such person shall be declared bankrupt after the time so advertised and after the expiration of such two calendar months as aforesaid.

17. And by the same statute a new act of bankruptcy was created, or rather a new mode of proceeding established by which creditors are enabled to avail themselves of the provisions of the bankrupt laws. As by that act imprisonment on mesne process was in a great measure abolished, those parts of the Bankrupt Act which make an imprisonment for debt for twenty-one days an act of bankruptcy became nearly a dead letter; and the power which creditors thus possessed of testing the solvency of their debtor being taken away, new provisions became necessary. Accordingly by the 8th section of that act it was enacted, That if any creditor or creditors, whose debt or debts shall be of the required amount, of any trader within the meaning of the laws in force respecting bankrupts, shall file an affidavit or affidavits in the Court of Bankruptcy that such debt or debts is or are justly due to him or them respectively, and that such debtor, as he or they verily believe, is such trader as aforesaid, and shall cause him to be served personally with a copy of such affidavit or affidavits, and with a notice in writing requiring immediate payment of such debt or debts; and if such trader shall not within twenty-one days after personal service of such affidavit or affidavits and notice, pay such debt or debts, or secure or compound for the same to the satisfaction of such creditor or creditors, or enter into a bond, in such sum and with such two sufficient sureties as a commissioner of the Court of Bankruptcy shall approve of, to pay such sum or sums as shall be recovered in any action or actions which shall have been or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in the same, or to render himself to the custody of the gaoler of the court in which such action shall have been or may be brought according to the practice of such court, or within such time and in such manner as the said court or any judge thereof shall direct, after judgment shall have been recovered in such action, every such trader shall be deemed to have committed an act of bankruptcy on the twenty-second day after service of such affidavit or affidavits and notice, provided a fiat in bankruptcy shall issue against such trader within two calendar months from the filing of such affidavit or affidavits, but not otherwise.

But this proceeding on the part of creditors to make a debtor a bank-

rupt, by summons before the Court of Bankruptcy, has been considerably altered by the recent act 5 & 6 Vict. c. 122, by the 11th and following sections of which it is enacted, That if any creditor within the meaning of the statutes relating to bankrupts shall file an *affidavit*, in the court authorized to act in the prosecution of fiats in bankruptcy in the district in which such debtor shall reside, or in the Court of Bankruptcy if such debtor shall not reside in any such district, in the form specified in Schedule A,¹ No. 1, of the truth of his debt, and of the debtor, as he verily believes, being such trader as aforesaid, and of the delivery to such trader, personally, of an account in writing of the particulars of his demand, with a *notice* thereunder requiring immediate payment thereof, in the form specified in the said Schedule A, No. 2, it shall be lawful for the court in which such affidavit shall be filed, as the case may be, to issue a *summons* in writing, in the form specified in the said Schedule A, No. 3, calling upon such trader to appear before such court, and stating in such summons the purpose for which such trader is called upon by such summons to appear as hereinafter provided. And (§ 12) upon the appearance of any trader so summoned as aforesaid, it shall be lawful for such court to require such trader to state whether or not he admits the demand of such creditor so sworn to as aforesaid, or any and what part thereof, and, if such trader shall admit such demand or any part thereof, to reduce such admission into writing, in the form specified in the Schedule B, No. 1; and such admission so reduced into writing such trader is hereby required to sign, and the same is thereupon to be filed in such court. And it shall also be lawful for such court to allow such trader, upon his said

¹ SCHEDULE A No. 1.—*Affidavit for summoning a Trader Debtor.*

A. B. of — and *C. D.* of — severally make oath and say,—And, first, this deponent *A. B.* for himself saith, that *E. F.* is justly and truly indebted to this deponent in the sum of — pounds, for [stating the nature of the debt with certainty and precision]; and this deponent further saith, that the said *E. F.*, as this deponent verily believes, is a trader within the meaning of the statutes relating to bankrupts, or some or one of them, and resides at —; and that an Account in writing of the particulars of the demand of the said *A. B.*, amounting to the said sum of — pounds, with a Notice thereunder written in the form prescribed by the statute in that case made and provided, purporting to require immediate payment of the said debt, is hereunto annexed: And this deponent *C. D.* for himself saith, that he did on the — day of — instant [or last], personally serve the said *E. F.* with a true copy of the said Account and Notice.

Sworn, &c.

No. 2.—*Particulars of Demand, and Notice requiring Payment, To E. F. of —*

The following are the particulars of the demand of the undersigned *A. B.* of — against you the said *E. F.*, amounting to the sum of — pounds. [Here copy the account.]

Take notice, that I the said *A. B.* hereby require immediate payment of the said sum of — pounds. Dated this — day of — in the year of our Lord — (Signed) *A. B.*

No. 3.—*Summons of Trader Debtor.*

These are to will and require you, to whom this warrant is directed, personally to be and appear before the Court of Bankruptcy, to be holden in Basinghall Street in the city of London [or at — in the county of —], on — the — day of — at — o'clock; and you are hereby informed, that the purpose for which you are thus summoned to appear before the said court is, to ascertain, in manner and form prescribed by the statute in that case made and provided, whether or not you admit the demand of *A. B.* of —, who claims of you the sum of — pounds for a debt, or any and what part thereof, or whether you verily believe that you have a good defence to the said demand, or to any and what part thereof: and hereof you are not to fail at your peril. Given under my hand the — day of — in the year of our Lord —.

(Signed) *J. K.* Commissioner.

appearance, to make a deposition upon oath, in writing under his hand, to be filed in such court, in the form specified in the said Schedule B, No. 2, that he verily believes he has a good defence to the said demand, or to some and what part thereof.—§ 12.

And if any such trader so summoned as aforesaid *shall not come before such court* at the time appointed (having no lawful impediment made known to and proved to the satisfaction of the court at the said time, and allowed); or if any such trader, upon his appearance to such summons as aforesaid, or at any enlargement or adjournment thereof, as the case may be, *shall refuse to admit such demand, and shall not make a deposition* in the form hereinbefore mentioned, *that he believes that he has a good defence* to such demand; then and in either of the said cases *if such trader shall not*, within fourteen days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, *pay, secure, or compound for such demand* to the satisfaction of such creditor, *or enter into a bond*, in such sum and with two sufficient sureties as such court shall approve of, *to pay such sum as shall be recovered in any action* which shall have been brought or shall thereafter be brought for the recovering of the same, together with such costs as shall be given in such action, every such trader shall be deemed to have committed an act of bankruptcy on the *fifteenth day after service of such summons*, provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such fiat.—§ 13.

And if any such trader so summoned as aforesaid upon his said appearance *shall sign an admission* of such demand in the form aforesaid, *and shall not*, within fourteen days next after the filing of such admission, *pay, or tender and offer to pay*, to such creditor *the amount of such demand*, or secure or compound for the same to the satisfaction of the creditor, every such trader shall be deemed to have committed an act of bankruptcy on the *fifteenth day after the filing of such admission*, provided the fiat in bankruptcy shall issue against such trader within two months from the filing of such affidavit.—§ 14.

² SCHEDULE B., No. 1.—*Admission of Debt by Trader Debtor.*

Court of Bankruptcy, Basinghall Street, London,
[or, at — in the county of —] — day of — A. D. —
WHEREAS I the undersigned, *E. F.* of — am summoned to appear before this Honourable Court for the purpose of stating, in manner prescribed by the statute in that case made and provided, whether or not I admit the demand of *A. B.* of — (who claims of me, the said *E. F.*, the sum of — pounds for a debt), or any and what part thereof, or whether I verily believe that I have a good defence to the said demand, or to any and what part thereof; be it known, that I the said *E. F.* hereby confess that I am indebted to the said *A. B.* in the said sum of — pounds [or in part of the said sum of — pounds, that is to say, in the sum of — pounds]. (Signed) *E. F.*

No. 2.—*Deposition by Trader Debtor of Belief of good Answer to Creditor's Demand, or some part thereof.*

Court of Bankruptcy, Basinghall Street, London,
[or, at — in the county of —] — day of — A. D. —
E. F. of — being sworn, on the day and year and at the place aforesaid, upon his oath, saith, That he verily believes he has a good defence to the demand [or to — pounds, part of the demand] hereinafter mentioned of *A. B.* of — who claims of the said *E. F.* the sum of — pounds, for a debt alleged to be due and owing from the said *E. F.* to the said *A. B.*, as seated in the affidavit of the said *A. B.*, filed in this Honourable Court, and bearing date the — day of —

Sworn before me, *J. K.*, Commissioner.

(Signed) *E. F.*

And if any such trader so summoned as aforesaid shall upon his said appearance *sign an admission for part only* of such demand in the form aforesaid, *and shall not make a deposition* in the form hereinbefore required that he believes he has *a good defence to the residue* of such demand, then and in such case, *if such trader*, as to the sum so admitted, *shall not*, within fourteen days next after the filing of such admission, *pay*, or tender and offer to pay, to such creditor *the sum so admitted*, or secure or compound for the same to the satisfaction of the creditor, *and as to the residue* of such demand *shall not*, within fourteen days after personal service of such summons, or within such enlarged time as may be granted to him in that behalf, *pay*, secure, or compound for the same to the satisfaction of such creditor, *or enter into a bond*, in such sum and with two sufficient sureties as such court shall approve of, *to pay such sum as shall be recovered in any action* which shall have been brought or shall thereafter be brought for the recovery of the same, together with such costs as shall be given in such action, every such trader shall be deemed to have committed an act of bankruptcy on the *fifteenth day after service of such summons*, provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such affidavit.—§ 15.

Provided always, that if any such trader so summoned as aforesaid shall, upon his appearance before such court, refuse to sign the admission in that behalf required as aforesaid, whatever may be the nature of his statement, or whether he makes any statement or not, it shall be deemed, for the purposes of this act, that every such trader thereby *refuses* to admit such demand. Provided always, that it shall be lawful for such court, upon reasonable cause shown, to enlarge the time for calling upon such trader to state whether or not he admits such demand or any part thereof, and for entering into such bond, or for either of such matters, for such time as such court shall think fit.—§ 16.

Provided always, that an admission of any debt made after such summons as aforesaid and signed by any such trader *elsewhere than before such court*, may be filed in such court, and shall be of the same force and effect to all intents and purposes as an admission signed by such trader so summoned as aforesaid on his appearance in such court, provided there be present some attorney of one of her majesty's superior courts of law on behalf of such trader, expressly named by him and attending at his request, to inform him of the effect of such admission before the same is signed by such trader; and provided also, that such attorney do subscribe his name thereto as a witness to the due execution thereof, and in such attestation declare himself to be attorney for the said trader, and state therein that he subscribes as such attorney; and such admission shall be made in the form of Schedule C,¹ hereunto annexed.—§ 17.

¹ SCHEDULE C.—*Admission of Debt by Trader Debtor, signed out of Court.*

I the undersigned *E.F.* of _____ do hereby confess, that I am indebted to *A.B.* of _____ in the sum of _____ pounds. (Signed) *E.F.*

Dated this _____ day of _____ A.D. _____

Witness, *G.H.*, attorney for the said *E.F.*, and subscribing witness to the execution hereof as such attorney.

Where any trader against whom an affidavit of debt is filed as aforesaid shall be summoned to appear before the court in which such affidavit shall be filed, as the case may be, every such trader shall have such costs and charges as such court in its discretion shall think fit.—§ 18.

And in every action brought after the commencement of this act, wherein any such creditor is plaintiff and any such trader is defendant, and wherein the plaintiff shall not recover the amount of the sum for which he shall have filed an affidavit of debt under the provisions of this act, such defendant shall be entitled to the costs of suit, to be taxed according to the custom of the court in which such action shall have been brought; provided that it shall be made appear to the satisfaction of the court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not any reasonable or probable cause for making such affidavit of debt in such amount as aforesaid, and provided such court shall thereupon, by a rule or order of the same court, direct that such costs shall be allowed to the defendant. And the plaintiff shall, upon such rule or order being made as aforesaid, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed, and then in such sum only as the same shall exceed, the amount of the taxed costs of the defendant in such action; and in case the sum recovered in any such action shall be less than the amount of the costs of the defendant to be taxed as aforesaid, then the defendant shall be entitled, after deducting the sum of money recovered by the plaintiff in such action from the amount of his costs so to be taxed as aforesaid, to take out execution for such costs in like manner as a defendant may now by law have execution for costs in other cases.—§ 19.

18. By sect. 20 of the same act, *if any plaintiff* shall recover judgment, in any action personal for the recovery of any debt or money demand in any of her majesty's courts of record, against any such trader, and *shall be in a situation to sue out execution upon such judgment*, and there be nothing due from such plaintiff by way of set-off against such judgment, *and such trader shall not*, within fourteen days after notice in writing personally served upon him requiring immediate payment of such judgment debt, *pay, secure, or compound for the same* to the satisfaction of such plaintiff, he shall be deemed to have committed an act of bankruptcy on the *fifteenth day after service of such notice*. Provided always, that if such execution shall in the meantime be suspended or restrained by any rule, order, or proceeding of any court of justice having jurisdiction in that behalf, no further proceeding shall be had on such notice, but it shall be lawful nevertheless for such plaintiff, when he shall again be in a situation to sue out execution on such judgment, to proceed again by notice in manner before directed.

19. And by sect. 21, if any decree or order shall be pronounced in any cause depending in any court of equity, or any order shall be made in any matter of bankruptcy or lunacy, against any such trader, ordering such trader to pay any sum of money, and such trader shall disobey such decree or order, the same having been duly served

upon him, the person entitled to receive such sum under such decree or order, or interested in enforcing the payment thereof pursuant thereto, may apply to the court by which the same shall have been pronounced to fix a peremptory day for the payment of such money, which shall accordingly be fixed by an order for that purpose; and *if such trader*, being personally served with such last-mentioned order fourteen days before the day therein appointed for payment of such money, *shall neglect to pay the same*, he shall be deemed to have committed an act of bankruptcy on the *fifteenth day after the service of such order*.

20. And by sect. 22, if any such trader shall *file*, in the office of the lord chancellor's secretary of bankrupts, *a declaration in writing*, (in the form of Schedule D,¹ to the act annexed) signed by such trader, and attested by an attorney or solicitor, *that he is unable to meet his engagements*, every such trader shall be deemed thereby to have committed an act of bankruptcy *at the time of filing such declaration*, provided a fiat in bankruptcy shall issue against such trader within two months from the filing of such declaration. And a copy of such declaration, purporting to be certified by the said secretary or his clerk as a true copy, shall be received as evidence of such declaration having been filed. This is a re-enactment of the 6th section of 6 Geo. IV. c. 16; except that that section required an advertisement of such declaration to be inserted in the London Gazette, and the docket could not be struck until four days after the insertion of such advertisement.

By the preceding enumeration it will be seen, that acts of bankruptcy may be divided into two classes:—1st. Those acts which, being in themselves indifferent or equivocal, derive their character from the intent with which they are done; and 2dly, Those which are in themselves substantive acts of bankruptcy, and where the intent is perfectly immaterial. The former are collected in the 3d section of the 6 Geo. IV. c. 16, which, after enumerating certain acts, connects them together and declares them to be acts of bankruptcy, if done "*with intent to defeat or delay creditors*." This intent may either be expressed by the trader, or it may be established by the evidence of circumstances from which that inference may be drawn. For as the law supposes every man to have common foresight, it presumes him to *intend* that such consequences shall follow from his conduct which must of necessity arise from it. Any circumstances, however, short of the trader's own explicit declaration are, of course, open to explanation.

As to *departing the realm*, or *remaining abroad*, if the intent to delay can be proved, or can be inferred as the necessary and foreseen consequence of the delay actually produced, it is an act of bankruptcy. But the bare fact of delay is not of itself sufficient; and departure even by a man in embarrassed circumstances, though a straggling, is not conclusive evidence of such intent. Going abroad to avoid a criminal process, as a writ *de excommunicato capiendo*, or a process to enforce a duty, as a decree to execute a conveyance, are not a departure within

¹ SCHEDULE D.—*Declaration of Insolvency by Trader.*

I the undersigned *E. F.* of — do hereby declare, that I am unable to meet my engagements. Dated this — day of — in the year of our Lord —
Witness, *G. H.*, attorney of the Court of — (Signed) *E. F.*

the act; but going abroad to avoid process for *payment of money* would be an act of bankruptcy

So also of a *departure from his dwelling-house*. When a trader, having admitted and seen a creditor who called for payment of his debt, and then under pretence of going for money to pay the creditor, left his house, and the creditor in it, he was considered as having committed an act of bankruptcy. The length of absence is immaterial, the act of bankruptcy being committed the moment the trader leaves the house. If the trader takes up a temporary residence at any place where his business carries him, and departs from it with intent to delay, it is an act of bankruptcy.

The term *beginning to keep house* is a metaphorical expression, signifying not merely keeping within doors of a house itself, but any act of concealing or withdrawing from a communication with creditors, whether it be by seclusion on board a ship, or in a mill or warehouse, counting-house, chambers, or dwelling-house, or even in a friend's house, if the trader usually transacts business there while in the town where it is situate. A denial to the assessed taxes collector, or closing the doors and shutters of a banking-house during the usual hours of business, are equally acts of bankruptcy. In short, the law upon this subject may be safely summed up under the following heads: 1st. That a beginning to keep house with intent to delay creditors may be proved in any other manner than by the mere fact of denial to a creditor; and 2dly, When the creditor has given orders to be denied with such intent, it is not necessary to show that a denial did actually take place in consequence of it. But a denial to a creditor calling even by appointment on a Sunday, or at an unreasonable time, or when the debtor is really and *bonâ fide* engaged on other business, does not constitute an act of bankruptcy.

Where a trader is arrested for a just debt, and declares his power to pay it, but refuses, in order to induce his other creditors to come into a composition, it is a *yielding to prison* within the act.

Under the head of *fraudulent conveyances and transfers of property* are included all the cases of fraudulent conveyances (that is to say, voluntary conveyances without a valuable consideration) which are rendered void as against creditors by the statutes 13 Eliz. c. 5, and 27 Eliz. c. 4, and all grants and conveyances which a court of equity would declare fraudulent, as well as all cases which either appear from the facts themselves to be, or, from the conclusion of law arising from those facts, would be deemed to be fraudulent as against third parties, however fair they might be as between the parties themselves. They include also, not only all conveyances by a trader of the *entire* of his property (whether for a past consideration, as, for instance, to a creditor for debt already incurred, or for a present consideration, as, for instance, to indemnify a surety, or to secure a person about to advance money to him, or without consideration), but also all grants or conveyances of any *part* of his property, if made with intent to defeat or delay creditors in the recovery of their debts.

An assignment of the *whole* of a trader's property is a clear act of bankruptcy; and this not only if done for the benefit of *one* creditor, or of *several* creditors, or of *all* to the exclusion of *one*, in either of

which cases it is a decided act of preference, and of course fraudulent ; but even when intended for the benefit of *all* the creditors, as being calculated to defeat the provisions of the bankrupt law by investing persons of the party's own choice with the management and disposal of his property, instead of trustees chosen by the creditors.

But no creditor who has either executed, or acted under, or been privy to such a deed, can himself set it up as an act of bankruptcy ; therefore if such a deed were executed by all the creditors, they would be *estopped* by such assent from treating it as an act of bankruptcy.

And by the 4th section of the 6 Geo. IV. c. 16, a conveyance or assignment by deed to a trustee or trustees of *all* the estate and effects of any such trader for the benefit of *all* his creditors, shall not be deemed an act of bankruptcy, *unless a commission issue within six calendar months from the execution thereof* ; provided such deed be executed by every such trustee within fifteen days after the execution thereof by the trader, and that the execution by the trader and by every such trustee be attested by an attorney or solicitor, and that notice be given within two months after the execution thereof by such trader (in case he reside in London or within forty miles thereof) in the London Gazette and also in two London daily newspapers, and in case he do not reside within forty miles of London, then in the London Gazette and also in one London daily newspaper and one provincial newspaper published near to his residence ; such notice containing the date and execution of the deed, and the name and place of abode of every trustee and of such attorney or solicitor.

An assignment of *part* of a trader's effects to a particular creditor, however, carries with it no intrinsic evidence of fraud. A trader must, in the course of his business, have the power to make over parts of his property, either for past debts or for future advances. But when such act is done *in contemplation of bankruptcy*, and consequently with the intent to give the grantee a *preference* over the other creditors, it is contrary to the spirit and policy of the bankrupt law, and is not only void, but, whether it be by deed (as formerly), or (now) by gift, delivery, or transfer of goods and chattels, is an act of bankruptcy. Thus, where a trader, who could only pay 8s. in the pound, and who was threatened with an attachment out of chancery for non-payment of money, assigned a lease to secure certain creditors, and then in trust for himself ; or where a trader, three days before he absconded, made an assignment to his son (who was a creditor to a much larger amount) of part of his real and personal estate, these and similar transactions are considered acts of bankruptcy. So also a trader, the night before he absconded, inclosing bills of exchange to a creditor, or making a pretended sale on the eve of bankruptcy, or paying a bill of exchange before it became due, have all been considered fraudulent preferences. And in a recent case, a voluntary payment, under circumstances which might reasonably lead the creditor to believe bankruptcy probable, though not inevitable, was considered a preference.

It has been repeatedly laid down, that in order to make void a delivery of goods &c. to a creditor, the transaction must not only be in contemplation of bankruptcy, but it must also have been *voluntary*. Therefore a payment or delivery under the threat or apprehension

(however unfounded) either of a criminal or civil process is valid; or where the trader acts from the mere importunity of his creditor; or, as in *Smith v. Payne*, where the creditor, knowing it was in vain to ask for money, pressed the trader to let him have goods to the amount of his debt. So in *Crossby v. Crouch*, where the trader had procured A to discount bills, who afterwards required him to deposit goods as a collateral security, Lord Ellenborough observed, that the reason upon which a payment to an importunate creditor has been allowed to be valid, has not been that he might resort to a suit to enforce payment, but that his demand repels the presumption that the bankrupt upon the eve of his bankruptcy spontaneously favoured one creditor to the prejudice of the rest. A demand for a further security for a debt not yet due has the same effect. Thus, in the case of *Hartshorn v. Slodden*, where the trader, at the instance of the creditor, gave goods out of his shop in part payment of a bond not then due, that circumstance was holden not to vitiate the transaction. So a delivery under a threat of a criminal prosecution. In the case of *Bayley v. Ballard*, the trader gave three checks to his clerk to be delivered to a creditor, but before they were delivered the creditor called upon the trader and demanded payment of his debt: Lord Ellenborough held, that the intention to give a voluntary preference not being consummated, the payment was valid.

But where a trader, being pressed for payment or security, gave a bill of sale of apparently the whole of his stock, the court held that inasmuch as the act did not redeem him even from any present difficulty, which is the ordinary motive for such an act when done under the pressure of a threat, it was evident that it was not done under such pressure, but voluntarily, and with a view to prefer the particular creditor in contemplation of bankruptcy.

Where a trader, being pressed, conveyed estates in trust to sell and pay the pressing creditor, with a further trust to pay debts to certain relatives, the court considered this to be an undue preference in contemplation of bankruptcy, and an act of bankruptcy.

Acts of Bankruptcy by Members of Parliament.

By the 9th section of the 6 Geo. IV. c. 16, if any such trader having privilege of parliament shall commit any of the aforesaid acts of bankruptcy, a fiat of bankruptcy may issue against him; and the commissioners, and all other persons acting under it, may proceed thereon in like manner as against other bankrupts. But such person shall not be subject to be arrested or imprisoned during the time of such privilege, except in cases hereby made felony.

And by section 10, if any creditor of any such trader having privilege of parliament, to such amount as is requisite to support a fiat, shall file an affidavit in any court of record at Westminster, that such debt is justly due to him, and that such debtor (as he verily believes) is such trader as aforesaid, and shall sue out of the same court a summons against such trader, and serve him with a copy thereof, *if such trader shall not*, within one calendar month after personal service of such summons, *pay, secure, or compound for such debt* to the satisfaction of such creditor, *or enter into a bond in such*

sum and with two sufficient sureties as any of the judges of the court, shall approve of, *to pay such sum as shall be recovered in such action*, together with such costs as shall be given, *and within one calendar month next after personal service of such summons cause an appearance to be entered to such action* in the proper court in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons; and any such creditor or creditors may sue out a fiat against him, and proceed thereon in like manner as against other bankrupts.

And by sect. 11, if any decree or order shall have been pronounced in any cause depending in any court of equity, or any order made in any matter of bankruptcy or lunacy against any such trader having privilege of parliament, ordering him to pay any sum of money, *and he shall disobey the same*, the person entitled to receive such sum, or interested in enforcing the payment thereof, may apply to the court to fix a peremptory day for the payment, which shall accordingly be fixed by an order for that purpose; *and if such trader, being personally served with it eight days before the day therein appointed, shall neglect to pay the same*, he shall be deemed to have committed an act of bankruptcy from the time of the service thereof.

By the 42 Geo. III. c. 144, a member of parliament is declared incapable of sitting and voting in the House of Commons during twelve calendar months from the issuing of a fiat against him, unless within such period the fiat be superseded, or the creditors who may prove under it be paid in full. And if within that period the fiat be not superseded, or the creditors paid in full, the commissioners are to certify the same to the speaker, and the election is thereupon declared void.

IV. THE PETITIONING CREDITOR'S DEBT.

By the 6 Geo. IV. c. 16, § 15, it was provided that no commission should issue, unless the single debt of the petitioning creditor (or of two or more persons being partners) amounted to 100*l.* or unless the debt of two creditors amounted to 150*l.*, or unless the debt of three or more creditors amounted to 200*l.* But now, by the 5 & 6 Vict. c. 122, § 9, the amount of the debt or debts of any creditor or creditors petitioning for a fiat in bankruptcy shall hereafter be as follows:—The single debt of such creditor (or of two or more persons being partners) petitioning for the same shall amount to 50*l.* or upwards; and the debt of two creditors so petitioning shall amount to 70*l.* or upwards; and the debt of three or more creditors so petitioning shall amount to 100*l.* or upwards. And every person who has given credit to any trader on valuable consideration for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may so petition or join in petitioning as aforesaid, whether he shall have any security in writing or otherwise for such sum, or not.

If a creditor to the requisite amount receive, after notice of an act of bankruptcy, a sum in part liquidation of his debt, this does not preclude him from suing out a fiat; because the payment is void, and the original debt remains in full force.

A debt consisting of promissory notes of the bankrupt, purchased previously to the act of bankruptcy from the payee by the petitioning creditor at the rate of 10s. in the pound, has been holden to be a good petitioning creditor's debt. Yet where a banker became bankrupt, and a debtor of the estate had, after issuing of the fiat, purchased the bankrupt's cash notes to the amount of the debt for much less than their nominal value, it was holden that, having obtained them subsequently to the bankruptcy, he could not set them off in an action brought against him by the assignees. But the distinction between these cases is evident and material; in the latter case, the purchase and set-off of the notes would be a fraud upon the remaining creditors; in the former case, not.

The petitioning creditor's debt must be one for which, if payable at the time, an action at law could be maintained by and in the name of the petitioning creditor. Therefore the assignee of a bond cannot be a petitioning creditor. So a claim arising from merely equitable considerations (as, for instance, a decree for the payment of interest &c. in a suit for a specific performance) cannot constitute a good petitioning creditor's debt, because no action at law can be maintained for the recovery of it. Nor can a debt barred by the statute of limitations, for the same reason. Nor a debt founded upon an illegal consideration.

A sum of money awarded by arbitrators is a good petitioning creditor's debt, until set aside for matter *dehors*; provided the award do not appear bad on the face of it, or the deed of submission be not void, or the like.

A debt due to an executor, even before probate; a debt due from the bankrupt to his wife's trustees; a debt due to a surety; a debt due upon a solicitor's bill, even before taxation, or pending an order to tax it (at the risk, of course, of its being reduced upon taxation); a debt due on account, though not liquidated; and the like, are all good petitioning debts, for the reason above given, namely, because the creditor may maintain an action for them in his own name.

A factor who has sold goods to the debtor in his own name, even although he has named his principal, is a good petitioning creditor (the principal not interfering), whether he sold upon a commission *del credere* or not; for he might have sued for the amount in his own name.

An uncertificated bankrupt may be a petitioning creditor, if his assignees do not interfere and claim the debt.

Interest, even on a bill of exchange, cannot be the subject of a petitioning creditor's debt, unless expressed to be payable upon the face of the instrument; for otherwise it is merely damages to be recovered in an action, and not a debt in law. Therefore it cannot be added to the principal, to make up the amount required to constitute a petitioning creditor's debt. Formerly it was holden not to be proveable under the commission; but now, interest on bills of exchange or promissory notes up to the time of suing out the fiat is allowed to be proved, by statute 6 Geo. IV. c. 16, § 57.

Creditors who hold collateral securities for their debts, such as a mortgage, warrant of attorney, bill of exchange, or any other security, though of a higher nature than the original debt, may be petitioning creditors in respect of such original debt; the taking or obtaining such

security being holden not to be such an extinguishment of the original debt as to prevent the party suing out a fiat upon it. And although such collateral security be afterwards satisfied, as if the bill or bond be paid when due, this circumstance will not invalidate or affect the fiat. A mortgagee may sue out a fiat, without giving up his security.

A creditor who has taken his debtor in execution cannot be a petitioning creditor against him; because his debt, in contemplation or law, is satisfied, and he cannot maintain an action for the amount of it. But if he have not taken the debtor in execution, if he have merely proceeded against him in an action for a debt which of itself would be a good petitioning creditor's debt, he may sue out a fiat of bankruptcy against him, either before or after he obtains judgment against him. If, however, the proceedings were for a cause of action sounding merely in damages (as, for instance, an action for a breach of promise of marriage) no petitioning creditor's debt can actually or impliedly exist until judgment.

An alien cannot be a petitioning creditor.

An infant could not be a petitioning creditor, because he could not enter into the bond required upon suing out a fiat; nor could he be one of several petitioning creditors, even although the others executed the bond. But as the bond may now be dispensed with, the matter may perhaps, in future, be decided differently.

A husband cannot alone be the petitioning creditor, where the debt was due to his wife *dum sola*, or as executrix, but the wife must join in the petition. A husband may sue out a fiat of bankruptcy on a promissory note given to his wife *dum sola*; for the property in it vested in him solely upon marriage, and he might have sued upon it.

One of several obligees or partners cannot alone sue out a fiat upon the bond or partnership debt respectively, but the others must join.

A partner of the debtor cannot be a petitioning creditor against him, unless in cases where he might maintain an action against him for the amount of the debt.

A creditor who has signed a composition deed, or been otherwise privy or assenting to it, may be a petitioning creditor; but he cannot set up the deed as the act of bankruptcy.

The debt must be due from the bankrupt in his own right, and not in *autre droit*, as executor or the like. But it is no objection that it is due to the petitioning creditor in *autre droit*, as executor or the like.

The petitioning creditor's debt must have accrued before the debtor ceased to be a trader, that is, either whilst he was in trade or before he entered into it; but whether in the way of his trade or not is wholly immaterial. And the debt must have accrued before the act of bankruptcy on which it is intended to found the fiat. Therefore, where a verdict was obtained against a trader before an act of bankruptcy, in an action for breach of promise of marriage, and judgment was not obtained until after the act of bankruptcy, it was holden that this did not constitute a good petitioning creditor's debt. So where a person accepted an accommodation bill for a trader before an act of bankruptcy, and, after the act of bankruptcy, paid the amount to a third person to whom it was negotiated, this was holden not to be a

good petitioning creditor's debt; for, until payment, the acceptor was but a surety for the bankrupt, and only became a creditor by his payment, which being after the act of bankruptcy could not create a good petitioning creditor's debt. So, where the debt was contracted after the arrest, and before the trader had lain in prison the requisite time, it was holden not sufficient.

In the case of bills of exchange or promissory notes, if the bill or note be given by the bankrupt before the act of bankruptcy, it is sufficient; and each assignment of it afterwards will have reference to the time when the bankrupt parted with it. Where a trader gave a creditor, in payment of a debt due to him, a bill drawn by him upon another person, and the trader committed an act of bankruptcy before the bill became due, or was even presented for acceptance, the bill was holden to be a good petitioning creditor's debt, even although it appeared that subsequently to the fiat it was duly paid by the acceptor. Where a trader gave his promissory note for 200*l.* to A before an act of bankruptcy, and A indorsed it to B after the act of bankruptcy, it was holden that B was a good petitioning creditor; and the same, where the note became due before the act of bankruptcy, and was indorsed to the petitioning creditor after it was due and dishonoured, and after the act of bankruptcy. But the bill or note must be actually indorsed to the petitioning creditor before the suing out of the fiat, and must be proved to be so, for the fact shall not be presumed.

In all cases, if a sufficient petitioning creditor's debt exists at the time of the act of bankruptcy, the creditor's obtaining a security of a higher nature for it after the act of bankruptcy, such as judgment, bond, or other security, will not preclude him from suing out a fiat upon the original debt.

Although the petitioning creditor's debt must exist at the time of the act of bankruptcy upon which the fiat is to be grounded, yet, by 6 Geo. IV. c. 16, § 19, no fiat shall be deemed invalid by reason of any act of bankruptcy prior to the debt of the petitioning creditor, provided there be a sufficient act of bankruptcy subsequent to such debt.

And although the petitioning creditor's debt must be due, that is, must have existence at the time of the act of bankruptcy, it is *not necessary that it should be actually payable at the time*; for, by § 15, every person who has given credit to any trader upon valuable consideration for any sum payable at a certain time, which time shall not have arrived when such trader committed an act of bankruptcy, may so petition or join in petitioning as aforesaid, whether he shall have any security in writing or otherwise for such sum or not. But a debt, to be within this statute, must be payable at a time certain, either by express stipulation to that effect, or, it should seem, by the custom of the trade.

A bill for 100*l.*, not due at the time of the act of bankruptcy, but due before the holder petitioned for the fiat, has been holden to be a good petitioning creditor's debt; although if a rebate of interest were to be made for the time it had to run when the act of bankruptcy was committed, it would of course be otherwise.

If, after the adjudication of bankruptcy, the petitioning creditor's debt is found insufficient in amount to support it, another debt may in some

cases, be substituted, provided it shall not have been incurred anterior to the debt of the petitioning creditor.—6 Geo. IV. c. 16, § 18.

Upon a trader's filing a *declaration of insolvency*, a fiat may be issued upon the petition of the trader himself (paying the usual fee), as well as upon the petition of a creditor. And the lord chancellor may order the prosecution of the fiat in the Court of Bankruptcy, or in any district court; and such court, upon the application of such trader, and proof of the trading and filing the declaration, or upon the application of a creditor or creditors to the requisite amount, and upon proof of the matters requisite to support a fiat, may make the adjudication of bankruptcy, and all further proceedings shall be carried on in like manner as if the fiat had been issued and adjudicated upon on the petition of a creditor—7 & 8 Vic. c. 96, § 41.

V. STRIKING THE DOCKET, AND SUIING OUT THE FIAT.

The first thing to be done in order to procure a fiat is for the petitioning creditor to make an *affidavit* of his debt, usually before a master in chancery, or a master extraordinary in the country; which must describe the bankrupt by name and residence accurately, and state him to be a trader generally, as "linen-draper, dealer and chapman," &c., and to have become bankrupt, and if for a country fiat, stating the place, and that it is more than forty miles from London. This affidavit is to be filed at the Bankrupt Office.

The creditor was then required, by 6 Geo. IV. c. 16, § 13, to execute a *bond* to the lord chancellor, in the penalty of 200*l.*, conditioned to prove his debt, as well before the commissioner as on any trial at law, should the fiat be contested, and that an act of bankruptcy had been committed by the debtor, and to proceed on the fiat. But now, by 5 & 6 Vict. c. 122, § 3, the lord chancellor is empowered to dispense with this bond, if he think fit.

The affidavit being taken to the Bankrupt Office, the fiat is bespoke, and an entry of particulars made in the docket-book; which proceedings are termed *striking the docket*.

The *petition* from the creditor to the lord chancellor for the fiat is then prepared by the clerks of the office; and thereupon the lord chancellor, or the master of the rolls, or vice-chancellor, or one of the masters in chancery acting under the appointment of the lord chancellor for that purpose, signs the *fiat*, authorizing the petitioning creditor to prosecute his complaint in the court to which it is directed.

In case of competition between two creditors applying at the same time for a fiat, if both are equally prepared with all requisites, they draw lots for it; but if one applies for a fiat in town, and another for a fiat in the country, that which appears most advantageous to the creditors at large will be adopted.

The fiat, when signed, was formerly filed by the solicitor at the registrar's office; which, in the case of London fiats, was required to be done within seven days from the date thereof; and if London fiats were not prosecuted within fourteen days, or country fiats within twenty-eight days after their respective dates, they were supersedable, unless from circumstances it was impossible to prosecute them within

that time. The fiat was deemed *prosecuted* when the advertisement declaring the bankruptcy appeared in the *Gazette*, or, under circumstances, when the party was declared bankrupt. But now, by 5 & 6 Vict. c. 122, § 4, every fiat in bankruptcy shall, after the granting thereof, be forthwith issued and transmitted by the secretary of bankrupts to the court to which it is directed, and be forthwith opened, unless such court in its discretion think fit to postpone the opening thereof. Provided, that if such fiat be not opened by the petitioning creditor within *three days* after it shall have been so transmitted, or within such extended time as shall be allowed by the said court, such court is hereby authorized to open such fiat, at any time *within fourteen days then next following*, upon the application of any other creditor to the amount required to constitute a petitioning creditor, and to adjudicate thereon, upon the proof of the debt of such creditor and of the other requisites to support such fiat. Provided always, that no such fiat shall be issued to the petitioning creditor, or his attorney or agent.

When the fiat is issued, the solicitor applies to the registrar for an appointment to open the fiat; who, in the presence of the solicitor, allots the fiat by ballot to a commissioner, and writes the name of such commissioner upon the face of the fiat; and the solicitor then arranges with the commissioner for the meeting to adjudicate.

The time may be enlarged for opening a fiat, on affidavit that the petitioning creditor intends to prosecute the same, and that there is no composition pending or intended, and no connivance with the bankrupt. A person who has thus sued out a fiat and failed to prosecute it within the time limited, is not allowed to sue out a new fiat without the special leave of the court; and, by the practice at the Bankrupt Office, any other solicitor is after that period preferred to the one who struck the first docket.

One effect of a creditor suing out a fiat of bankruptcy against his debtor is, that he thereby elects to proceed for his debt under the fiat, and not by action at law, and relinquishes his proceedings by action, if he has taken any. In such a case the Court of Review, upon petition, will enjoin the creditor from proceeding on the action if necessary, or discharge the debtor if he be in custody; but a court of law will not interfere in such cases.

By 5 & 6 Vict. c. 122, § 5, whenever any fiat in bankruptcy shall have issued against any person, and it shall be proved to the satisfaction of the court authorized to act in the prosecution of such fiat that there is probable cause for believing that such person is about to quit England, or to remove or conceal any of his goods or chattels, with intent to defraud his creditors, unless he be forthwith apprehended, it shall be lawful for such court to issue a warrant, directed to any person or persons such court shall think fit, whereby such person or persons shall have authority to arrest the person named in such fiat by his body, and also to seize his books, papers, moneys, securities for moneys, goods, and chattels, wheresoever he or they may be found, and him and them safely keep until the expiration of the time allowed for opening such fiat, or until such person shall be adjudged bankrupt, and be thereon dealt with under such fiat according to the laws relating to bankrupts. Provided always, that it shall be lawful for any person

arrested upon any such warrant, or for any person whose books, moneys, goods, or chattels have been seized under any such warrant, to apply at any time after such arrest or seizure to such court for an order or rule on the petitioning creditor named in such fiat to show cause why the person arrested should not be discharged out of custody, or why his books, papers, moneys, securities for moneys, goods, and chattels, should not be delivered up to him; and it shall be lawful for such court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party. Provided, that any such order may be discharged or varied by the Court of Review, on application thereto by either party dissatisfied with such order.

Maliciously suing out a Fiat.—If the petitioning creditor fails in proving the matters necessary to support the fiat, and it appears that the fiat was taken out fraudulently or maliciously, the injured trader may, if he please, bring a special action for maliciously suing out the fiat, in which he may recover considerable damages.

Auxiliary Fiats.—As in some cases it is convenient to have meetings for the proof of debts or other matters in another part of the country than that in which the principal proceedings are carried on, or even sometimes in the same neighbourhood, to assist the principal commissioner, the lord chancellor is empowered to issue an auxiliary fiat for the proof of debts under 20*l.*, and the examination of witnesses on oath, or for either purpose. But now the court is empowered to direct a deputy registrar to take proof of debts and examination of parties or witnesses.—7 & 8 Vict. c. 96, § 53.

VI. OPENING THE FIAT, AND DECLARING THE PARTY BANKRUPT.

At the time appointed for opening the fiat, the petitioning creditor attends with his solicitor and the witnesses, to swear to his debt and prove the trading and act of bankruptcy.

The commissioner may summon before him any person whom he believes capable of giving any information concerning the trading or act of bankruptcy, and may require any person so summoned to produce any books, papers, deeds, writings, and other documents in his custody, possession, or power, which may appear necessary to establish the same, and may examine such person upon oath by word of mouth or by interrogatories in writing; and every person so summoned shall incur such danger or penalty for not coming before the commissioner, or for refusing to be sworn and examined, or for not fully answering to his satisfaction, or for refusing to sign or subscribe his examination, or for not producing any books, papers, or documents, as is provided as to persons summoned after the adjudication of bankruptcy.

Every witness summoned to attend before the commissioner shall have his necessary expences tendered to him, in the same manner as is required upon the service of a subpoena in an action at law.

Though the evidence at this first and opening meeting is entirely private and *ex-parte*, it is both the practice and duty of the commissioners to inquire minutely into the fairness of the petitioning creditor's debt, and the manner in which it arose, as well as the fact of trading and the act of bankruptcy. Every witness must be a competent witness, with reference to the matter he is called upon to prove,

according to the rules of evidence in the courts of common law. Proof of the petitioning creditor's debt is the only exception, which is proved by the petitioning creditor himself.

The petitioning creditor ought to attend *in person* to prove his debt; and even the circumstance of his residing at a distance of eighty-five miles from the place of meeting has been held not to be a sufficient ground to excuse his personal attendance. But, under circumstances of ill health or of great distance, the commissioners are now in general inclined to dispense with his personal attendance, and to allow proof to be made by his affidavit. Where the petitioning creditor died between the striking of the docket and the opening of the fiat, his executors were allowed to depose to the debt. The deposition of the petitioning creditor's debt is filed with the proceedings; and therein it ought to appear that the debt was still due at the time of the deposition, and if it consists of bills of exchange, that they were indorsed to him before the act of bankruptcy.

The *proof of trading* should also be established by the *personal* examination of a competent witness who is not a creditor; but this also has been dispensed with, and an affidavit thereof admitted.

The same may be said of the *proof of the act of bankruptcy*; but it is doubtful if an affidavit alone would be admitted if the application for that mode of proof were opposed. Strict *legal* proof is required; so that if the act of bankruptcy consists of a fraudulent conveyance, proof thereof by the subscribing witness, or by evidence of the bankrupt's hand-writing in the signature of the deed must be made. If intention forms the principal ingredient in the act of bankruptcy, such facts must be stated from which the intent can be fairly inferred.

The bankrupt cannot be called upon, nor is he admissible, as a witness to prove either the petitioning creditor's debt, the trading, or the act of bankruptcy; though what the bankrupt said at the time of his committing the act of bankruptcy is receivable as evidence, as evincing the *intent* with which the act was committed. So neither can the wife of the party be examined to prove any of the requisites to support a fiat. Neither is a creditor a good witness to prove either the trading or the act of bankruptcy. But although the act of bankruptcy ought not to be proved by a creditor, yet if the objection be not taken before the commissioner at the first meeting, it cannot afterwards be urged, either in a civil or criminal proceeding, as an objection to the fiat.

The petitioning creditor and witnesses having been sworn and examined sign their respective depositions, which are signed also by the commissioner in the margin.

If, upon this examination, the commissioner is satisfied that there is a good petitioning creditor's debt, and a sufficient trading and act of bankruptcy, he adjudges the party to be bankrupt, and subscribes the memorandum of adjudication. But if he is not satisfied with the proof of either, another private meeting may be appointed for the purpose of proving it.

It is discretionary with the commissioner whether counsel shall be allowed to attend on behalf of the bankrupt to contest the adjudication of bankruptcy; and even in extreme cases all the lord chancellor would do was to recommend them to hear counsel on the subject.

If the bankrupt die before the bankruptcy is declared, the fiat cannot be proceeded with; but his death after adjudication does not affect it.

Upon the adjudication of bankruptcy, the commissioner signs a *warrant of seizure* of the bankrupt's effects; and formerly, by 6 Geo. IV. c. 16, § 25, the commissioner was required to cause notice of the adjudication to be *forthwith* published in the London Gazette, appointing the public meetings to receive the proof of debts, and to take the bankrupt's surrender and examination, the last of which meetings was to be on the *forty-second* day after such publication in the Gazette. But now by 5 & 6 Vict. c. 122, § 23, it is enacted, That, *before* notice of the adjudication of bankruptcy shall be given in the London Gazette, and *at or before* the time of putting in execution the warrant of seizure, a duplicate of the adjudication shall be served on the person so adjudged bankrupt, personally, or by leaving the same at his usual place of abode or business; and such person shall be allowed *five days* from the service of such duplicate to show cause to the court authorized to act in the prosecution of the fiat against the validity of such adjudication. And if such person shall, within the time allowed, show to the satisfaction of such court that the petitioning creditor's debt, trading, and act of bankruptcy, or that any or either of such matters, are insufficient to support such adjudication, and upon such showing no other creditor's debt, trading, and act of bankruptcy sufficient to support such adjudication, or such of the said last-mentioned matters as shall be requisite to support such adjudication in lieu of the petitioning creditor's debt, trading, and act of bankruptcy, or any or either of such matters which shall be deemed insufficient in that behalf, as the case may be, shall be proved to the satisfaction of such court, such court shall thereupon cause a memorandum in writing to be filed with the proceedings under such fiat that such adjudication is *annulled*, and the same shall thereby be annulled accordingly. But if at the expiration of the said time no cause shall have been shown to the satisfaction of such court for the annulling of such adjudication, such court shall forthwith, after the expiration of such time, cause notice of such adjudication to be given in the London Gazette, and shall thereby appoint two public sittings of such court for the bankrupt to surrender and conform, the last of which sittings shall be on a day not less than *thirty* and not exceeding *sixty* days from such advertisement, and shall be the day limited for such surrender.

If, however, the bankrupt be desirous of expediting the proceedings, it is provided, that if he shall, after such adjudication, and *before the expiration of the time so allowed* for showing cause as aforesaid, surrender to such fiat, and give his consent, testified in writing under his hand before such court, to such adjudication, and that the same may be advertized, such court, after such consent so given as aforesaid, shall forthwith cause notice of such adjudication to be advertized, and appoint the sittings for the bankrupt to surrender and conform in manner aforesaid.—§ 23.

If the bankrupt means to dispute the adjudication of bankruptcy, he may present a petition to the Court of Review, praying the reversal thereof, as we shall hereafter show more particularly when we come to treat of the rescinding or annulling of fiats.

But, by sec. 24, if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication), within twenty-one days after the advertisement of the bankruptcy in the London Gazette, or (if he were in any other part of Europe at the date of the adjudication) within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit, or other proceeding to dispute or annul the fiat, and shall not have prosecuted the same with due diligence and with effect, the Gazette containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and, in all actions at law or suits in equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat, and that such fiat was sued forth on the day on which the same is stated in the Gazette to bear date.

And by sect. 25, in the event of the death of any witness deposing to the petitioning creditor's debt, trading, or act of bankruptcy, under any fiat in bankruptcy already issued or hereafter to be issued, the deposition of any such deceased witness, purporting to be sealed with the seal of the Court of Bankruptcy, or a copy thereof purporting to be so sealed, shall in all cases be receivable in evidence of the matters therein respectively contained.

And by sect. 26, if the assignees commence any action or suit for any money due to the bankrupt's estate before the time allowed by this act for the bankrupt to dispute the fiat shall have elapsed, any defendant in any such action or suit shall be entitled, after notice given to the assignees, to pay the same or any part thereof into the court in which such action or suit is brought; and all proceedings with respect to the money so paid into court shall thereupon be stayed until the time aforesaid shall have elapsed. And if within that time the bankrupt shall not have commenced such action, suit, or other proceeding as aforesaid, and prosecuted the same with due diligence, the money shall be paid out of court to the assignees; but otherwise shall abide the event of such action, suit, or other proceeding as aforesaid, and upon such event shall be paid out of court, either to the assignees or the person adjudged bankrupt, as the court shall direct. And after such payment so made into court, it shall not be lawful for the person so adjudged bankrupt to proceed against the defendant for recovery of the same money.

The commissioner at this meeting also signs a *summons to the bankrupt* to surrender, which must be either left for him at his usual place of abode, or personally served upon him in case he is in prison. At the back of the summons is a memorandum, which, when he surrenders himself, is filled up and signed by the commissioner, and operates as a protection from arrest till his final examination. The bankrupt may surrender himself at any meeting, even at the private meeting for the adjudication of bankruptcy, if he know of it, and thereby obtain the benefit of such protection; but he need not surrender until the day limited in the advertisement, or till such further time as his surrender may be adjourned to by the court.

The official assignee is appointed by the commissioner at this meeting,

immediately after the adjudication, by instrument under his hand and seal, which is filed of record in the Court of Bankruptcy, and a certificate thereof under seal of the court is delivered to such assignee by the registrar upon application.

VII. SEIZURE OF THE BANKRUPT'S PROPERTY BY THE MESSENGER.

The commissioner, as before observed, at the time of the adjudication of bankruptcy, signs a warrant of seizure of the bankrupt's effects, which is directed to a *messenger*, who, by 6 Geo. IV. c. 16, § 27, is authorized to break open any house, chamber, shop, warehouse, door, trunk, or chest of the bankrupt, where the bankrupt or any of his property shall be reputed to be, and to seize upon the body or property of the bankrupt; and if the bankrupt be in prison or in custody, he may seize any property belonging to him (necessary wearing apparel only excepted) either in his own possession or in that of any other person in the prison or place where he is in custody. And by sections 28 and 30, provision is made for seizing the bankrupt's property in Ireland and Scotland.

Under the 6 Geo. IV., however, the commissioner's warrant did not empower the messenger to break open any house to search for the bankrupt's goods, other than the house of the bankrupt. When, therefore, property of the bankrupt was suspected to be concealed in any house, premises, or other place *not belonging to the bankrupt*, it was necessary to apply to justices of the peace, who, by the 29th section, were authorized to grant a search warrant for that purpose. But now, by 5 & 6 Vict. c. 122, § 30, in all cases where it shall be made to appear to the satisfaction of the court authorized to act in the prosecution of any fiat in bankruptcy, that there is reason to suspect and believe that property of any bankrupt is concealed in any house, premises, or other place not belonging to such bankrupt, such court is hereby directed and authorized to grant a search warrant to any person appointed by the court in which the adjudication against such bankrupt shall have been made; and it shall be lawful for such person to execute such warrant according to the tenor thereof, and such person shall be entitled to the same protection as is allowed by law in execution of a search warrant for property reputed to be stolen or concealed.

Obstructing the messenger in the execution of the commissioner's warrant is punishable as for a contempt of the court of chancery. And any person indemnifying another against the consequence of turning a messenger out of possession commits a contempt; and it is no justification of his resistance, that the warrant was illegal.

If the messenger seize property not in fact belonging to the bankrupt, the owner has his remedy for damages against the messenger by action at law in the mode pointed out by and subject to the regulations contained in the 6 Geo. IV. c. 16, §§ 31, 32, 44, and 90.

VIII. PROOF OF DEBTS.

1. *What Debts are proveable.*

In general, all debts may be proved under a fiat, for which, if payable at the time, the creditor might have had his remedy against the

bankrupt either at law, in equity, or otherwise, in his own name or in the name of another. It must be a debt the amount of which is either actually ascertained, or which may be readily ascertained by computation without the intervention of a jury; and not a claim merely sounding in damages, and those unliquidated, as for breach of an agreement or of a covenant (unless it be a covenant for payment of money) or the like, even although such covenant &c. be secured by a penalty.

It must be a debt due by and from the bankrupt; so that if a party, after the fiat is sued out, has paid money to the assignees by mistake, his remedy would only be against them personally, and not by proof under the fiat.

A debt due from the bankrupt as agent for a third party is not proveable.

An actual existing debt, though liable to be defeated by a subsequent contingency, is nevertheless proveable prior to the happening of such contingency; but the payments of the dividends may be so regulated as to secure the estate in the event of the money having to be refunded on the happening of the contingency.

If a creditor had agreed to receive part of his debt in lieu of the whole, provided that part were paid by a certain day, and it was not then paid, the entire original debt is proveable. But if it were agreed to allow discount in case of prompt payment, it has been decided that the debt must be proved *minus* the discount.

A debt barred by the Statute of Limitations cannot be proved; but if the termination of the six years fall subsequent to the issuing of the fiat, the statute will then cease to run, and the debt is not barred.

A debt tainted with usury, or arising out of any illegal transaction, trade, or consideration, or due to an alien enemy, cannot be proved; and, indeed, it may in general be said, that all objections which would operate against the recovery of a debt either at law or in equity are equally available in bankruptcy. A debt, however, contracted abroad for goods contraband in England is nevertheless proveable, unless the seller were an actual participator in the act of smuggling them into this country.

A debt of his testator may be proved against the estate of a bankrupt executor, if he had acknowledged assets; so against that of a trustee who had misapplied the trust funds to his own use. So also against an executor for a legacy, or upon an order in chancery for payment of money.

If the bankrupt has, prior to his bankruptcy, agreed to give a certain price for land, the contract not being completed by possession &c., the seller, upon the bankruptcy happening, may, upon petition to the Court of Review, obtain an order for liberty to re-sell the land, and may prove against the estate of the bankrupt for the difference in value.

Whether the party seeking to prove would, but for the intervention of bankruptcy, have been obliged to have sued in the name of his assignor or in his own name, makes no difference; although it is otherwise with regard to the petitioning creditor's debt, as such.

The debt must be existing as a debt at the date of the fiat, though it may not be payable till a future period. It must be within the definition, *debitum in præsentì*, though *solvendum in futuro*.

Formerly a debt, in order to be proveable under a fiat, must not only have been due, but actually *payable*, before the act of bankruptcy. By the 7 Geo. I. proof upon bills, bonds, notes, or other securities was permitted, allowing a rebate of interest; and afterwards by the 49 Geo. III. this was extended to all persons giving credit before the bankruptcy. These provisions are now consolidated in the 6 Geo. IV. c. 16, the 51st section of which enacts, that any person who shall have given credit to the bankrupt, upon valuable consideration, for any money or other matter or thing whatsoever which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security, or not, shall be entitled to prove such debt, bill, bond, note, or other security, as if the sum was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive, at the rate of five per cent, to be computed from the declaration of a dividend to the time such debt would have become payable.

And, by the 47th section of the same act, all debts contracted before the *date of the fiat* may be proved, where the creditor had *no notice of the act of bankruptcy*. That section enacts, that every person with whom the bankrupt shall have really and *bonâ fide* contracted any debt or demand before the issuing the fiat, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be admitted to prove the same, and be a creditor under such fiat, as if no such act of bankruptcy had been committed, provided such person had not, at the time the same was contracted, notice of any act of bankruptcy committed. That is to say, every debt or demand arising *bonâ fide* before the issuing of the fiat, and without knowledge on the part of the creditor of any act of bankruptcy committed by the debtor, may be proved. Thus, if goods be sold to be paid for by a bill at four months, and no bill is given, the debt may be proved before the expiration of the four months. And even if the debt is contracted after notice of an act of bankruptcy previously committed, the creditor is not prevented from proving his debt, if it be not *the act of bankruptcy* on which the fiat is founded, for that is the act to which the words of the statute are constructively confined. Nor is it necessary that a debt, to be proveable, should be contracted while the bankrupt was in trade.

Servants' Wages.—By the 6 Geo. IV. c. 16, clerks and servants were entitled to be paid *six months wages* in full, if so much were due at the time of issuing the fiat, and might prove for the remainder; but workmen by the piece and weekly labourers were not held to be included within this enactment. Now, by 5 & 6 Vict. c. 122, § 28, when the bankrupt shall have been indebted at the time of issuing the fiat against him to any servant or clerk in respect of wages or salary, it shall be lawful for the court authorized to act in the prosecution of such fiat, upon proof thereof, to order so much as shall be due, not exceeding *three months wages or salary, and not exceeding 30L.*, to be paid to such servant or clerk out of the estate of such bankrupt, and such servant or clerk shall be at liberty to prove under the fiat for any sum exceeding such last-mentioned amount. And by § 29, the court is

authorized to order so much as shall be due, *not exceeding 40s.*, to be paid to any labourer or workman out of the estate, and such labourer or workman shall be at liberty to prove under the fiat for any sum exceeding such last-mentioned amount.

Apprentice Fees.—Where any person shall be an apprentice to a bankrupt at the time of issuing the fiat, the issuing of such fiat shall be and enure as a complete discharge of the indentures; and if any sum shall have been really and *bonâ fide* paid by or on the behalf of such apprentice to the bankrupt as an apprentice fee, it shall be lawful for the commissioners to order any sum to be paid to or for the use of such apprentice which they shall think reasonable, regard being had to the amount of the sum so paid, and to the time during which such apprentice shall have resided with the bankrupt previous to the issuing of the fiat.—6 Geo. IV. c. 16, § 49.

Rent.—After an act of bankruptcy, while goods are on the premises, even though the messenger is in possession, a landlord may distrain. But by 6 Geo. IV. c. 16, § 74, it is provided, that no distress for rent made and levied after an act of bankruptcy upon the goods or effects of any bankrupt (whether before or after the issuing of the fiat) shall be available *for more than one year's rent*, but the landlord or party to whom the rent shall be due shall be allowed to come in as a creditor under the fiat for the overplus of the rent due, and for which the distress shall not be available.

A landlord cannot prove and distrain also for the same rent.

Bonds, &c.—A *covenant or bond* to pay a sum at a certain time, though the time fall after the bankruptcy, constitutes a debt proveable, subject to a rebate of interest. But if it be to pay on demand or request, and no request or demand had been made before bankruptcy, there is no breach of the covenant or debt due before the fiat which is proveable. A covenant to do a thing, the breach of which will only entitle the other party to such damages as a jury will assess, will not induce a proveable debt, unless the damages be so ascertained before the bankruptcy; in which event the proof will be founded upon the verdict of the jury and the consequent judgment thereon. As we shall have occasion to treat more hereafter upon the subject of contingent debts, we shall in this place only further observe, that the interest and principal to be proved on bonds must not exceed the amount of the penalty, and that in case the creditor be only an assignee (which gives him an equitable, but not a legal title) both assignor and assignee must join in the proof.

Bills of Exchange and Promissory Notes.—In all cases where a bankrupt would be liable, either as acceptor, drawer, or indorser of a bill of exchange, or as maker or indorser of a promissory note, to an action at the suit of the holder, supposing the bill or note to be due and not paid, the holder may prove upon the estate for the amount of it, whether due or not. But whatever would operate as a defence to or in reduction of such liability, either at law or in equity, will equally operate to the exclusion or diminution of such proof. The want, therefore, of a proper stamp is an objection; and so is the want of due notice of dishonour to the bankrupt or his assignees, or the giving time for its payment, or the compounding for it, without the bankrupt's or the assignees' assent, where such assent is necessary.

It has been observed, that a debt payable on notice and demand cannot be proved unless demand or notice had been given or made before the bankruptcy. Where, however, by the bankrupt's promissory note both principal and interest were payable three months after notice, and interest had been paid on the same for two years before the bankruptcy, notice was presumed, and the debt held to be proveable, although no notice was proved to have been actually given.

An accommodation bill in the hands of the party accommodated cannot of course be proved against the bankrupt who accommodated him; and if there are other bills of the like nature in the hands of the assignees to which the same party is liable, the whole will be treated as nullities, and the cash balance only taken into account. But where A lent his indorsement to B (the drawer of the bill), and C (the acceptor) became bankrupt the day before the bill became due, and A was afterwards obliged to take it up, A was allowed to prove against C's estate. So if B had been bankrupt, even although A had not paid it till after the bankruptcy, for A would be a surety within the 52d section of the 6 Geo. IV. c. 16, which we shall refer to hereafter.

Where there have been mutual accommodation acceptances, and one of the parties becomes bankrupt, the solvent party must actually pay the cross acceptances before he can prove the amount against the bankrupt's estate; though it was formerly otherwise.

These observations do not apply where bills drawn or accepted for accommodation get into the hands of parties who have paid value for them; and where two houses are bankrupt, and there are such bills outstanding which may be proved against both estates, there can be no proof as between the two houses, unless there be a surplus after satisfying the holders of the bills. Notice that the bills are accommodation bills does not affect the right of a holder who has paid value; and he may prove such bill against the estate of each party to it, receiving dividends only to the full amount of the bill.

The holder of a bill may prove against the estate of each party to it; and if either of the parties be solvent, he may prove against one and bring an action against the other; but he can only receive on the whole 20s. in the pound. Provided the bill were in existence before the fiat, a party taking it up afterwards may prove it; or if, when it gets into his hands, it be already proved, he may have the benefit of the proof. If any part of the bill has been received by the holder before proof, he can only prove for so much as remains due; and even a dividend declared, though not paid, must be deducted.

If a surety accept a bill and become bankrupt, and the original debtor pay part of the debt, the creditor can only prove to the amount of the residue. And if a debt be proved, and the creditor state that he holds bills &c. as security, and any part of them be paid, the amount so paid must be expunged, so that he cannot receive future dividends for the whole amount, even though he would not altogether get 20s. in the pound if the dividends were continued to be paid on the whole amount originally proved. But if proof be made on the bills, and any other party to it pay any dividend subsequently to proof, the proof is not expunged, and he may receive dividends on the whole up to 20s. in the pound altogether.

If any assignee or indorsee give an under value for the bills (as, for instance, 10s. in the pound for them), he may prove for their full amount, provided at the time of his acquiring them they were in the hands of a party entitled to prove under the fiat.

Formerly interest was not allowed on bills &c. unless the bill itself so stipulated. Now, however, it is provided by the 6 Geo. IV. c. 16, § 57, that in all future fiats against any person liable upon any bill of exchange or promissory note whereupon interest is not reserved, overdue at the issuing of the fiat, the holder shall be entitled to prove for interest, to be calculated to the date of the fiat, at such rate as is allowed by the Court of King's Bench in actions upon such bills or notes.

Costs of protests, commission, re-exchange, &c. incurred before the fiat, may now be proved.

Damages, Costs, &c.—The 6 Geo. IV. c. 16, § 58 provides, that if any plaintiff in any action at law or suit in equity, or petitioner in bankruptcy or lunacy, shall have obtained any judgment, decree, or order against any person who shall thereafter become bankrupt for any debt or demand in respect of which such plaintiff or petitioner shall prove under the fiat, such plaintiff or petitioner shall also be entitled to prove for the costs, although such costs shall not have been taxed at the time of the bankruptcy.

Personal actions may be brought either for claims sounding in debt, which may be proved, or for claims sounding in damages, which may not. Where a verdict is before the bankruptcy, and the judgment after, the amount of the verdict, and also the costs given by the judgment, may be proved, if the action were for debt. If the action were for damages only, neither the damages nor costs are proveable.

If the fiat issue after the first day of term, and judgment is signed subsequently in the same term, even in the instance of an action for damages, as the judgment has relation to the first day of term, the whole is proveable. In an action for debt, if both verdict and judgment were after the bankruptcy, the debt is proveable, but not the costs. But if for damages, then neither is proveable.

Judgment of nonsuit, or judgment on a verdict for defendant, is not proveable till the judgment is signed and the costs are taxed.

Annuities.—By the 6 Geo. IV. c. 16; § 54, it is provided, that any annuity creditor of a bankrupt, by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity; which value the commissioner shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value as shall have been caused by the lapse of time since the grant thereof to the date of the fiat.

A bond conditioned for the payment of a sum of money at the death of the obligor, with interest in the mean time, is not an annuity within the meaning of this act: an annuity is where the principal is altogether sunk, and a mere annual sum payable.

Mutual Debts and Credits.—Where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners

shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy before the credit given to or the debt contracted; and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made proveable against the estate of the bankrupt may also be set off in manner aforesaid against such estate, provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy committed.—§ 50.

Contingent Debts.—If any bankrupt shall, before the issuing of the fiat, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such fiat, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are required to ascertain the value thereof, and to admit such person to prove the amount; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends; provided such person had not, when such debt was contracted, notice of any act of bankruptcy committed.—§ 56.

Bottomry and Respondentia Bonds, and Policies of Insurance.—The obligee in any bottomry or respondentia bond, and the assured in any policy of insurance, shall be admitted to *claim*, and, after the loss or contingency shall have happened, to prove his debt or demand in respect thereof, and receive dividends with the other creditors, as if the loss or contingency had happened before the issuing the fiat against such obligor or insurer. And the person effecting any policy of insurance upon ships or goods with any person as a subscriber or underwriter becoming bankrupt, shall be entitled to prove any loss to which such bankrupt shall be liable in respect of such subscription, although the person so effecting such policy was not beneficially interested in such ships or goods, in case the person or persons so interested is not or are not within the United Realm.—§ 53.

Proof by Sureties.—The 6 Geo. IV. c. 16, § 52 provides, that any person who at the issuing the fiat shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, if he shall have paid the debt, or any part thereof in discharge of the whole debt, (although he may have paid the same after the fiat issued), if the creditor shall have proved his debt under the fiat, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the said fiat which such creditor possessed or would be entitled to in respect of such proof; or if the creditor shall not have proved under the fiat, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the fiat, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail as aforesaid after an act of bankruptcy committed; provided that such person had not, when he became such surety or bail or so liable as aforesaid, notice of any act of bankruptcy committed.

Every person who has made himself legally liable for the payment of such a debt, or who accepts or draws or veen indorses a bill for the accommodation of a trader who becomes bankrupt before payment, is a surety within the meaning of this act. But, to bring a case within this section, the debt must be a *subsisting debt* at the issuing of the fiat, and therefore it must not be for an uncertain amount of damages. The surety must also pay or satisfy the debt before he can prove for it. If the debt be already proved by the principal creditor, then he shall stand in his place with regard to such proof.

The repealed act 49 Geo. III. c. 121, § 8, was held not to extend to a surety for payment of an annuity, except so far as related to arrears at the date of the fiat. But now, by 6 Geo. IV. c. 16, § 55, it is provided, that it shall not be lawful for any person entitled to any annuity granted by any bankrupt to sue any person who may be collateral surety for the payment, until such annuitant shall have proved under the fiat for the value of such annuity, and for the payment (arrears) thereof. And if such surety, after such proof, pay the amount proved, he shall be thereby discharged from all claims in respect of such annuity. And if such surety shall not (before any payment of the said annuity subsequent to the bankruptcy shall have become due) pay the sum so proved, he may be sued for the accruing payments, until such annuitant shall have been paid or satisfied the amount so proved, with interest thereon at the rate of four per cent per annum from the time of notice of such proof, and of the amount thereof being given to such surety. And after such payment, such surety shall stand in the place of such annuitant in respect of such proof, to the amount so paid. And the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant or of such surety. Provided, that such surety shall be entitled to credit, in account with such annuitant, for any dividend received by such annuitant under the fiat before such surety shall have been fully paid or satisfied the amount so proved as aforesaid.

Proof by Creditors holding Securities.—The 6 Geo. IV. c. 16, § 108 provides, that no creditor having security for his debt, or having made any attachment, in London or any other place, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, except in respect of an execution or extent served and levied by seizure upon, or of any mortgage or lien upon any part of the property of such bankrupt before the bankruptcy: provided, that no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors.

If a creditor hold the bankrupt's security alone, then he cannot prove without giving up the security; but it is not necessary, if another is security with the bankrupt. If he give up his security and prove, he cannot afterwards retract his proof, and retake his security. If he prove without discovering his security, the proof may be expunged.

By an order of Lord Loughborough, 8th March, 1794, it is ordered, that, upon application to the commissioners by any person claiming to be mortgagee of any part of the bankrupt's estate or effects, the commis-

sioners shall inquire whether such person is a mortgagee, and for what consideration, and under what circumstances; and if the commissioners shall find that such person is a mortgagee of any part of the bankrupt's estate or effects, and no sufficient objection appear to his title to the sum claimed by him under the mortgage, they shall then proceed to take an account of the principal, interest, and costs due upon such mortgage, and of the rents and profits received by such mortgagee, if in possession; and that the commissioners do then cause due notice to be given in the London Gazette and in such other of the public papers as they shall think fit, when and where the said mortgaged premises are to be sold before them, or by public auction at any other place, if they shall so think fit, and that such sale be made accordingly; and that all proper parties should join in the conveyance to the purchaser, as the commissioners should direct. And it was further ordered, that the moneys arising from such sale should be applied, in the first place, in payment of the expences attending such sale, and then in payment and satisfaction of what should be found due to such mortgagee for principal, interest, and costs, and that the surplus, if any, be paid to the assignees; but in case the moneys arising from such sale should be found insufficient to pay what should be found due to such mortgagee, then that such mortgagee should be admitted a creditor under the fiat for the deficiency, and receive dividends rateably with the rest of the creditors, but so as not to disturb any dividends already made. And for the better making of such inquiry, and taking of such account as aforesaid, and making a title to such purchasers, it was further ordered, that all parties should be examined by the commissioners upon interrogatories or otherwise, and should produce to the commissioners, upon oath, all deeds, papers, and writings in their custody or power relating to the estate and effects of the bankrupt, as the commissioners should direct.

The commissioners can only order a sale of the creditor's security when he applies for that purpose, or consents: they cannot dispose of his security without his consent; they can only sell the equity of redemption. In calculating the sum to which the mortgagee is entitled, if the security be insufficient to satisfy the debt, the commissioners allow interest only to the date of the fiat; but if sufficient, the assignees can only redeem by payment of interest up to the time of redemption.

The sale must be conducted by the solicitor to the fiat. The costs of the sale &c. must be paid out of the produce. The mortgagee himself cannot bid without leave of the court; and the solicitor who conducts the sale will not be allowed to purchase in any way. If he do, the sale will be set aside.

Equitable mortgagees must, in the first instance, apply to the Court of Review by petition for an order declaring them such, and that a sale may take place. The preceding observations as to legal mortgagees will, with this exception, equally apply to equitable mortgagees. Further it may be observed, that equitable mortgagees being constituted by the deposit of some kind of title deeds, if the mortgagee has no written memorandum describing the terms of his deposit, it is the invariable rule that he shall pay the costs of his petition. If he has such a memorandum, then, as in legal mortgages, the costs come out of the produce of the sale.

The pledge of goods by way of security is in general liable to the same rules as equitable mortgages. If a creditor has also a security of a third person for the bankrupt's debt, he may prove for the whole debt, and recover what he can also from the surety, though he will not be allowed to receive more than 20s. in the pound in the whole.

2. The Mode of Proof.

By whom.—The 6 Geo. IV. c. 16, § 46 directs, that at the several meetings appointed by the commissioners as before noticed, and at every other meeting appointed for proof of debts (whereof ten days notice shall have been given in the London Gazette), every creditor may prove his debt by his own oath. And all bodies politic and public companies incorporated or authorized to sue or bring actions, either by charter or act of parliament, may prove by an agent, provided he swear that he is such agent, and that he is authorized to make such proof. And if any creditor live remote from the place of meeting, he may prove by affidavit sworn before a master in chancery, ordinary or extraordinary; or if he live out of England, by affidavit sworn before a magistrate of the place where he resides, and attested by a notary public, British minister, or consul. And no creditor shall pay any contribution on account of any such debt. Provided, that it shall be lawful for the commissioners to examine upon oath, either by word of mouth or by interrogatories in writing, every person claiming to prove a debt, or to require such further proof, and examine such other persons in relation thereto, as they shall think fit.

• And the 34th section of the 1 & 2 Wm. IV. c. 56 directs, that any creditor may make proof of his debt by affidavit sworn before the judge or commissioners of the Court of Bankruptcy, or before a master in chancery ordinary or extraordinary, or, if such creditor live out of England, by affidavit sworn before a magistrate where such creditor shall be residing, and attested by a notary public, British minister, or consul; subject nevertheless to such rules and orders touching the personal attendance of any creditor to make such proof according to the existing laws and practice in bankruptcy as the Court of Review, with consent of the lord chancellor, shall make and direct.

And by the 6 Geo. IV. c. 16, § 43, the agent who effects a policy may prove a loss on the estate of the underwriter if his principal be abroad; otherwise an agent cannot in general prove, unless specially authorized by act of parliament, or by consent, or under special circumstances. And to enable one person to prove on behalf of several, special circumstances and the leave of the court are necessary.

A collector of taxes may prove for the amount due, on satisfying the commissioners of his appointment. And as against a parish officer or tax collector, one of the inhabitants may be allowed to prove on behalf of the parish.

Trustees and cestuique trusts should join in the proof.

A guardian, or even a person in care of a lunatic, though not regularly appointed, may, on petition, be allowed to prove.

So executors and administrators must prove on behalf of their respective estates, producing the probate of the will or letters of administration.

The assignee of a bankrupt creditor he also joining, should prove.

If the bankrupt be a sole executor or trustee, he may prove against his own estate on obtaining an order from the court, which will guard against the misapplication of the dividends by ordering it to be paid into court. If he be jointly such, the co-executor or co-trustee should prove.

The assignee of a chose in action may prove, the original assignor joining. And one partner may prove on behalf of the partnership.

When and where.—Proof can be made at one of the two public meetings, or at any other appointed by the commissioners for that purpose under the 46th section already alluded to. No time is, in fact, limited for proving. If, indeed, a dividend has been declared before a creditor prove, his coming in to prove thus late will not disturb the prior declaration of dividend, but he will, on the next dividend, be brought up equal to those who have received the first. So if after a final dividend is declared, any further assets come in, he will receive a dividend equal to that which creditors have received who proved in the first instance, as far as the assets will allow. But where the assignees of a bankrupt creditor apply late to prove, greater indulgence is shown to them, and sometimes a dividend declared will be stayed in the payment, so as to place them on a footing with the other creditors.

Form of Proving.—In general, the party must attend personally before the commissioner, and sign a deposition on oath that the debt is due. Where a creditor is disabled by age or imbecility from proving his debt, the commissioners will, in general receive such other evidence of it as is satisfactory to them. Any other creditors, or the assignees, or the bankrupt himself, may take objections to proofs. The 1 & 2 Wm. IV. c. 56, § 34, already alluded to, also points out the form of proof in other cases; and where the creditor resides abroad, the affidavit of debt must be attested by a notary, the mere swearing it before the British consul not being sufficient. A false oath as to the debt subjects the party to the consequences of perjury. All securities for the debt should be exhibited.

Where Claims may be entered.—Where the formalities required for proof cannot be procured in time, an agent or clerk or other person may enter a claim for the debt; the advantage of which is, that the assignees will be bound to retain sufficient in hand to pay that creditor, on his afterwards substantiating his proof, a dividend equal to what those who have already proved shall receive. So if the amount of the debt cannot be immediately ascertained, a claim will be allowed to be entered for the probable amount.

Of the Privilege of Creditors from Arrest.—A creditor attending to prove, or the petitioning creditor attending the commissioners for the purpose of watching the progress of the fiat and proposing himself as assignee, is privileged from arrest; and if arrested, the Court of Review will order his discharge, and sometimes order the party arresting him to pay all the consequent costs.

3. *Effect of Proof.*

By proving the creditor relinquishes all right of action against the bankrupt, and all securities must be given up, if the bankrupt alone be the party bound, unless they be such as mortgages, pledges, and

property on which he has a lien, which, as we have already seen, he may procure to be sold, and may prove for the balance of his debt.

And by 6 Geo. IV. c. 16, § 59, no creditor who has brought any action or instituted any suit against the bankrupt in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the fiat, shall prove a debt, or have any claim entered upon the proceedings, without relinquishing such action; and in case the bankrupt shall be in custody at the suit of such creditor, he shall not prove or claim as aforesaid, without giving a sufficient authority in writing for his discharge; and the proving or claiming a debt shall be deemed an election to take the benefit of the fiat with respect to the debt so proved. But such creditor shall not be liable to the payment, to such bankrupt or his assignees, of the costs of the action so relinquished. And where such creditor shall have brought any action or suit against the bankrupt jointly with any other persons, his relinquishing such action shall not affect the action against such other persons. Provided also, that any creditor having so elected to prove or claim, if the fiat be afterwards annulled, may proceed in the action as if he had not so elected.

What is deemed an election to come in under the fiat, is a question of considerable nicety. Being chosen assignee, without having proved, is no election to come in.

Proving under a separate fiat against one of two partners or obligors does not prevent the creditor from suing the other; but he cannot sue both, unless he give an indemnity to the bankrupt against the costs and consequences of the action. If a creditor have two distinct and separate demands, arising on distinct contracts, his proving as to one does not preclude him from suing for the other.

If, having securities which he gives up, a creditor proves, but afterwards discovers they were of greater value than he was before aware of, he will not be allowed to retract his proof, and resume his securities.

Proving under a fiat does not preclude the creditor from subsequently contesting the validity of the fiat.

Expunging or reducing Proofs.—By the 6 Geo. IV. c. 16, § 60, it is enacted, that whenever it shall appear to the assignee, or to two or more creditors who have each proved debts to the amount of twenty pounds or upwards, that any debt proved under the fiat is not justly due either in whole or in part, they may make representation thereof to the commissioners, who may summon before them and examine upon oath any person who shall have so proved, together with any person whose evidence may appear material either in support of or in opposition to any such debt; and if the commissioners, upon the evidence given on both sides, (or if the person who shall have so proved as aforesaid shall not attend to be examined, having been first duly summoned, or notice having been left at his place of abode) shall be of opinion that such debt is not due either wholly or in part, they shall be at liberty to expunge the same, either wholly or in part. Provided, that such assignees or creditors requiring such investigation shall, before it is instituted, sign an undertaking to pay such costs as the commissioners shall adjudge, such costs to be recovered by petition. Provided also, that such assignees or creditors may apply in the first

instance by petition to the lord chancellor (now to the Court of Review), or that either party may petition against the determination of the commissioners.

A creditor concealing the fact of his having securities, is a good ground to expunge his proof; and fraud is generally a sufficient reason. So if the creditor die, leaving the bankrupt a legacy the debt proved may be reduced to the extent of the legacy.

IX. THE CHOICE AND APPOINTMENT OF ASSIGNEES.

1. *Official Assignees.*

The 1 & 2 Wm. IV. c. 56, § 22 enacts, that a number of persons not exceeding thirty (being merchants, brokers, or accountants, or persons who have been engaged in trade) shall be chosen by the lord chancellor to act as official assignees in bankruptcies prosecuted in the Court of Bankruptcy, one of whom shall in all cases be an assignee of each bankrupt's estate and effects, together with the assignee or assignees chosen by the creditors. And by 5 & 6 Vict. c. 122, § 48, the lord chancellor is empowered to appoint persons of a similar description, not exceeding thirty, to act as official assignees in bankruptcies prosecuted in the country, with the same rights, powers, privileges, and exemptions, as those appointed under the former act.

And all the personal estate and effects, and the rents and profits of the real estate, and the proceeds of sale of all the estate and effects real and personal, of the bankrupt, shall in every case be possessed and received by the official assignee alone, save where it shall be otherwise directed by the lord chancellor, or by the court acting in the prosecution of the bankruptcy if authorized so to do by any general or other order of the lord chancellor, and whether such official assignee be appointed under the 1 & 2 Wm. IV. or the 5 & 6 Vict. And all stock in the public funds or of any public company, and all moneys, exchequer bills, India bonds, or other public securities, and all bills, notes, and other negotiable instruments, shall be forthwith transferred, delivered, and paid by such official assignee into the Bank of England, to the credit of the accountant in bankruptcy, to be subject to such order, rule, and regulation for the keeping of the account of the said moneys and other effects, and for the payment and delivery in, investment, and payment and delivery out of the same, as the lord chancellor, or as the Court of Review, or judge or commissioner of the Court of Bankruptcy, if authorized so to do by any order of the lord chancellor, shall direct. And if any such assignee shall neglect to make such transfer, delivery, or payment, he shall be liable to be charged in the same manner as is provided in cases of neglect by assignees to invest money in the purchase of exchequer bills when directed so to do. Provided always, that until assignees shall be chosen by the creditors, such official assignee shall be enabled to act, and shall be deemed sole assignee.—1 & 2 Wm. IV. c. 56, § 22, and 5 & 6 Vict. c. 122, § 48.

But the official assignee is not to interfere with the assignees chosen by the creditors in the appointment or removal of a solicitor or attorney, or in directing the time and manner of effecting any sale of the bankrupt's estate or effects.—5 & 6 Vict. c. 122, § 49.

No official assignee shall be deemed personally responsible or liable for any act done by him or by his order or authority in the execution of his duty as such official assignee, by reason of the petitioning creditor's debt, trading, and act of bankruptcy, or of any or either of such matters, being insufficient to support the adjudication of bankruptcy.—§ 54.

Fourteen days before a final dividend shall be advertised under any bankrupt's estate, there shall be sent by the official assignee to each creditors' assignee a Debtor and Creditor account between the official assignee and such estate, showing also the moneys remaining uncollected under such estate, and the cause of such moneys remaining uncollected; a copy of which account shall be delivered to any creditor who shall apply for the same and have proved or claimed a debt under such fiat, upon his applying for the same to the official assignee, and to any other person, such person, not being a creditor, paying such sum, not exceeding 2s. 6d., as shall be settled by the court authorized to act in the prosecution of such fiat.—§ 55.

There shall be paid by the official assignee of each bankrupt's estate administered in the country, the like sums as by the 1 & 2 Wm. IV. are directed to be paid by the official assignee of each bankrupt's estate administered in the Court of Bankruptcy; and such sums shall be placed by the accountant in bankruptcy to the like accounts respectively, and be subject to the like orders and directions of the lord chancellor.—§ 56.

By General Orders of the Court of Bankruptcy, the official assignees are each required to find sureties to the extent of 6000*l.*; and they must not, either directly or indirectly, carry on any trade or business or hold any other office or employment. They are divided equally among the six commissioners; each of whom appoints his appropriate assignees to act *in rotation* under the several bankruptcies prosecuted before him. Each official assignee is to obey the instructions of his commissioner and of the Court of Review.

The official assignee is directed to pay into the Bank of England all moneys as soon as they amount to 100*l.*, and to deliver an account therewith; and he must deposit in the Bank of England, to the credit of the accountant in bankruptcy, all bills, notes, and other negotiable instruments (except unaccepted bills, which he must first present for acceptance), as soon as he receives them; and he must give due notice of all dishonoured bills.

2. The Creditors' Assignees.

Who may be chosen.—An assignee is a mere trustee for the creditors. He need not be a creditor. Being a party to a composition deed (which was the act of bankruptcy relied on), though it precluded him from being petitioning creditor, has been held not to prevent his being assignee. The bankrupt cannot be assignee; nor can the solicitor to the fiat. Nor should any person be chosen who has an interest adverse to the general benefit of the creditors. But the creditors may choose whom they please, though the Court of Review may appoint an agent or inspector to see that justice is done by him. The number of assignees is unlimited.

When, where, how, and by whom chosen.—Formerly, in pursuance of the 6 Geo. IV. c. 16, § 61, assignees were chosen at the *second* meeting; but now, by the 20th section of 1 & 2 Wm. IV. c. 56, the choice must be made at the *first* meeting, or at an adjournment thereof.

All creditors who have proved debts to the amount of 10*l.* and upwards shall be entitled to vote; and also any person authorized by letter of attorney (upon proof of the execution thereof, either by affidavit before a master in chancery, ordinary or extraordinary, or by oath before the commissioners *vivâ voce*, and in case of creditors residing out of England, by oath before a magistrate where the party resides, duly attested by a notary public, British minister, or consul); and the choice shall be made by the major part in value of the creditors. Provided, that the commissioners may reject any person chosen who shall appear to them unfit; and upon such rejection a new choice shall be made. § 61. An appeal, however, lies from their decision.

The bankrupt himself may be chosen if he has been allowed to prove a debt of sufficient amount; and so may a creditor on a voluntary bond, though he cannot receive dividends till all other creditors are paid in full. The number of creditors present is immaterial: if only one be present, he may choose himself. If the commissioner, through mistake, reject a proof which is afterwards substantiated, and it would have been sufficient to turn the choice, the choice may sometimes be opened; as it has also been where, from the number of creditors attending to prove, some were unable to substantiate their proofs in time.

The assignee, when chosen, must sign his acceptance of the trust at the foot of the memorandum of his appointment made and signed by the commissioner.

Removal of Assignees.—The 1 & 2 Wm. IV. c. 56, § 36, enacts, that the Court of Review shall have power to remove any assignee of any estate; and the order of such court thereupon shall be final and conclusive to all intents and purposes, and not subject to any review by the lord chancellor or otherwise.

Fraud exercised in the appointment is a sufficient ground for removal; and, on directing a new choice, it is entirely open, although only one of several assignees is objected to. Any misconduct or even laches in the execution of their trust is sufficient to ask for their removal. So also if they purchase the bankrupt's property for their own use.

By General Order, 8th March, 1794, in case an assignee shall become bankrupt, such bankrupt assignee shall be removed; and on the death or bankruptcy of an assignee, upon application made to the major part of the commissioners named in the commission, signed by one or more of the creditors who have proved their debts and are entitled to vote for assignees, the commissioners shall cause due notice to be given, in the London Gazette and in such other of the public papers as they shall think fit, of the time and place when and where they shall proceed to the choice of a new assignee in the room and stead of the deceased or bankrupt assignee.

So actual insolvency or compounding with creditors, or a continual residence abroad, is a ground for removal.

An assignee may be removed at his own instance, but he must pay

the costs attendant thereon, and indemnify as to all actions pending by or against him. If he be removed for the convenience of the estate, he will not have to pay the costs, but, on the contrary, will be entitled to the costs entailed on him thereby, and may retain them out of moneys in hand.

X. APPOINTMENT OF THE ASSIGNEES, AND WHAT PROPERTY OF THE BANKRUPT PASSES TO THEM THEREON.

1. *The Appointment.*

As soon as the assignees are chosen, if the commissioner approves of the choice, he signs their appointment, and also a certificate thereof. All the property of the bankrupt, real and personal, now vests in them together with the official assignee by virtue of the appointment, without any deed of conveyance whatever, except his copyhold and customary estates, of which the commissioner must make sale, as pointed out in 6 Geo. IV. c. 16, § 68.

The title of the assignees as to the real estate of the bankrupt vests in them at the date of their appointment; but their title as to the personal estate, after their appointment, relates back to the act of bankruptcy. The crown, not being bound by the bankrupt laws, in regard to any process at its suit, is only bound from the actual date of the appointment. Under the excise laws, certain utensils and materials are subject to the lien of the crown in specified cases, notwithstanding bankruptcy. So the bankrupt's goods are liable in the hands of the assignees for the arrears of taxes, provided that such arrears do not extend beyond a year's amount.

2. *What Property of the Bankrupt passes under the Appointment.*

The general rule is, that all property of the bankrupt, real and personal, in possession, remainder, reversion, or choses in action, to which he was entitled at the time of the act of bankruptcy, or prior to the appointment, vests in the assignees by virtue of the appointment; and his acts thenceforth, with reference to this property, are considered, to all intents and purposes, as the acts of a stranger, subject to the exceptions which we shall hereafter point out.

Real Estates.—The 64th section of the 6 Geo. IV. c. 16 empowered the commissioners to convey, *by deed* indented and enrolled, to the assignees all lands, tenements, and hereditaments (except copyhold or customaryhold) in England, Scotland, Ireland, or any of his majesty's dominions, to which the bankrupt is entitled, and all interest therein to which he is entitled and of which he might have disposed, and all such lands, tenements, and hereditaments as he shall purchase, or as shall descend, be devised, revert to, or come to him before he shall obtain his certificate, and all deeds, papers, and writings respecting the same; providing also for the due registration of such deed when the same was necessary. But now the 1 & 2 Wm. IV. c. 56, § 26 enacts, that all such present and future real estate of the bankrupt as in the said act is directed to be conveyed by the commissioners to them by deed, shall vest in the assignees *by virtue of their appointment*, without any deed of conveyance; and that when any assignee shall die or be

removed, and a new assignee be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed shall, by virtue of such appointment, vest in such new assignee (either alone or jointly with the existing assignees, as the case may require) without any conveyance. Provided, (s 27) that where any conveyance or assignment of any real or personal property of a bankrupt would require to be registered, enrolled, or recorded in any registry office &c., a certificate (as in the act described) of the appointment of the assignees shall be registered, which shall have the like effect; and the title of any purchaser without notice of the bankruptcy, who shall have duly registered, enrolled, or recorded his purchase deed previous to the registry hereby directed, shall not be invalidated unless the certificate of appointment be registered as aforesaid within two months from the date of such appointment as regards the United Kingdom, and within twelve months from the date thereof as regards all other places.

Advowsons, saleable offices, annuities, heriots, reliefs, and other incorporeal hereditaments will pass to the assignees. So a mere possibility will pass; but not such a possibility as that lands will come to the bankrupt by descent, unless they actually descend to him before he obtain his certificate.

Estates Tail.—The sale of the estates tail of the bankrupt was provided for by the 65th section of the 6 Geo. IV. c. 16; but that clause is repealed by the 3 & 4 Wm. IV. c. 74 (Fines and Recoveries Abolition Act), and other provisions are substituted, by which the commissioners are empowered to dispose of such lands for the benefit of the creditors to a purchaser for valuable consideration, and to create by such disposition as large an estate as the tenant in tail could himself have done if he had not become bankrupt; and the rents and profits are in the meantime to be received by the assignees, who may proceed for the recovery thereof by action of debt, or may distrain for the same.

Copyholds.—By sect. 68 of the 6 Geo. IV. c. 16, the commissioners are empowered, by deed indented and enrolled in any court of record, to make sale of any copyhold or customaryhold lands, or of any interest to which the bankrupt is entitled therein, and thereby to entitle or authorize any person on their behalf to surrender the same for the purpose of a purchaser being admitted thereto.

This conveyance is made direct by the commissioners to the vendee, which avoids the payment of a double fine to the lord.

And by sect. 69, every person to whom such copyhold or customary lands or tenements shall be so sold, shall, before he enter into or take any profit of the same, agree and compound with the lords of the manors for fines, dues, and other services as theretofore usually paid, and thereupon the said lords shall, at the next or any subsequent manor court, grant unto such vendee the said copyhold or customary lands or tenements for such estate or interest as shall have been so sold to him as aforesaid, reserving the ancient rents, customs, and services, and shall admit him tenant of the same.

Leaseholds.—The assignees may take leasehold property, or any agreement for a lease, if they think it beneficial, the term being vested in the bankrupt till their acceptance. If they accept it, they of course

become liable to the covenants just as the bankrupt was, and he will not be liable to pay any rent accruing after the date of the fiat; nor, if the assignees decline the same, will he be liable, in case he deliver up such lease or agreement to the lessor &c. within fourteen days after he shall have had notice that the assignees have declined. If the assignees shall not, upon being thereto required, elect whether they will accept or decline such lease or agreement, the lessor &c. may apply by petition to the Court of Review, who will order them so to elect, and to deliver up such lease or agreement, in case they decline the same, and the possession of the premises, or make such other order as may seem fit. A surety, however, for the payment of the rent or the performance of the covenants is not thereby discharged.

What is to be deemed an election to accept or reject the lease has always been a question of considerable nicety, and each case must depend upon its own peculiar circumstances. If the assignees decline the lease, they cannot maintain an action against the landlord upon a covenant in the lease to repurchase the fixtures at a valuation. And where it was agreed between the landlord and tenant that if the tenant should be desirous to build, the expence thereof should be deducted at so much per annum from the rent, and on the tenant's bankruptcy the assignees rejected the lease, it was held that they must give up the property to the landlord without claiming any allowance for the money so expended by the tenant in building. (*Exp. Ladd re Reyland*, 3 Dea. & Ch.) If the assignees elect to take it, they cannot withdraw their determination; but they may rid themselves from all responsibility by assigning to a pauper, even though it be avowedly for that purpose.

Conditional Estates, given to the bankrupt by deed or will, pass to the assignees; and the equity of redemption in conditional estates created by him also belongs to the assignees. So where an estate is granted to the bankrupt defeasible upon the performance of a condition or happening of a contingency, the estate vests in the assignees until performance of the condition or happening of the contingency. A lease may be made, or a conditional estate may be given, so as to be void on the bankruptcy of the lessee or conditional tenant: but if a lease contain merely the usual covenant not to assign, it will, notwithstanding this clause, pass to the assignees. So may an annuity or interest be given by will, determinable by bankruptcy; but its merely being given "for personal support, and to be paid from time to time into his own proper hands, and not to any other person, and his receipt alone to be a sufficient discharge," will not prevent it from passing to the assignees.

All *powers* which the bankrupt might legally execute (except that of nominating to a vacant ecclesiastical benefice) may be executed by his assignees.

Personal Property.—By the 63d section of the 6 Geo. IV. c. 16, it is enacted, that the commissioners shall *assign* to the assignees, for the benefit of the creditors, all the present and future personal estate of the bankrupt, wheresoever the same may be found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall have obtained his certificate. And the commissioners shall also *assign* all debts due

or to be due to the bankrupt; and such assignment shall vest the property, right, and interest in such debts in such assignees; and after such assignment, neither the bankrupt nor any person claiming through or under him shall have power to recover the same, or to make any release or discharge thereof; neither shall the same be attached as the debt of the bankrupt by any person according to the custom of the city of London or otherwise, but such assignees shall have like remedy to recover the same in their own names as the bankrupt had. But now, by the 1 & 2 Wm. IV. c. 56, § 25, when any person hath been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws in force may be *assigned* by the commissioners, shall become absolutely vested in and transferred to the assignees *by virtue of their appointment*, without any deed of assignment for that purpose, as fully to all intents as if they were assigned by deed. And as often as any such assignee shall die, or be removed, and a new assignee be duly appointed, all personal estate vested in such deceased or removed assignee shall by virtue of such appointment vest in the new assignee (either alone or jointly with the existing assignees, as the case may require) without any deed of assignment.

By 6 Geo. IV. c. 16, § 112, the bankrupt may retain such wearing apparel as on his last examination he thinks fit to swear is necessary for him.

All debts and choses in action due to the bankrupt pass to the assignees, whether payable immediately or *in futuro*, or by instalments. But accommodation bills in the hands of the party for whose accommodation they were accepted will not pass, and therefore a trader may indorse and pay away such bills for value after an act of bankruptcy. In mutual accounts the balance only passes to the assignees. Debts due to another and assigned to the bankrupt pass to the assignees. So a legacy left to the bankrupt before he obtains his certificate passes to them. So the assignees may take the benefit of all contracts made by the bankrupt, as on the other hand they are bound by his agreements before the bankruptcy.

The share of property which the bankrupt holds as joint tenant, or as tenant in common, passes to his assignees, and they in future hold it with the co-tenants as tenants in common.

If the property be in a partnership, they take only such share as on a division the bankrupt would have been entitled to.

And lastly, all *future* property acquired by the bankrupt prior to his obtaining his certificate passes to his assignees. The locality of the property is defined to be in England, Scotland, Ireland, or in any of the dominions, plantations, or colonies belonging to his majesty, estates tail in England or Ireland, and personal, wheresoever it may be found.

The Property of the Bankrupt in possession of Others.—The general rule is, that all property of the bankrupt which was in the possession of others at the time of the bankruptcy vests in the assignees, subject to any lien or claim which the holders may legally have upon it; and all property of the bankrupt's which was in his possession at the time of the bankruptcy, but which has come to the possession of others since, by conveyance, sale, payment, or otherwise, vests in the assignees free from all lien or claim which the holders may pretend to

nave. The subject of lien has been already treated of in a part of the work. Property which the bankrupt had before his bankruptcy specifically appropriated to others does not pass to his assignees.

As to *stock in the public funds*, the 6 Geo. IV. c. 16, § 80 provides, that if any bankrupt shall have any government stock, funds, or annuities, or any stock of any public company, either in England, Scotland, or Ireland, standing in his name in his own right, it shall be lawful for the commissioners, by writing under their hands, to order all persons whose act or consent is thereto necessary, to transfer the same into the names of the assignees, and to pay all dividends upon the same to such assignees.

As to goods purchased by the bankrupt but *not delivered*, if they still remain in the vendor's hands, he has a lien on them for the price, which the assignees must satisfy before they can claim them; and if the vendor has sent them to the vendee, before they actually come into the latter's or his assignee's possession, he may exercise his right of stoppage *in transitu*; which subject is already noticed *ante*, p. 394.

Whether an execution against the goods of a trader has priority over the right of the assignees depends on whether they were seized prior to the act of bankruptcy. If so, even though the act of bankruptcy were on the same day, they may be sold under the execution, and the debt for which they were seized must be first paid before the assignees can lay any claim to them or their produce.

Goods returned by a trader before the act of bankruptcy to the vendor who was a creditor, although not received or agreed to be accepted by him till afterwards, will not pass to the assignees, unless it were done by way of fraudulent preference.

All property conveyed by the bankrupt voluntarily without valuable consideration passes to the assignees, and they may recover it. And the 6 Geo. IV. c. 16, § 73 enacts, that if any bankrupt, being at the time insolvent, shall (except upon the marriage of any of his children, or for some valuable consideration) have conveyed, assigned, or transferred to any of his children, or any other person, any hereditaments, offices, fees, annuities, leases, goods, or chattels, or have delivered or made over to any such person any bills, bonds, notes, or other securities, or have transferred his debts to any other person or persons, or into any other person's name, the commissioners shall have power to sell and dispose of the same.

Lastly, if a bankrupt, knowing himself to be on the eve of bankruptcy, voluntarily give or assign goods, money, or other property to one creditor with a view of giving him a preference over others, such property may be recovered back by the assignees. It must be done with a view to give a preference, and voluntarily, and in contemplation of bankruptcy; otherwise a fair *bonâ fide* payment or transfer of property cannot be revoked.

As regards *payments* by or to the bankrupt, the 6 Geo. IV. c. 16, § 82 provides, that all payments really and *bonâ fide* made by the bankrupt to any creditor *before the date and issuing of the fiat* (such payment not being a fraudulent preference of such creditor) shall be deemed valid, notwithstanding any prior act of bankruptcy; and all payments really and *bonâ fide* made to any bankrupt *before the date and issuing of the*

fiat shall be deemed valid, notwithstanding any prior act of bankruptcy; and such creditor shall not be liable to refund the same to the assignees, provided the person so dealing had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed.

As to *conveyances, contracts, executions, &c.* subsequent to the act of bankruptcy, but without notice; the 6 Geo. IV. c. 16, § 81 provided, that all such should be valid if made *more than two calendar months* before the date and issuing of the fiat. But the 2 & 3 Vict. c. 11, reciting that it is expedient that further provision should be made for the protection of purchasers against secret acts of bankruptcy and fiats in bankruptcy, renders valid all *conveyances* by any bankrupt *bonâ fide* made and executed *before the date and issuing of the fiat*, notwithstanding any prior act of bankruptcy, provided the person to whom the bankrupt so conveyed had not at the time of such conveyance notice of any prior act of bankruptcy; and further provides, that no purchase from any bankrupt *bonâ fide* and for valuable consideration, where the purchaser *had notice* at the time of such purchase of an act of bankruptcy by such bankrupt committed, shall be impeached by reason thereof *unless the commission* against such bankrupt *shall have been sued out within twelve calendar months* after such act of bankruptcy. And another statute of the same session, cap. 29, enacts, that all *contracts, dealings, and transactions* by and with any bankrupt really and *bonâ fide* made and entered into *before the date and issuing of the fiat* against him, and all *executions and attachments* against the lands and tenements or goods and chattels of such bankrupt *bonâ fide* executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; *provided* the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, *had not*, at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, *notice* of any prior act of bankruptcy by him committed. Provided also, that nothing herein contained shall be deemed or taken to give validity to any *payment* made by any bankrupt being a *fraudulent preference* of any creditor or creditors of such bankrupt, or to any *execution* founded on a judgment on a warrant of attorney or cognovit given by any bankrupt by way of such *fraudulent preference*.

If payments are made to a bankrupt for a specific purpose, even with notice, being clothed with a specific trust, no property therein passes to the assignee; and if the specific purpose fail, the bankrupt may repay the money.

As a person having property of the bankrupt in his hands was formerly liable for it to the assignees if he gave it up to the bankrupt, even without notice of the bankruptcy, and the bankrupt kept it back from the assignees, the 6 Geo. IV. c. 16, § 84 enacts, that no person or body corporate or public company, having in his or their possession or custody any money, goods, wares, merchandizes, or effects belonging to any bankrupt, shall be endangered by reason of the payment or delivery thereof to the bankrupt or his order, provided such person or

company had not, at the time of such delivery or payment, notice that such bankrupt had committed an act of bankruptcy.

As to what is to be deemed notice, besides the ordinary instances in which a party is said to have either express or implied notice, the 6 Geo. IV. c. 16, § 83 provides, that the issuing of a fiat shall be deemed notice of a prior act of bankruptcy (an act of bankruptcy having been actually committed before the issuing of the fiat) if the adjudication of the person or persons against whom such fiat has issued shall have been notified in the London Gazette, and the person or persons to be affected by such notice may reasonably be presumed to have seen the same. And by § 85, if any accredited agent of any body corporate or public company shall have had notice of any act of bankruptcy, such body corporate or company shall be thereby deemed to have had notice.

Property of the Bankrupt's Wife.—A settlement on the bankrupt's wife before marriage, or after if in pursuance of prior articles, although she brought him no property, is good and valid against his subsequent assignees. But not so a settlement after marriage, unless made in pursuance of some subsequently acquired property of the wife's coming to him, or unless it was made without fraud before he entered into trade, and at a time when he was not indebted. As to the property of the wife which comes to the husband either on or after the marriage, we need only refer to our former pages, where the law of Husband and Wife is given, observing, that the assignees have the same interest which the bankrupt himself would take.

Property in the possession, order, and disposition of the Bankrupt belonging to others.—By sec. 24, if a bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the commissioners shall have power to sell and dispose of the same. Provided, that nothing herein shall invalidate or affect any transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of the Registry Acts.

To bring a case within the statute, the property must consist of goods and chattels, and they must have been in his possession, order, or disposition as the reputed owner at the time of his bankruptcy, *with the consent of the true owner*. The cases which this definition has given rise to are extremely numerous as well as subtle. The statute does not, however, apply to property which the bankrupt holds as trustee or in *autre droit*.

If the bankrupt has property in his possession of which he has obtained possession by fraud, that will not pass to his assignees, but may be reclaimed by the party defrauded.

To the rule, however, that property of others in the possession of the bankrupt with the consent of the true owner passes to the assignees, there are certain exceptions. If it be held by him as trustee, or as executor, or as factor, or as an officer in a friendly society enrolled according to law, or if it be placed in his hands for a specific purpose,

or it be in his hands as overseer, and be distinguishable from his own property, such property will not pass.

3. *Concealment and Discovery of the Bankrupt's Property.*

By § 120 of the 6 Geo. IV. c. 16, any person wilfully concealing any real or personal estate of the bankrupt, and who shall not within forty-two days after the issuing of the fiat discover such estate to one or more of the commissioners or assignees, shall forfeit the sum of 100*l.* and double the value of the estate so concealed. And any person who shall, after the time allowed to the bankrupt to surrender, voluntarily discover to one or more of the commissioners or assignees any part of such bankrupt's estate, not before come to the knowledge of the assignees, shall be allowed five per centum thereupon, and such further reward as the major part in value of the creditors present at any meeting called for that purpose shall think fit, to be paid out of the estate recovered on such discovery.

As to the concealment of property by the bankrupt himself, see *post*, under the title of *Bankrupt's Examination*.

4. *How the Property is to be Disposed of.*

All the property of the bankrupt must be sold either before the commissioners or by public auction, as the commissioners may think most advantageous; or the assignees may dispose of it or manage it in any other way they think proper, but then it will be at their own risk, and they will be liable always, at the instance of any non-consenting creditor, to show that they have dealt with it in the best manner. The sale should be duly advertised. No auction duty is payable on the sale of bankrupt's property under the fiat. Neither the commissioners nor the assignees, the solicitor, the auctioneer employed, nor, as we have already seen, should any party interested as mortgagee, bid at the sale, unless they obtain the consent of all the creditors or the leave of the court to do so, otherwise the sale is voidable, and a re-sale will be directed at the costs of the party who may have so improperly bidden.

Like all other vendors, the assignees must in general make out a good title before they can compel a completion of the contract. So where the title deeds cannot be delivered, the assignees must give attested copies of them at the expence of the estate. In the covenant for production of deeds, they should take care to limit their liability to the time of their continuance in office.

By § 78 of the 6 Geo. IV. c. 16, the bankrupt may be ordered to join in all necessary conveyances.

And, by § 87, no title to any real or personal estate shall be impeached by the bankrupt, or by any person claiming under him, in respect of any defect in the suing out of the commission, or in any of the proceedings under the same, unless the bankrupt shall have commenced proceedings to supersede the said commission, and duly prosecuted the same, within twelve calendar months from the issuing thereof.

The produce must be paid into the hands of the official assignee. If, after paying all debts, and interest on such as bear interest, and all expences of the fiat, there be a surplus, it must be paid over to the

bankrupt, or to his real or personal representatives, according to circumstances.

Management of Estate by Bankrupt.—By 1 & 2 Wm. IV. c. 56, § 35, the assignees may, with the approbation of the proper subdivision court, appoint the bankrupt himself to superintend the management of the estate, or to carry on the trade for behoof of the creditors, and in any other respects to aid in administering the estate and effects as they may think best for the benefit of the estate.

XI. THE BANKRUPT'S SURRENDER AND EXAMINATION.

We have already seen, that on the adjudication of bankruptcy the commissioner signs a notice thereof and *summons* to the bankrupt to attend the meetings, which is served upon him personally if in prison, or left at his place of abode. Under this summons he is not liable to any penalty for not surrendering himself until the day appointed for his surrender by the notice in the Gazette, or, in other words, until the second meeting; though it is always prudent for him to surrender as early as possible, and afford every advantage which his estate can derive from his knowledge of the circumstances attending it.

The bankrupt must, however, at all events, surrender himself to be examined before three o'clock on the day appointed, or he becomes guilty of felony. By 5 & 6 Vict. c. 122, if any person adjudged bankrupt, after the commencement of this act, shall not, upon the day limited for the surrender of such bankrupt, and before three of the clock of such day, or at the hour and upon the day allowed him for finishing his examination, after notice thereof in writing left at the usual or last known place of abode or business of such person, or personal notice in case such person be then in prison, and notice given in the London Gazette of the issuing of the fiat, and of the sittings of the court authorized to act in the prosecution of the fiat against him, surrender himself to such court, and sign or subscribe such surrender, and submit to be examined before such court from time to time upon oath; or if any such bankrupt, upon such examination, shall not discover all his real and personal estate, and how, and to whom, upon what consideration, and when he disposed of, assigned, or transferred any of such estate, and all books, papers, and writings relating thereunto, (except such part as shall have been really and *bonâ fide* before sold or disposed of in the way of his trade, or laid out in the ordinary expences of his family); or if any such bankrupt shall not, upon such examination, deliver up to the said court all such part of such estate, and all books, papers, and writings relating thereunto, as shall be in his possession, custody, or power, (except the necessary wearing apparel of himself, his wife, and children); or if any such bankrupt shall remove, conceal, or embezzle any part of such estate to the value of 10*l.* or upwards, or any books of account, papers, or writings relating thereto, with intent to defraud his creditors; every such bankrupt shall be deemed guilty of felony, and be liable to be transported for life, or for such term, not less than seven years, as the court before which he shall be convicted shall adjudge, or shall be liable to be imprisoned, with or without hard labour, in any common gaol, penitentiary house, or house of correction, for any term not exceeding seven years.—§ 32.

The court authorized to act in the prosecution of any fiat in bankruptcy shall have power, as often as such court shall think fit, from time to time, to enlarge the time for the bankrupt named in such fiat surrendering himself for such time as such court shall think fit, so as every such order be made six days at least before the day on which such bankrupt was to surrender himself.—§ 33.

And if any bankrupt shall, after an act of bankruptcy committed, or in contemplation of bankruptcy, or with intent to defeat the object of this or any other statute relating to bankrupts, and after the commencement of this act, have destroyed, altered, mutilated, or falsified any of his books, papers, writings, or securities, or made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors, every such bankrupt shall be deemed guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned in any common gaol or house of correction for any term not exceeding three years, with or without hard labour.—§ 34.

And if any bankrupt shall, within three months next preceding his bankruptcy, and after the commencement of this act, under the false colour and pretence of carrying on business and dealing in the ordinary course of trade, have obtained on credit from any other person any goods or chattels with intent to defraud the owner thereof; or if any bankrupt shall within the time aforesaid, with such intent, have removed, concealed, or disposed of any goods or chattels so obtained, knowing them to have been so obtained; every such person so offending shall be deemed guilty of a misdemeanor, and being convicted thereof shall be liable to imprisonment for any term not exceeding two years, with or without hard labour.—§ 35.

And it shall be lawful for the court authorized to act in the prosecution of any fiat in bankruptcy issued after the commencement of this act, upon the request in writing of at least three creditors (not being partners) who shall have respectively proved debts of the amount of 50*l.* or upwards under such fiat, to direct the assignees of the bankrupt, if he shall be suspected of or charged with the commission of any of the offences specified in this act, to institute and carry on a prosecution of such bankrupt for such offence, and to order that the costs and expences incurred in such prosecution shall be paid out of the estate and effects of the said bankrupt, and such assignees shall thereupon institute and carry on such prosecution. And in case the said assignees shall refuse or neglect to institute and carry on to conviction such prosecution, having no lawful or reasonable impediment made known to and allowed by the said court, the said court may order the same to be instituted and carried on either by the official assignee alone, or by the creditors making such request as aforesaid, as the said court may think fit.—§ 36.

The commissioners, however, may at any time, either before the day fixed for the bankrupt's final examination, or after he has passed it, or even after he has obtained his certificate, compel the bankrupt to attend before them to be examined; and where a bankrupt, after the usual summons, and before the day appointed for his surrendering, was removing and embezzling his effects &c., and the commissioners summoned him for an earlier period, and on his disobeying it committed him to Newgate, the commitment was held to be valid.

The 36th section of the 6 Geo. IV. c. 16 enacts, that the commissioners may summon any bankrupt before them, whether such bankrupt shall have obtained his certificate or not; and in case he shall not come at the time appointed (having no lawful impediment), the commissioners may by warrant direct any person they shall think fit to apprehend and arrest such bankrupt, and bring him before them. And, upon the appearance of such bankrupt, it shall be lawful for them to examine him upon oath touching all matters relating either to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, concealment of his lands, tenements, goods, money, or debts, and to reduce his answers into writing, which the bankrupt shall sign and subscribe; and if such bankrupt shall refuse to be sworn or to answer any questions put to him touching any of the matters aforesaid, or to sign and subscribe his examination (not having any lawful objection, allowed by the commissioners), it shall be lawful for them to commit him to such prison as they shall think fit, there to remain without bail until he shall submit himself to be sworn, and full answers make to their satisfaction to such questions as shall be put to him, and sign and subscribe such examination.

And by § 115, if any bankrupt apprehended by any warrant of the commissioners shall, within the time hereby allowed for him to surrender, submit to be examined, and in all things conform, he shall have the same benefit as if he had voluntarily surrendered.

And by § 116, the bankrupt, after the choice of the assignees, shall (if required) forthwith deliver up to them, upon oath before a master ordinary or extraordinary in chancery, or a justice of the peace, all books of account, papers, and writings relating to his estate in his custody or power, and discover such as are in the custody or power of any other person; and every such bankrupt not in prison or custody shall, at all times after such surrender, attend such assignees upon every reasonable notice in writing, and shall assist such assignees in making out the accounts of his estate; and, after he shall have obtained his certificate, shall, upon demand in writing, attend the assignees to settle any accounts between his estate and any debtor to or creditor thereof, or attend any court of record to give evidence touching the same, or do any act necessary for getting in the said estate, for which attendance he shall be paid 5s. per day. And if he shall, after such demand not attend, or on such attendance refuse to do any of the matters aforesaid, without sufficient cause, the commissioners may, by warrant, cause such bankrupt to be apprehended and committed to such prison as they shall think fit, there to remain until he shall conform to their satisfaction, or that of the lord chancellor.

In order to enable him the better to pass his examination, it is enacted by § 116, that the bankrupt, after he shall have surrendered, may at all times, before the expiration of the day appointed for his surrender, or such further time as shall be allowed to him to finish his examination, inspect such books, papers, and writings, in the presence of his assignees or of any person appointed by them, and may bring with him each time any two persons to assist him.

And by § 119, whenever any bankrupt is in prison or in custody under any process, attachment, execution, commitment, or sentence, the com-

missioners may, by warrant under their hands directed to the person in whose custody he is confined, cause such bankrupt to be brought before them at any meeting, either public or private; and if any such bankrupt is desirous to surrender, he shall be so brought up, and the expence thereof paid out of his estate, and such person shall be indemnified by the warrant of the commissioners for bringing up such bankrupt: provided, that the assignees may appoint any persons to attend such bankrupt from time to time, and to produce to him his books, papers, and writings, in order to prepare an abstract of his accounts, and a statement to show the particulars of his estate and effects, previous to his final examination and discovery thereof; a copy of which abstract and statement the said bankrupt shall deliver to them ten days at least before his last examination.

The bankrupt's balance sheet must be filed in duplicate with the deputy registrar of the court ten days at least before the day appointed for the last examination of the bankrupt, or the adjournment day thereof for that purpose, (one copy for the official assignee, and the other for the proceedings); and the last examination of the bankrupt shall in no case be passed by the court unless his balance sheet shall have been duly filed as aforesaid. Office copies of the balance sheet or such part thereof as shall be required, shall be provided by the proper officer.—Gen. Rules, 12 Nov. 1842.

In the bankrupt's examination, he is bound to answer all questions relative to his property and dealings. Although it is a general rule, that no one shall be compelled to criminate himself, yet a bankrupt, in his examination before the commissioner, forms in some measure an exception to this rule; for it has been held, that he may be compelled to answer what may subject him to penalties, as for gaming, smuggling, and the like. And though, if he was asked, whether a certain bill of exchange was not forged by him, or whether he did not receive certain goods knowing them to be stolen, or any other matter of direct crimination, he certainly would not be bound to answer, because he would thereby directly criminate himself; yet if his answer would only *tend* to show that he had committed a criminal act, it seems, that a commitment by the commissioners for not answering such question would be good. And if a bankrupt *absolutely refuse* to account for part of his effects, on the ground that his answer to the inquiries would criminate himself, he may nevertheless be legally committed for such refusal, by reason that his answer is unsatisfactory.

The bankrupt is bound, on his examination, to give *full and particular*, and not mere *general* answers to the questions which may be put to him. Therefore the commissioner may inquire into the bankrupt's motives, and into any circumstances tending to elucidate them; and will be entitled to a full answer to each question. The last examination of a bankrupt was repeatedly adjourned, in order that he might produce a written account or balance sheet, which he had frequently referred to as the only mode of explaining his trade and dealings; and the last adjournment was made upon his assurance that he would produce such account if further time was given; the commissioners were held justified in committing him, when the account was not produced on the day to which the last adjournment was made,

nor any satisfactory answer given by the bankrupt, explaining why it was not produced.

Commissioners cannot delegate their authority to examine the bankrupt; and, consequently, they cannot commit the bankrupt for not answering the questions asked of him by the persons delegated by them, even if he admits before them that he has not answered them, and declines to give any reason why he has not.

The Warrant.—The commitment must be under the hands and seals of the commissioners, and is directed to the messenger, and also to the keeper of the gaol to which the bankrupt is committed, and “his deputy there.” The warrant should set forth the grounds of the commitment; and if for unsatisfactory answers, it should set forth the questions and answers, so that from the face of the warrant itself the court before whom he is brought may be able to judge of the propriety of the commitment, if the bankrupt be brought up on a *habeas corpus*.

The bankrupt cannot be admitted to bail upon this commitment.

If the gaoler suffer the bankrupt to escape, he is liable to a penalty of 500*l*.

Re-examination and Re-commitment.—If the bankrupt is anxious to conform himself, he may give notice to that effect to the commissioner, who will be bound to hold a meeting and re-examine him. If he still merits it, he may be re-committed, but a fresh warrant is necessary.

Habeas Corpus.—If rightly committed, he can only be discharged by pursuing the course last mentioned. If wrongfully committed, he may be brought before the Court of Chancery or any of the common-law courts at Westminster in term, or any of the judges thereof in vacation, by *habeas corpus*, notice of which must be given to the assignees, and the matter there decided.

Privilege from Arrest.—By 5 & 6 Vict. c. 122, § 23, the bankrupt shall be free from arrest or imprisonment by any creditor in coming to surrender, and after such surrender during the time by this act limited for such surrender, and such further time as shall be allowed him for finishing his examination, and for such time after finishing his examination until his certificate be allowed and confirmed, as such court shall from time to time by indorsement upon the summons of such bankrupt, think fit to appoint, provided he was not in custody at the time of such surrender. And if such bankrupt shall be arrested for debt or on any escape warrant in coming to surrender, or shall after his surrender be so arrested within the time aforesaid, he shall, on producing his summons signed as required by this act to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged. And if any officer shall detain any such bankrupt after he shall have shown such summons to him, such officer shall forfeit to such bankrupt, for his own use, the sum of 5*l*. for every day he shall detain such bankrupt, to be recovered by action of debt in any court of record at Westminster, in the name of such bankrupt, with full costs of suit. And it shall be lawful for the court authorized to act in the prosecution of such fiat, at the time appointed for the last examination of the bankrupt, or any enlargement or adjournment thereof, to adjourn such examination *sine die*; and in such case he shall be free from arrest or imprisonment for such time, not

exceeding three months, as such court shall from time to time by indorsement upon the summons of such bankrupt appoint, with like penalty upon any officer detaining such bankrupt after having been shown such summons.

This privilege is generally from all arrests, even upon a *capias utlagatum*. He may be taken, however as principal by his bail; or if he have escaped from prison, the marshal may retake him. All detainers founded on an illegal arrest fall with it. When thus privileged, in order to obtain his discharge, the bankrupt may petition the court. If the creditor still detain him, an order may be obtained calling on the officer to discharge him. If that be neglected, the parties will be liable for the consequences of contempt. The bankrupt, like all other parties or witnesses, is also privileged while attending any hearing of his petition, *eundo, morando, et redeundo*.

XII. EXAMINATION OF OTHER PERSONS RELATIVE TO THE ESTATE OF THE BANKRUPT.

By 6 Geo. IV. c. 16, § 33, the commissioners, after adjudication, may summon before them, by writing under their hands, any person known or suspected to have any of the estate of the bankrupt in his possession,—or any person supposed to be indebted to such bankrupt,—or any person whom the commissioners believe capable of giving information concerning the person, trade, dealings, or estate of the bankrupt, or concerning any act of bankruptcy committed by him, or any information material to the full disclosure of his dealings; and they may require such person to produce any books, papers, deeds, writings, or other documents in his custody or power, which may appear necessary to the verification of the deposition of such person, or to the full disclosure of any of the matters which they are authorized to inquire into. And if such person so summoned shall not come at the time appointed (having no lawful impediment), the commissioners may, by warrant under their hands and seals, authorize and direct the person or persons therein named for that purpose to apprehend and arrest such person, and bring him before them to be examined as aforesaid.

And by sect. 34, upon the appearance of any person summoned, or if any person be *present at any meeting*, it shall be lawful for them to examine every such person upon oath, either by word of mouth or by interrogatories in writing, and to reduce into writing the answers; and the party examined is required to sign and subscribe them. And if any such person shall refuse to be sworn, or to answer any lawful questions put to him, or shall not fully answer to the satisfaction of the commissioners, or shall refuse to sign and subscribe his examination (not having any lawful objection, allowed by the said commissioners), or shall not produce any books, papers, deeds, and writings, and other documents in his custody or power, which such person was required to produce, and to the production of which he shall not state any objection allowed by the commissioners, it shall be lawful for them, by warrant under their hands and seals, to commit him to such prison as they shall think fit, there to remain without bail, until he shall submit himself to them to be sworn.

And by sect. 37, the commissioners may summon before them the

wife of the bankrupt, and may examine her, for the finding out and discovery of the estate, goods, and chattels of such bankrupt, concealed, kept, or disposed of by her, in her own person, or by her own act, or by any other person; and she shall incur such danger or penalty for not coming before the commissioners, or for refusing to be sworn and examined, or for refusing to sign or subscribe her examination, or for not fully answering to the satisfaction of the commissioners, as is hereby provided against other persons.¹

The practice is, if a witness do not obey the summons, for some party to make an affidavit as to the service of it, and a memorandum of non-attendance is entered on the proceedings; on which the commissioners will issue their warrant. It seems, however, that they may do so without this affidavit; but they should let a sufficient time elapse between the service and the time appointed for the witness's attendance. If the witness be in custody, he may be brought up by *habeas corpus* to be examined. Though a witness be a creditor, or the like, he cannot adduce that as a reason for non-attendance.

All documents required to be produced should be described in the summons previous to its receiving the commissioners' signature. The competency of a witness is a question for the commissioners to decide, and they should always abide by the rules of evidence established in the common law courts. A witness cannot himself object to his competency. A bankrupt's partner may be examined and obliged to produce the partnership books and papers. So a solicitor (if not the solicitor of the bankrupt) having a deed of the bankrupt's in his custody may be compelled to produce it. So a mortgagee must produce his mortgage deed. But the petitioning creditor cannot be compelled to give evidence in support of a subsequent joint fiat. An executrix of a debtor to the bankrupt having pleaded that she has fully administered cannot be examined as to the truth of her plea. A witness is in general allowed to be attended by his counsel on his examination; but this is discretionary with the commissioners.

Warrant and Habeas Corpus.—The observations made on the subject of the warrant for committal of a bankrupt and of the *habeas corpus* thereupon will in almost every respect apply to this case.

Privilege from Arrest.—A witness's privilege from arrest is just the same in this as in all other cases while going to, attending, and returning from a court of justice.

Witnesses' Expences.—By sect. 35, where any person known or suspected to have any of the estate of the bankrupt in his possession, or who is supposed to be indebted to the bankrupt, shall be summoned to attend before the commissioners, every such person shall have such costs and charges as the commissioners shall think fit; and every witness summoned to attend before the commissioners shall have his necessary expences tendered to him in like manner as is now by law required upon service of a subpoena to a witness in an action at law.

XIII. THE CERTIFICATE.

When the bankrupt has duly submitted himself to examination, and surrendered up his property and effects, and in other respects conformed to the requisition of the bankrupt laws, he becomes entitled to

¹ See also, on this subject, the 8 & 9 Vic. c. 48, sec. 1.

a *certificate* of such conformity, signed by the court, which operates as a discharge from any future claims of his creditors.

This certificate was formerly, by the 6 Geo. IV. c. 16, required to be signed by four-fifths in number and value of the creditors who had proved debts under the fiat to the amount of 20*l.* or upwards, or, after six months from the last examination of the bankrupt, either by three-fifths in number and value, or by nine-tenths in number of such creditors, who thereby testified their consent to his discharge. It was then signed and sealed by the commissioners; and it certified to the lord chancellor or the Court of Review, that the bankrupt had made a full discovery of his estate and effects, and had in all respects conformed to the law respecting bankrupts, and that the requisite number of creditors had signed: the bankrupt also was required to make oath that the consent of creditors had been obtained without fraud. Notice was then given in the *Gazette*, that the certificate would be allowed within twenty-one days, unless cause was shown to the contrary; and in the mean time any creditor might petition against such allowance.

But now the 5 & 6 Vict. c. 122, § 37 enacts, that every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force at the time of issuing the fiat in bankruptcy against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands made proveable under the fiat, in case he shall obtain a certificate of such conformity so signed and allowed, and subject to such provisions as hereinafter mentioned; and no certificate of such conformity shall release or discharge the bankrupt from such debts, claims, or demand, unless such certificate shall be obtained, allowed, and confirmed according to such provisions. Provided always, that no such certificate shall release or discharge any person who was partner with such bankrupt at the time of his bankruptcy, or was then jointly bound, or had made any joint contract with such bankrupt; and provided also, that nothing herein contained shall affect the validity of any certificate allowed by the lord chancellor or the Court of Review previous to the commencement of this act.

And by sect. 39, it shall be lawful for the court authorized to act in the prosecution of any fiat in bankruptcy already issued or hereafter to be issued, on the application of the bankrupt, to appoint a public sitting for the allowance of such certificate (whereof and of the purport whereof twenty-one days notice shall be given in the *London Gazette* and to the solicitor of the assignees); and at such sitting any of the creditors may be heard against the allowance of such certificate, but *it shall not be requisite for such certificate to be signed by any of the creditors of such bankrupt.* And such court, having regard to the conformity of the bankrupt to the laws relating to bankrupts, and to the conduct of the bankrupt as a trader before as well as after his bankruptcy, shall judge of any objection against allowing such certificate, and either find the bankrupt entitled thereto and allow the same, or refuse or suspend the allowance thereof, or annex such conditions thereto as the justice of the case may require. Provided always, that no certificate shall be such discharge, unless such court shall, in writing

under hand and seal, certify to the Court of Review that such bankrupt has made a full discovery of his estate and effects, and in all things conformed as aforesaid, and that there does not appear any reason to doubt the truth or fulness of such discovery, and unless the bankrupt make oath in writing that such certificate was obtained fairly and without fraud, and unless the allowance of such certificate shall, after such oath, be confirmed by the Court of Review, against which confirmation any of the creditors of the bankrupt may be heard before such court.

By sect. 38 it is provided, that no bankrupt shall be entitled to the certificate under this act, and that any such certificate if obtained shall be void, if such bankrupt shall have lost by any sort of gaming or wagering in one day 20*l.*, or within one year next preceding his bankruptcy 200*l.*; or if he shall within one year next preceding his bankruptcy have lost 200*l.* by any contract for the purchase or sale of any government or other stock, where such contract was not to be performed within one week after the contract, or where the stock bought or sold was not actually transferred or delivered in pursuance of such contract; or if such bankrupt shall, after an act of bankruptcy, or in contemplation of bankruptcy, or with intent to defeat the object of this or any other statute relating to bankrupts, have concealed, destroyed, altered, mutilated, or falsified, or caused to be concealed, destroyed, altered, mutilated, or falsified, any of his books, papers, writings, or securities, or made or been privy to the making any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors, or shall have concealed any part of his property; or if any person having proved a false debt under the fiat, such bankrupt being privy thereto, or afterwards knowing the same, shall not have disclosed the same to his assignees within one month after such knowledge.

Any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to forbear opposing or to consent to the allowance or confirmation of such certificate, shall be void, and the money thereby secured or agreed to be paid shall not be recoverable, and the party sued on such contract or security may plead the general issue, and give this act and the special matter in evidence.—§ 40.

And if any creditor of a bankrupt shall obtain any sum of money, or any goods, chattels, or security for money, from any person, as an inducement for forbearing to oppose or for consenting to the allowance or confirmation of the certificate of such bankrupt, every such creditor so offending shall forfeit and lose for every such offence the treble value or amount of such money, goods, chattels, or security so obtained (as the case may be), to be recovered as hereinafter provided.—§ 41.

Effect of the Certificate.—The goods of the bankrupt acquired after obtaining the certificate, as well as his person, are discharged thereby. All debts proveable under the fiat are barred by the certificate; and this extends to all foreign debts.

The 5 & 6 Vict. c. 122, § 42, enacts, that any bankrupt who shall, after such certificate shall have been confirmed, be arrested, or have any action brought against him for any debt, claim, or demand proveable under the fiat, shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and such bankrupt's certificate, and the confirmation thereof, shall be sufficient evidence of the trading, bankruptcy, fiat, and other proceedings precedent to the obtaining such certificate. And if any such bankrupt shall be taken in execution or detained in prison for such debt, claim, or demand, where judgment has been obtained before the confirmation of his certificate, it shall be lawful for any judge of the court wherein judgment has been so obtained, on such bankrupt's producing his certificate, to order any officer who shall have such bankrupt in custody by virtue of such execution to discharge such bankrupt without exacting any fee, and such officer shall be hereby indemnified for so doing.

And by sect. 43, no bankrupt, after such certificate shall have been confirmed, shall be liable to pay or satisfy any debt, claim, or demand from which he shall have been discharged by virtue of such certificate, or any part of such debt, claim, or demand, upon any contract, promise, or agreement made after the suing out of the fiat, unless such contract, promise, or agreement be in writing signed by the bankrupt, or by some person thereto lawfully authorized in writing by such bankrupt.

The certificate does not bar an action for a tort, or of trover, or of trespass for mesne profits, or an extent at the suit of the crown.

And by sect. 127 of 6 Geo. IV. c. 16, if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any insolvent act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall only protect his person from arrest and imprisonment, but his future estate and effects (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife, and children) shall vest in the assignees under the said commission, who shall be entitled to receive the same, in like manner as they might have seized property of which such bankrupt was possessed at the issuing of the commission.

And by sec. 105, if any assignee indebted to the estate of which he is such assignee, in respect of money so retained or employed by him, become bankrupt, if he shall obtain his certificate, it shall only have the effect of freeing his person from arrest and imprisonment; but his future effects (his tools of trade, necessary household goods, and the necessary wearing apparel of himself, his wife, and children excepted) shall remain liable for so much of his debts to the estate of which he was assignee, as shall not be paid by dividends under his fiat, together with lawful interest for the whole debt.

These provisions of the 6 Geo. IV., it should be observed, are not to be found in the recent act, 5 & 6 Vict. c. 122; which, on the

contrary, enacts that *every* bankrupt who shall have duly surrendered and conformed &c. shall be discharged from all debts, claims, and demands provcable under the fiat, *in case he shall obtain a certificate* allowed and confirmed under the provisions of that act. There can be no doubt, however, but that under the circumstances here provided against, the courts, when called upon to judge of objections against allowing the bankrupt's certificate, will give due consideration to these enactments, and accordingly either refuse or suspend the allowance of the certificate, or annex such conditions thereto as the justice of the case may require. But, except as to any conditions thus imposed, the certificate, if allowed and confirmed, will have the same effect in these as in all other cases.

XIV. THE DIVIDEND.

Audit of the Assignees' Accounts.—By the 6 Geo. IV. c. 16, § 106, the commissioners are required, at the meeting appointed for the last examination of the bankrupt, to appoint a public meeting (whereof and of the purport whereof they shall give twenty-one days notice in the London Gazette) to audit the accounts of the assignees; And such meeting was to be not sooner than four calendar months from the issuing of the fiat, nor later than six calendar months from the last examination of the bankrupt. But now, by 5 & 6 Vict. c. 122, § 27, it shall be lawful for the court authorized to act in the prosecution of any fiat in bankruptcy, *whenever such court shall think fit*, at or after the sitting appointed for the last examination of the bankrupt named in such fiat, to audit the assignees' accounts, and to make a declaration of dividend under such fiat, subject nevertheless to such advertisement and such other provisions relating to such audits and dividends as are now required in respect of audits and dividends under bankrupts' estates, except such provisions as relate to the limitation of time in any manner respecting such audits and dividends, or the appointment thereof.

And (§ 106) the assignees at such meeting shall deliver upon oath a true statement in writing of all moneys received by them respectively, and when, and on what account, and how the same have been employed. And the commissioners shall examine such statement, and compare the receipts with the payments, and ascertain what balances have been from time to time in the hands of the assignees respectively; and it shall be lawful for the commissioners to examine the assignees upon oath touching the truth of such accounts. And sec. 107 provides, that no dividend shall be declared, unless the accounts of the assignees have been first so audited, and such statement delivered by them upon oath.

If assignees refuse or neglect to attend the meeting, or to produce their accounts, they may be compelled by the Court of Review by attachment.

And by General Rules, 12 Nov. 1842, every bill of fees and disbursements and charges of any solicitor or attorney, or messenger, incurred prior to any sitting for an audit, shall be delivered to the deputy registrar for taxation five days at least before the day appointed for such sitting; and in default thereof, if such sitting be adjourned by reason of such default, such solicitor or attorney or messenger shall

pay the costs occasioned by such adjournment, and the amount thereof shall be deducted from his bill. And no money shall be paid to any solicitor or attorney or messenger, on account of any fees or disbursements or charges of any bill until such bill shall have been taxed.—Rule 15.

The audit account of the official assignee, or of any creditors' assignees, shall be made out in the ordinary form of a Dr. and Cr. account, each item being entered according to its date, and a name, date, and proper explanation given to each item. And a duplicate of such account shall be sent by the official assignee to the solicitor two days at least prior to the day appointed for the audit of such account, subject to the power of the commissioner to require an account digested under proper heads to be annexed to the audit account, if he think proper.—Rule 16.

At every audit the Debtor and Property Book exhibited to the court by the official assignee shall be carefully examined, and compared with the debts and property collected as stated in the audit paper; and the cause of any moneys remaining uncollected shall be ascertained, and a minute thereof made and filed with the proceedings. And all persons appearing to be indebted to the bankrupt's estate shall be forthwith summoned and examined in that behalf upon oath, and the examination so taken shall be filed with the proceedings; and such directions shall be given by the court as to any further proceedings thereupon as to such court shall seem fit.—Rule 17.

No audit and dividend shall be appointed for the same day, except for some special cause, to be stated to the court at the time of such appointment, and allowed.—Rule 18.

Declaration of the Dividend.—Section 107 of 6 Geo. IV. c. 16 provides, that the commissioners shall appoint a public meeting (whereof and of the purport whereof they shall give twenty-one days notice in the London Gazette) to make a dividend; at which meeting all creditors who have not proved their debts shall be entitled to prove the same. And the commissioners at such meeting shall order such part of the net produce of the bankrupt's estate in the hands of the assignees, as they shall think fit, to be forthwith divided amongst such creditors as have proved in proportion to their respective debts, and shall make an order for a dividend, and shall cause one part of such order to be filed amongst the proceedings, and shall deliver another part thereof to the assignees; which order shall contain an account of the time and place of making such order, of the amount of the debts proved, of the money remaining in the hands of the assignees to be divided, of how much in the pound is then ordered to be paid, and of the money allowed to be retained by the assignees, with their reasons for allowing the same. And the assignees (without any deed of distribution made for that purpose) shall forthwith make such dividend, and shall take receipts in a book to be kept for that purpose from each creditor.

Within one month after the declaration of a dividend, the official assignee shall give notice, by advertisement in the London Gazette, and to each creditor by a printed circular letter, to be sent by post, of the time and place of the delivery of the dividend warrants; and that

at such time the official assignee will require the production of such securities (if any) as the creditor exhibited at the time of his proof; and that no dividend warrant will be delivered to the creditor holding security for his debt until such security be produced, without the special directions of a commissioner.—General Rules, 12th Nov. 1842, rule 22.

Final Dividend.—By 6 Geo. c. 16, § 109 it is provided, that if the bankrupt's estate shall not have been wholly divided upon the first dividend, the commissioners shall appoint a public meeting (whereof and of the purport whereof they shall give twenty-one days notice in the London Gazette) to make a second dividend, when all creditors who have not proved their debts may prove the same; and the commissioners, after taking such audit as hereinbefore directed, shall order the balance in the hands of the assignees to be forthwith divided amongst such of the creditors as shall have proved their debts. And such second dividend shall be final, unless any action at law or suit in equity be depending, or any part of the estate be standing out not sold or disposed months after the same shall be so converted, divide the same in manner aforesaid.

A final dividend shall be advertised within two years after the date of the fiat, unless there be some cause to the contrary to the satisfaction of the commissioner, to be stated in writing, and filed with the proceedings.—Gen. Rules, 12 Nov. 1842, rule 19.

Fourteen days before a final dividend shall be advertised under any bankrupt's estate, there shall be sent by the official assignee to each creditors' assignee a Debtor and Creditor account between the official assignee and such estate, showing also the moneys remaining uncollected under such estate, and the cause of such moneys remaining uncollected; a copy of which account shall be delivered to any creditor who shall apply for the same and have proved or claimed a debt under such fiat, upon his applying for the same to the official assignee, and to any other person, such person, not being a creditor, paying such sum, not exceeding 2s. 6d., as shall be settled by the court authorized to act in the prosecution of such fiat.—6 Geo. IV. c. 16, § 55.

Parties coming to prove debts after any dividend has been declared shall, if the funds admit of it, be paid a dividend equal to that which has been declared on all prior dividends. If a surplus then exist, it must be divided amongst all who have proved up to that time.

Remedy to recover Dividends from the Assignees.—By sect. 111, no action for any dividend shall be brought against the assignees by any creditor who shall have proved under the fiat; but if the assignees refuse to pay any such dividend, the lord chancellor (now the Court of Review) may, on petition, order payment thereof, with interest for the time that it shall have been withheld, and the costs of the application. Five per cent interest is given.

XV. THE BANKRUPT'S MAINTENANCE AND ALLOWANCE.

Bankrupt's Maintenance till his last Examination.—By § 114 of the 6 Geo. IV. c. 16, it shall be lawful for the commissioners before the choice of assignees, and after such choice for the assignees, with the approbation of the commissioners testified in writing under their hands

from time to time to make such allowance to the bankrupt out of his estate until he shall have passed his last examination, as shall be necessary for the support of himself and family.

Allowance to Bankrupt from the Proceeds of his Estate.—The 5 & 6 Vict. c. 122, § 44 enacts, that every bankrupt who shall have obtained his certificate under any fiat issued after the commencement of this act, if the net produce of his estate in hand shall, by any order of dividend (with or without prior dividend), pay the creditors who before or at the time of making such order have proved debts under the fiat 10s. in the pound, shall be allowed and paid 5l. per centum out of such produce, provided such allowance shall not exceed 400l.; and every such bankrupt, if such produce shall (with or without prior dividend), pay such creditors 12s. 6d. in the pound, shall be allowed and paid as aforesaid 7l. 10s. per centum, provided such allowance shall not exceed 500l.; and every such bankrupt, if such produce shall (with or without prior dividend) pay such creditors 15s. in the pound or upwards, shall be allowed and paid as aforesaid 10l. per centum, provided such allowance shall not exceed 600l.: provided always, that such allowance as aforesaid shall not be payable to any bankrupt until after the expiration of twelve months from the date of the fiat; and such allowance shall then be payable only in the event of the dividends paid to the creditors who at any time before the expiration of such twelve months shall have proved debts under the fiat being of the requisite amount in that behalf aforesaid; and if at the expiration of such time the dividends paid as aforesaid shall not amount to 10s. in the pound, it shall be lawful for the court to allow such bankrupt so much as the assignees and court shall think fit, not exceeding 3l. per centum and 300l.

In all joint fiats under which any partner shall have obtained his certificate, if a sufficient dividend shall have been paid upon the joint estate, and upon the separate estate of such partner, he shall be entitled to his allowance although his other partner may not be entitled to any allowance.—§ 45.

The act only gives the bankrupt his allowance in case he shall have obtained his certificate. The assignees are not bound to retain any sum for it; and if the fund is exhausted before he obtains his certificate, they are not liable to an action for his allowance. He is not entitled to any allowance until a final dividend is made, because it cannot be seen before whether he will be entitled or not. But if he has received his allowance, it seems that on a subsequent deficiency he would not be bound to refund.

The bankrupt's right to his allowance will be preferred to the claim of creditors for interest in the event of a surplus.

XVI. OF THE SURPLUS OF THE BANKRUPT'S ESTATE, AND INTEREST UPON THE DEBTS.

By the 132d^{*} section of the 6 Geo. IV. c. 16, the assignees shall, upon request made to them by the bankrupt, declare to him how they have disposed of his real and personal estate, and pay the surplus (if any) to him, his executors, administrators, or assigns. And every bankrupt, after the creditors who have proved shall have been paid,

shall be entitled to recover the remainder of the debts due to him. But the assignees shall not pay such surplus until all creditors who have proved shall have received interest upon their debts, to be calculated and paid at the rate and in the order following; that is to say,—All creditors whose debts are now by law entitled to carry interest, in the event of a surplus, shall first receive interest on such debts at the rate of interest reserved or by law payable thereon, to be calculated from the date of the fiat; and after such interest shall have been paid, all other creditors who have proved under the fiat shall receive interest on their debts from the date of the fiat, at the rate of four pounds per centum.

The interest is to be calculated from the date of the fiat to the first dividend upon the whole debt; from the first dividend till the second, upon the balance of the debt after deducting the former dividend; and so on.

Where creditors had signed receipts in full upon a payment of 20s. in the pound, under a mistaken impression that there would not be a surplus, they were notwithstanding held to be entitled to interest.

As the bankrupt law takes the property out of the bankrupt only for the purpose of paying his creditors, from the moment the debts are paid, the assignees are mere trustees for the bankrupt, and can be called upon to convey to him; therefore a devise of real estate has been determined not to be revoked by bankruptcy.

XVII. ANNULLING THE FIAT.

Formerly a writ of supersedeas was necessary to put a stop to the prosecution of a commission; but now the Court of Review orders the fiat to be annulled, and the lord chancellor, in accordance with that order, forthwith annuls it. By the 1 & 2 Wm. IV. c. 56, § 19, the lord chancellor, upon the reversal of any adjudication of bankruptcy, or for such other cause as he shall think fit, may order that any fiat shall be rescinded or annulled; and such order shall have all the force and effect of a writ of supersedeas of a commission according to the previous laws and practice in bankruptcy.

The following are the usual and ordinary cases in which a fiat will be annulled. If the proceedings are so defective that the validity of the fiat cannot be supported—as if the party against whom it was sued out was not a trader within the meaning of the statute, or is an infant, or a married woman, or has not committed an act of bankruptcy, or there is not a sufficient petitioning creditor's debt,—the fiat will be annulled, and usually at the expence of the petitioning creditor. So also for certain irregularities in working the fiat; as if there be a misdescription of the bankrupt; or if a second fiat be issued against an uncertificated bankrupt, or a third fiat be issued when 15s. in the pound has not been paid under the second, or the like; or if a fiat be not prosecuted within the time limited for that purpose; or if, after a docket struck, a bankrupt give money, security, or other satisfaction to the petitioning creditor; or if the fiat have been issued by a fraud practised on the court; or if the object of the fiat be foreign to that for which the legislature intended it; or if sued out by one creditor in

breach of good faith with the others ; or if all the creditors be paid in full with interest ; or if all the creditors consent. In any of these cases the court will, in general, direct the fiat to be annulled ; it is, however, in its discretion, as are also the terms on which it will make the order.

And by 6 Geo. IV. c. 16, § 133, if at any meeting of creditors after the bankrupt shall have passed his last examination (whereof and of the purport of which twenty-one days notice shall have been given in the London Gazette), the bankrupt or his friends shall make an offer of composition, or security for such composition, which nine-tenths in number and value of the creditors assembled shall agree to accept, another meeting for the purpose of deciding upon such offer shall be appointed, whereof such notice as aforesaid shall be given ; and if at such second meeting nine-tenths in number and value of the creditors present shall also agree to accept such offer, the Court of Review shall and may, upon such acceptance being testified by them in writing, annul the fiat. And by sec. 134, in deciding upon such offer, any creditor whose debt is below 20*l.* shall not be reckoned in number, but the debt due to such creditor shall be computed in value. And any creditor to the amount of 50*l.* and upwards residing out of England shall be personally served with a copy of the notice of the meeting to decide upon such offer as aforesaid, and of the purpose for which the same is called, so long before such meeting as that he may have time to vote thereat ; and such creditor shall be entitled to vote by letter of attorney executed and attested in manner hereby required for such creditors voting in the choice of assignees. And if any creditor shall agree to accept any gratuity or higher composition for assenting to such offer, he shall forfeit the debt due to him, together with such gratuity or composition ; and the bankrupt shall (if thereto required) make oath before the commissioners, that there has been no such transaction between him or any person with his privity and any of the creditors, and that he has not used any undue means or influence with any of them to attain such assent as aforesaid.

And by General Order, 27th June, 1826, it is ordered, that at the *first* of the said meetings a minute shall be taken by the solicitor of the assignees of the names of the several creditors present, and the amount of their several debts standing in proof upon the proceedings, distinguishing such of them as shall assent to such composition ; and that the *second* of the said meetings shall be held at a meeting of the commissioners ; and at such meeting the commissioners shall, by deposition of witnesses and documentary evidence, as to them shall appear proper, inquire and ascertain whether the several particulars directed by the act to be performed previous to the holding of such second meeting have been duly performed, and certify the same to the lord chancellor, together with the proceedings at such second meeting. And for the better information of all parties interested, it is further ordered, that the said commissioners shall state in such certificate what proportion in number and value the creditors assenting to such composition bear to the creditors who have proved debts of the amount of 20*l.* and upwards ; and also whether any sale has been made of the bankrupt's estate, in order that provision may, if expedient, be made for confirming the same.

The mere circumstance of the fiat being opened at a place distant from the main body of the creditors, is not sufficient ground for annulling it. Nor will the court do so at the instance of a creditor, where purchases under it have been effected; nor even at the instance of the bankrupt, unless he undertake to confirm all sales, nor where there has been long acquiescence on the part of the bankrupt.

When the fiat is sought to be annulled for want of due prosecution, it may be done upon the application of any person except the bankrupt at the Bankrupt Office; but the bankrupt must present a petition in the regular way. In all other cases, the mode is by petition to the Court of Review. Either the bankrupt himself, or the assignees, or any of the creditors, may petition for this purpose.

The 1 & 2 Wm. IV. c. 56 contains the following provisions as to the mode of proceeding when the bankrupt is desirous of disputing the adjudication of bankruptcy. By § 17, if any trader adjudged bankrupt shall be minded to dispute such adjudication, and shall present a petition praying the reversal thereof to the Court of Review within two calendar months (now, by 5 & 6 Vict. c. 122, within twenty-one days) from the date of such adjudication if such trader be residing within the United Kingdom, or within three calendar months if residing in any other part of Europe, or within one year if residing elsewhere, such Court shall proceed to hear and decide on the said petition; or, at the option of the bankrupt, and on his finding such security for costs (if the court shall think fit to require any security) as by the said court shall be approved, shall direct an issue to try any matter of fact affecting the validity of such adjudication by a jury to be duly impannelled and sworn for that purpose before the chief or any one or more of the other judges of the Court of Bankruptcy. And if the verdict on such issue shall not be set aside on application made to the Court of Review within one month after the said trial, or if the adjudication of the commissioner shall not be set aside by the Court of Review on the petition aforesaid, such verdict or such adjudication of the said commissioner shall in all cases as against the said bankrupt, and also as against the petitioning creditor, and as against any assignee to be chosen of such bankrupt's estate and effects, and as against all persons claiming under the said assignees, and all persons indebted to the bankrupt's estate, be conclusive evidence that the party was or was not a bankrupt at the date of such adjudication, any other act, debt, or trading than the act, debt, or trading proved at such trial notwithstanding: provided always, that an appeal shall be to the lord chancellor from the decision of the said Court of Review upon matter of law or equity, or on the refusal or admission of evidence only.

And by sec. 18, after any such issue shall have been tried, it shall be lawful for the Court of Review, on petition to be presented within one calendar month after such verdict, and upon notice thereof to the bankrupt, upon special circumstances to be submitted to the Court of Review, to order that another fiat do issue at the instance of any other than the former petitioning creditor against the said bankrupt, and that such fiat may be supported by any debt, trading, or act of bankruptcy other than those given in evidence on the trial of such issue.

The effect of annulling the fiat is to upset all that has been done

under it, except where sales are ordered to be confirmed. Joint fiats may, by 6 Geo. IV. c. 16, § 16, be annulled as to one partner and stand good as to the others. Where a creditor has abandoned an action and come in under a fiat, if it be afterwards annulled, he may go on with his action. (See § 59, quoted at p. 791). The annulling one fiat does not prevent another from issuing against the same bankrupt.

Writ of Procedendo.—This issues where a fiat has been improperly annulled, and places every thing again *in statu quo*. A petition for this purpose is in the nature of a re-hearing or appeal.

XVIII. OF FIATS AGAINST PARTNERS, AND JOINT FIATS.

We have hitherto confined ourselves for the most part to proceedings on a fiat in bankruptcy when sued out against an individual trader; we shall now endeavour to point out in what respects they differ when a fiat is sued out against one or more or all of the partners in a firm.

In the case of a firm of traders, a creditor of the firm may petition either against the firm collectively or against one or more of the partners. None but a joint creditor can sue out a joint fiat against two or more partners; and those only who have committed an act of bankruptcy can be made bankrupt. But a joint creditor may sue out a separate fiat against any one of the partners who has committed an act of bankruptcy. And even a partner, in respect of a debt quite distinct from the partnership, may sue out a separate fiat against his co-partner.

If three persons carry on business, and one reside on the premises and the others at a distance, the mere circumstance of the resident one shutting up shop and absenting himself is not an act of bankruptcy by all three, but only by such resident member.

Formerly a joint commission could not be sued out against some of the members of a firm, but it must have been sued out against all the ostensible partners; and if a commission was bad as against one partner, it was bad as to all. But now, by 6 Geo. IV. c. 16, § 16, a creditor may petition against one or more partners of a firm; and a fiat may be annulled as to one or more of such partners, and the validity thereof will not be affected as to the rest. And by § 17, if a joint fiat be thus sued out against some of the partners, and another fiat be sued out afterwards against one or more of the remaining partners, the second fiat shall be directed to the same commissioner; and after the adjudication all separate proceedings under the second fiat shall be stayed, and the same shall be annexed to and form part of the first fiat.

Two fiats against the same person cannot be in operation at the same time. Where a separate fiat issues against one partner, and afterwards a joint fiat is sued out against him and others of the firm, as the latter is usually most advantageous to the creditors, if it be valid and intended to be fairly prosecuted, the Court of Review, upon petition, will annul the separate fiat at the costs of the joint estate; or if sales have taken place under the first fiat, the court will merely impound it, so that it may remain a subsisting fiat, but not impede the operation or affect the validity of the second fiat.

Under a joint fiat the messenger seizes the joint property of the firm, and the separate property of each individual member. In case of a separate fiat against one member of a firm, the messenger may seize the joint property also, as his share therein belongs to the separate creditors; but the remaining partners are usually left in possession, accounting to the assignees for the bankrupt's share after payment of all joint debts.

By 5 & 6 Vict. c. 122, § 31, if any person adjudged bankrupt after the commencement of this act shall at the time of his bankruptcy be a member of a firm, it shall be lawful for the court authorized to act in the prosecution of the fiat against such bankrupt to authorize the assignee, upon his application, to commence or prosecute any action at law or suit in equity in the name of such assignee and of the remaining partner, against any debtor of the partnership, and such judgment, decree, or order may be obtained therein as if such action or suit had been instituted with the consent of such partner; and if such partner shall execute any release of the debt or demand for which such action or suit is instituted, such release shall be void. Provided, that every such partner shall have notice given him of such application, and he at liberty to show cause against it, and, if no benefit is claimed by him by virtue of the said proceedings, shall be indemnified against the payment of any costs in respect of such action or suit, in such manner as such court upon his application shall direct; and it shall be lawful for such court, upon the application of such partner, to direct that he may receive so much of the proceeds of such action or suit as such court shall direct.

Separate debts are those for which one member alone is liable and can be sued at law; joint, those for which the whole firm are liable, and for which they must all be sued.

The petitioning creditor, although a joint creditor, may prove and receive dividends under any separate fiat sued out by him; and if that fiat be annulled and a joint fiat supported for the convenience of administering the estate, he may elect whether he will prove as a joint or as a separate creditor of the single member against whom he sued out the fiat. Sometimes, as if an executor or assignee of a bankrupt, or a trustee, be a partner in a firm and apply the money for the partnership purposes *with the knowledge of his co-partners*, the debt may be treated by the cestuique trusts as either joint or separate. But this only gives the option, and proof cannot be made against both estates. But where a creditor holds a double security of the firm and of one of the members of it, without knowing him to be a member, he may prove against the firm and also under the separate fiat against the individual member.

A partner cannot in general prove against his firm, unless all the joint debts are paid; but if his debt arose out of a transaction wholly distinct from the partnership, as if he had carried on a business wholly different from that of the firm, and had supplied them with the goods thereof, then it seems, in general, he may prove against the firm. But if one only of two partners become bankrupt, the solvent partner, on paying all the joint debts, may prove under the separate fiat all such proportion of the joint debts as he had paid out of his own pocket.

Under a separate fiat, joint creditors who have proved debts of 10*l.* and upwards may vote in the choice of assignees. But under a joint fiat only joint creditors can vote.

As already observed, under a joint fiat the separate property of each member, as well as the joint property, passes. If one partner die and the survivor becomes bankrupt, the separate creditors of the deceased shall be paid out of the separate estate, and the joint are entitled to the surplus. The separate creditors are not entitled to be paid interest before the surplus of the separate estate is distributed among the joint creditors, and they have been paid 20*s.* in the pound.

Where a joint fiat issues against the firm, and the several members carry on distinct trades under distinct firms, the court, on petition, will order distinct accounts to be kept of the joint property of all, of the joint property of each minor firm, and of the separate estate of each, and will order distribution accordingly.

Sometimes the joint and separate creditors agree to consolidate the two estates, and that *all* the creditors shall be paid *pari passu*; but the court has no power to order this.

The certificate, as well under a joint as a separate fiat, bars all debts, joint or separate. But, by § 121, a certificate under a separate fiat against one member of a partnership does not release the others.

And by § 129, in all joint fiats under which any partner shall have obtained his certificate, if a sufficient dividend shall have been paid upon the joint estate and upon the separate estate of such partner, he shall be entitled to his allowance, although his other partners may not be entitled to any allowance.—5 & 6 Vict. c. 122, § 45.

Only one allowance to all is payable, and that not unless both separate and joint creditors are paid a sufficient dividend.

XIX. OF COSTS AND FEES.

By 6 Geo. IV. c. 16, § 14, the petitioning creditor shall, at his own costs, sue forth and prosecute the fiat until the choice of assignees. And the commissioners shall, at the meeting for such choice, ascertain such costs, and direct the assignees (who are also required by the act) to reimburse the petitioning creditor such costs out of the first moneys that shall be got in. And all bills of fees or disbursements of any solicitor or attorney employed under any fiat, for business done after the choice of assignees, shall be settled by the commissioners (or, if in any action or suit, shall be taxed by the proper officer), and the same shall be paid by the assignees. Provided, that any creditor of 20*l.* or upwards, if dissatisfied with the settlement by the commissioners, may have the costs taxed by a master in chancery.

The costs to be paid by the petitioning creditor are the solicitor's and messenger's bills to the choice of assignees, for ordinary expences; but not for extraordinary ones without an express order. The solicitor and messenger can recover such bills from the petitioning creditor by action; but they cannot recover from the assignees, although the latter have been ordered to pay the amount to the petitioning creditor. Nor can the petitioning creditor compel payment from the assignees until he has actually paid the amount. If however, the same solicitor

who sued out the fiat is employed by the assignees, and, after delivering a bill including that for which the petitioning creditor was liable, has received from them money generally on account, he is bound to appropriate it in the first place to the petitioning creditor's bill. But it is doubtful whether, if the assignees employ the same solicitor, they do not make themselves answerable to him for the petitioning creditor's costs.

The assignees are liable for all costs and expences incurred after the choice of assignees, whether they can be reimbursed by the estate or not. And they can only charge the estate with the costs settled in the manner mentioned by the act, though they may have made themselves personally liable for that part which is not so allowed.

Generally speaking, assignees, in all actions and suits by and against them, are liable personally to costs in the first instance; but they are allowed to remunerate themselves out of the funds of the bankruptcy in all cases where they have acted honourably and fairly in the correct discharge of their duty. If, however, there be no funds, they must bear the loss. If sued for any thing done in pursuance of the act, and they get a verdict, or the plaintiff be nonsuited, they are entitled to double costs.

All bills of charges, fees, and disbursements of any *auctioneer, appraiser, broker, valuer, or accountant* employed by any assignee or messenger or bankrupt under any fiat in bankruptcy, for business done under such employment, shall be settled by the court authorized to act in the prosecution of such fiat, and the amount of the bills so settled, and no more, shall be paid to or recoverable by such auctioneer, appraiser, broker, valuer, or accountant.—5 & 6 Vict. c. 122, § 83.

Fees payable in Bankruptcy.

To "THE SECRETARY OF BANKRUPTS' ACCOUNT," from which the Salaries of the Judge, Commissioners, &c. are paid :—
Upon the Granting of every Fiat, to be paid to the Lord Chancellor's Secretary of Bankrupts

Immediately after the choice of Assignees, by the Official Assignee of each bankrupt's estate, out of the first moneys that come to hand £10 0 0
20 0 0

To "THE SECRETARY OF BANKRUPTS' COMPENSATION ACCOUNT," for payment of the compensations to the Patentee of Bankrupts, the late London and Country Commissioners, and other persons whose fees and duties were abolished by the 1 Wm. IV. c. 56, and 5 & 6 Vict. c. 122 :—

Immediately after the choice of Assignees, by the Official Assignee of each bankrupt's estate, besides the sum hereinbefore directed £10 0 0

For every Sitting of the Court, or of any Division Judge or Commissioner thereof, other than the sitting at which any person may be adjudged a bankrupt, or any sitting for the choice of assignees, or for receiving proof of debts prior to such choice, or at which any bankrupt shall pass his last examination, or at which any dividend shall be declared, or at which the bankrupt's certificate shall be signed. 1 0 0

For every Sitting at which a dividend shall be declared, a sum according to the amount ordered to be divided ; viz.
For all sums not exceeding £10,000 10s. in every £100
And for any excess above £10,000 2s. 6d. in the £100
Such payments to be made within one week after such sitting.

To the Account at the Bank of England intituled "INTEREST ARISING FROM THE BANKRUPTCY FUND ACCOUNT :"—
For every Sitting under every Fiat prosecuted in the Country, as a charge for the use of the Court £0 10 0

To the SECRETARY of BANKRUPTS ; for the expenses of his office, and the surplus for his own use :—

For every Docket struck and not acted upon	£1 12 6
For every renewed Fiat	0 12 0
For every Petition of Appeal answered for Hearing	0 13 6
For every Order on Hearing	1 5 0
For every previous Minute of Order	0 3 6
For every Warrant for advertising Declaration of Insolvency	0 2 6
For Certificate of a Fiat, to authorize advertisement in the Gazette	0 2 6
For every Search made for Fiat or other Proceeding	0 1 0
For filing Affidavits and other Documents	0 1 0
For Copies of Affidavits, Orders, and other Proceedings, per folio of 90 words	0 0 1½
For every Certified copy of Declaration of Insolvency	0 2 6

To the CHIEF REGISTRAR of the Court of Bankruptcy, under London fiats; and to the Deputy Registrars of the several District Courts, under Fiats prosecuted in such courts .

On filing every Fiat	£0 1 0
For every Summons of Trader Debtor	0 1 0
On Allowance of every Bond with sureties	0 5 0
For every Rule or Order Nisi	0 5 0
For every Rule or Order absolute	0 5 0
For every Search Warrant	0 5 0
On swearing every Affidavit, except of the Bankrupt or relating to his Certificate	0 1 6
For every Order of Court made in any matter heretofore within the jurisdiction of the Court of Review	1 0 0
For every Certificate of Bankrupt's conformity	0 6 6
On entering every Appeal for hearing in the Court of Review	0 2 0
For every Order pronounced by that Court	1 5 0
For every previous Minute of Order	0 2 6
For entering every matter for hearing in a Subdivision Court	0 1 0
For every Order pronounced there	0 5 0
For Fees on the Trial of every issue, to be paid by the successful party	2 0 0
For every Search made in the Court	0 1 0
For filing Affidavits and other documents	0 1 0
For Copies of Affidavits, Orders, and other Proceedings, per folio of 90 words	0 0 1½
For every Subpœna ad testificandum and other Writ issued out of the court	0 2 0

Fees to the OFFICIAL ASSIGNEES.

By the General Rules of the Court of Bankruptcy, 12th Jan., 1832, it is recommended to the Commissioners to allow the Official Assignees 1 *per cent* on the moneys they respectively receive, and 1½ *per cent* more on the moneys actually divided; subject to increase or diminution in any case under special circumstances to be referred to the Court of Review.

MESSENGERS' Fees.

Attending the Commissioners until Adjudication, for Warrant of Seizure	£0 10 0
Executing the Warrant, at each place	0 13 4
Summons to Bankrupt to surrender, and Duplicate	0 5 0
Service of Summons on Bankrupt	0 6 8
Preparing Advertisement for the Gazette, and Copy, and attending with, and Fee, the same	0 6 8
Possession, from the day of execution of the warrant of seizure to the choice of assignees, and no longer, per day	0 5 0
Preparing Warrant for bringing up the Bankrupt from prison, attending Commissioner to sign the same, and service on the Gaoler	0 13 4
Summons for Assignees to attend Audit Meeting	0 6 8
Preparing Summonses, and serving same upon the assignees	0 6 8
Proclaiming Bankrupt when he does not surrender	0 3 4
In case of committal by the Commissioners, taking into custody, and executing their warrant, Messenger, and Men's attendance, with coach-hare, and expences	1 1 0
If the Messenger or his Man are compelled to travel any considerable distance from London, beside the above fees and all travelling and other necessary expences, an allowance at the following rate per day :—	
For the Messenger	0 6 8
For his Man	0 5 0

GENERAL RULES, ORDERS, &c. IN BANKRUPTCY.

ORDER OF THE LORD CHANCELLOR.—Nov. 12. 1842.

Made in pursuance of the Statute 5 & 6 VICTORIA, c. 122.

I DO HEREBY ORDER AND DIRECT AS FOLLOWS; that is to say,—

1. That every fiat in bankruptcy hereafter granted shall be forthwith issued and transmitted by the Lord Chancellor's Secretary of Bankrupts to the court to which such fiat shall be directed, in manner hereinafter in that behalf mentioned; that is to say,—Every such fiat directed to the Court of Bankruptcy shall forthwith be sent, by a messenger to be appointed by the said secretary for that purpose, to the Office of the Chief Registrar of such court at the said court in Basinghall-street, and there delivered by such messenger; and every such fiat directed to any District Court of Bankruptcy shall forthwith be sent (except where the lord chancellor shall by any special order hereafter otherwise direct) through the General Post Office to the deputy-registrar or deputy registrars of such district court.

2. That every commission of bankrupt and every fiat in bankruptcy heretofore issued and directed to any commissioners in the country, and opened, or purporting by the proceedings to have been opened, at any place situated within any one of the several districts in the country mentioned in and settled and described by an Order bearing date the 2d of November, 1842, and made by her Majesty, by and with the advice of her Privy Council, in pursuance of an act of parliament passed in the parliament holden in the 5th and 6th years of the reign of her present Majesty, intituled "An Act for the Amendment of the Law of Bankruptcy," or directed to any commissioners in the country heretofore authorized to act in the prosecution of fiats in bankruptcy at or for any such place and within 20 miles thereof, but not opened, shall be and the same is hereby transferred and removed into the District Court of Bankruptcy authorized to act in the prosecution of fiats in bankruptcy in the country within the district in which such place shall be situate. And every commission of bankrupt and every fiat in bankruptcy heretofore issued and directed to any commissioners in the country, and opened, or purporting by the proceedings to have been opened, in the country elsewhere than at any place situated within any one of the said several districts so settled and described as aforesaid, or directed to any commissioners in the country heretofore authorized to act in the prosecution of fiats in bankruptcy elsewhere than at or for any such place, but not opened, shall be and the same is hereby transferred and removed into the Court of Bankruptcy in London. And all further proceedings in every commission and fiat so transferred and removed as aforesaid shall be thenceforth prosecuted and carried on in manner directed by the said act in the court to which the same is hereby ordered to be transferred and removed.

3. That forthwith after the registering in any District Court of Bankruptcy of any commission or fiat in bankruptcy opened since the passing of the act 1 & 2 Wm. IV. c. 56, and at every public sitting of the court thereafter under such commission or fiat, and forthwith after the advertisement of the adjudication, and every public sitting thereafter, under every fiat hereafter opened in any District Court of Bankruptcy, minutes of such commission and fiat and of the proceedings shall be transmitted by the court acting in the prosecution of such commission or fiat to the Court of Bankruptcy in London, to be there kept and filed among the records of the said court, in manner following; that is to say,—A minute of the commission or fiat and proceedings shall be made from time to time in the form hereinafter set forth, so far as the same may be applicable, by the deputy-registrar, and certified by him as correct, and the deputy registrar shall cause such minute to be sent by the post to the chief registrar of the Court of Bankruptcy in Basinghall-street, who shall file the same among the records of such court:—

FORM OF MINUTE OF COMMISSION OR FIAT AND PROCEEDINGS.

Bankrupt, — [State the name and description of the bankrupt or bankrupts, as in the commission or fiat.]

Date of commission or fiat, —

Petitioning creditor, — [Name, &c., as in the commission or fiat.]

Solicitor, — [Name, &c., as in the commission or fiat.]

Date of Adjudication, — day of —, 184 —.

Date at which Gazetted, — day of —, 184 —.

Official assignee, — [Name and date of appointment.]

Creditors' assignees, — [Names &c., as in choice paper, and date of choice.]

Solicitor (if changed), —

Amount of debts proved at first meeting or sitting, —

Ditto, claimed, —

Last examination, — [Date of]

Adjourned to — [or sine die] — [or passed]

(And, in addition to the above, under fiats where last examination shall be hereafter passed, the amount of creditors' debts, of liabilities, and of assets, as disclosed in the balance-sheet.)

Certificate, — [Date and particulars (if any deemed material) of granting the same.]

Audit :—Date of, — day of —, 184—.

(From Audit or Dividend Paper.)

Gross receipts.....	£
Net receipts	£
(And in addition to the above, from Accounts hereafter audited :)	
Amount of Solicitors' bills :—	
1st bill	£
2d bill	£
&c., &c.	£
Total ...	£
Amount of Messengers' bills :—	
1st bill	£
2d bill	£
&c., &c.	£
Total ...	£

Court Fees :—

To Secretary of Bankrupts' Account	£
To Compensation Account	£
Rent and taxes	£
Wages in full.....	£
Remuneration charge for official assignee	£
Allowance to bankrupt	£
Postages and petty expences	£

Dividend :—Date of, — day of —, 184—.

(From Dividend Paper.)

Gross sum divided.....	£
Rate of dividend, — in the pound	
Balance retained	£
(And in addition to the above, where dividend hereafter declared :)	
Reason for retaining balance :—	

A similar return at every subsequent sitting for audit or dividend.

Like returns as above where there are separate estates for each bankrupt.

4. That every sum directed to be paid under section 57 of the 5 & 6 Victoria, c. 122, or under section 47 of the 1 & 2 William IV. c. 56, shall be taken by the deputy-registrar of the court authorized to act in the prosecution of the commission or fiat under which such sum shall be payable; and an account of all sums so taken shall be kept by such deputy-registrar, and such sums shall be certified by the commissioner to correspond with the number of sittings, and be paid by the deputy-registrar monthly into the Bank of England, or in the country into one of the branches thereof, or such other bank as shall be named by the Bank of England for that purpose, to the credit of the accountant in bankruptcy, to be carried to the account intituled "The Secretary of Bankrupts Account," and the voucher for such payment shall be produced to the commissioner within one week thereafter.

5. That the sum directed by the 5 & 6 Victoria, c. 122, § 78, to be charged to and paid out of the estate of the bankrupt under every fiat prosecuted in the country, for every sitting under such fiat, shall be received by the deputy registrar of the court authorized to act in the prosecution of such fiat; and a separate account of all sums so received shall be kept by the deputy registrar; and such sums shall be certified by the commissioner to correspond with the number of sittings, and be paid by the deputy-registrar, monthly, into one of the branches of the Bank of England or such other bank as shall be named by the Bank of England for that purpose, to the account intituled, "Interest arising from the Bankruptcy Fund Account."

6. That printed copies of this order shall be supplied by the Lord Chancellor's Secretary of Bankrupts to the several courts authorized to act in the prosecution of fiats in bankruptcy in London, and in the several districts in the country, and to the chief registrar of the Court of Bankruptcy in Basinghall-street; and one copy shall be posted up in some conspicuous place in every such court, and in the office of the chief registrar.

LYNDHURST, C.

GENERAL RULES AND ORDERS.—Nov. 12, 1842

Made under the 5 & 6 VICTORIA, c. 122, § 70,

FOR REGULATING THE FORMS OF PROCEEDINGS (WHERE NOT PROVIDED FOR BY THE SAID ACT) AND THE PRACTICE TO BE OBSERVED IN EVERY COURT AUTHORIZED TO ACT IN THE PROSECUTION OF FIATS IN BANKRUPTCY.

IT IS ORDERED, AS FOLLOWS;—that is to say,—

1. After the expiration of one calendar month from the date of these Rules and Orders, no attorney or solicitor shall be allowed to practise in any District Court of Bankruptcy until he shall have been admitted and enrolled as an attorney or solicitor of the Court of Bankruptcy in manner prescribed by the General Rules and Orders made for regulating the practice of the said court, and bearing date the 12th of January, 1832.

2. Every commission or fiat in bankruptcy transferred to the Court of Bankruptcy in London under the provisions of the act 5 & 6 Victoria, c. 122, § 52, shall, before or forthwith after any proceeding thereupon in such court, be registered in the office of the Chief Registrar in Basinghall-street, in a book to be kept for that purpose, and allotted by ballot to one of the commissioners of such court, in the same manner as fiats directed to such court are now allotted, or in such other manner as the commissioners shall from time to time direct.

3. Every fiat issued after the commencement of the aforesaid act, and directed to the Court of Bankruptcy in London, shall, forthwith after the delivery of the same at such court, be filed of record in the Office of the Chief Registrar in Basinghall-street, and a minute of the date of so filing the same shall be made at the time, in writing, at the foot of such fiat; and such fiat shall not be opened, upon the application of any other creditor than the petitioning creditor, until after the expiration of three days from such date.

4. Every commission or fiat in bankruptcy transferred to any District Court of Bankruptcy under the provisions of the act 5 & 6 Victoria, c. 122, § 52, shall, before or forthwith after any proceeding thereupon in such court, be registered, by a deputy-registrar attending such court, in a book to be kept for that purpose, and in districts where there are two commissioners shall be allotted by ballot, in the presence of the solicitor acting under such commission or fiat, or in rotation, in such manner as the commissioners shall from time to time direct, to one of such commissioners, and shall be further prosecuted before such commissioner, or before the district commissioner where there is only one commissioner. Provided always, that either of the commissioners authorized to act in the prosecution of fiats in bankruptcy in any district in the country may, in the absence of the other commissioner, sit or act for him.

5. Every fiat issued after the commencement of the aforesaid act, and directed to any District Court of Bankruptcy, shall, forthwith after the delivery of the same at such court, be registered by a deputy registrar attending such court, in a book to be kept for that purpose, and a minute of the date of registering the same shall be made at the time, in writing, at the foot of such fiat; and such fiat shall not be opened upon the application of any other creditor than the petitioning creditor, until after the expiration of three days from such date; and such fiat shall be allotted by ballot, or in rotation, and prosecuted as directed with respect to a commission or fiat transferred to such court, subject to the like proviso in case of the absence of a commissioner.

6. The present practice in the Court of Bankruptcy, where not inconsistent with or otherwise directed by the aforesaid act or these rules and orders, shall, until further order, be followed in such Court, and in every District Court of Bankruptcy. And every proceeding in any District Court of Bankruptcy, where not by the aforesaid act or herein specially provided for, shall, until further order, be in the same form (*mutatis mutandis*), and the paper thereof of the same size, as is now used in the Court of Bankruptcy in London, and shall be kept in such district court, unless and until directed by the Lord Chancellor to be transmitted to the Court of Bankruptcy in London.

7. Every attorney or solicitor of the Court of Bankruptcy having in his custody or power the proceedings under any fiat in bankruptcy, opened, or purporting by the proceedings to have been opened, at any time after the passing of the act 1 and 2 William IV. c. 56, shall forthwith bring such fiat and proceedings into the Court of Bankruptcy, or District Court of Bankruptcy into which such fiat shall have been transferred and removed (as the case may be), to be registered in such court, and further prosecuted therein, as hereinbefore in that behalf directed.

8. The deputy-registrar attending the commissioner shall take minutes, and have the charge of all proceedings before him, and otherwise assist in the business of the court, subject in all cases to the control of the commissioner.

9. Every application by a petitioning creditor to extend the time for opening any fiat shall be supported by affidavit to be filed in court.

10. In every case where the time for opening any fiat shall be extended under 5 & 6 Victoria, c. 122, § 4, the commissioner shall forthwith cause notice to be sent by the post to the Lord Chancellor's Secretary of Bankrupts of the extended time allowed by the Court.

11. In every advertisement of an adjudication of bankruptcy in the London Gazette, the date of the fiat under which such adjudication shall have been made shall be stated.

12. The personal attendance of the petitioning creditor, and of the witness or witnesses to prove the trading and act of bankruptcy, upon the opening of the fiat, shall in no case be dispensed with, except upon special cause proved to the satisfaction of the commissioner.

13. If any person adjudged bankrupt intend to dispute such adjudication, such person shall cause notice of his intention so to do to be served upon the petitioning creditor or his solicitor, and the deputy registrar of the court, two days at the least before the day of showing cause against such adjudication.

14. The bankrupt's balance-sheet must be filed in duplicate with the deputy-registrar of the court ten days at least before the day appointed for the last examination of the bankrupt, or the adjournment-day thereof for that purpose (one copy for the official assignee, and the other for the proceedings); and the last examination of the bankrupt shall in no case be passed by the court unless his balance-sheet shall have been duly filed as aforesaid. Office copies of the balance-sheet, or such part thereof as shall be required, shall be provided by the proper officer.

15. Every bill of fees and disbursements and charges of any solicitor or attorney, or messenger, under any commission or fiat in bankruptcy, incurred prior to any sitting for an audit under such commission or fiat, shall be delivered to the deputy-registrar for taxation five days at least before the day appointed for such sitting; and, in default thereof, if such sitting shall be adjourned by reason of such default, such solicitor or attorney, or messenger, shall pay the costs occasioned by the adjournment, and the amount thereof shall be deducted from the amount of such bill. And no money shall be paid to any solicitor or attorney, or messenger, on account of any fees or disbursements or charges of any bill, until such bill shall have been taxed.

16. The audit account of the official assignee, or of any creditors' assignee or assignees shall be made out in the ordinary form of a Debtor and Creditor account, each item thereof being entered according to its date, and a name, date, and proper explanation given to such item; and a duplicate of such account shall be sent by the official assignee to the solicitor two days at least prior to the day appointed for the auditing of such account; subject to the power of the commissioner to require an account, digested under proper heads, to be annexed to the audit account, if he shall think proper.

17. At every audit the Debtor and Property Book exhibited to the court by the official assignee shall be carefully examined and compared with the debts and property collected as stated in the audit paper; and the cause of any monies remaining uncollected shall be ascertained, and a minute thereof made, and filed with the proceedings. And all persons appearing to be indebted to the bankrupt's estate shall be forthwith summoned and examined in that behalf upon oath; and the examination so taken shall be filed with the proceedings; and such directions shall be given by the court as to any further proceedings thereupon as to the court shall seem fit.

18. No audit and dividend shall be appointed for the same day, except for some special cause, to be stated to the court in writing at the time of such appointment, and allowed.

19. Under every fiat issued within six months before the commencement of the aforesaid act, or hereafter to be issued, a final dividend shall be advertised within two years after the date of such fiat; and under every commission or fiat issued twelve months or more prior to the commencement of the aforesaid act, a final dividend shall be advertised within eighteen months after the commencement of the aforesaid act, unless, in either of the cases aforesaid, there be some cause to the contrary to the satisfaction of the commissioner, to be stated in writing, and filed with the proceedings.

20. The particulars of Demand and Notice under the aforesaid act, and specified in Schedule A (No. 2), shall, in cases where the debt demanded is claimed to be due to a partnership firm, be signed by or in the name of one of the partners, on behalf of himself and partner or partners, adding after such signature the style or firm of partnership, and place of business, as follows; that is to say,—"John Thompson, for self and partners, trading under the style or firm of — at — in the county of —." And in cases where the debt demanded is claimed to be due to any one person, or to two or more persons not being partners in trade, such particulars of demand and notice shall be signed by or in the name of every such person by his christian and surname, and his or their residence or place of business, as follows; that is to say, "Edward Jones, residing at — in the county of —," or "carrying on business at — in the county of —."

21. Such Particulars and Notice shall be directed to the party or parties intended to be summoned by the christian and surname of each of them (or, when the christian name is not known, then by the initial letter or letters, or some contraction of the christian name, and by the surname), and also by the place of residence, in the same form as mentioned in the last rule; and shall also contain in the body thereof a statement of the name or names of all the persons from whom the debt is claimed to be due, whether the whole of them shall be summoned or not, or (in case of partners) the style or firm of partnership, and place of business, in the same form as mentioned in the same rule.

22. The account in such particulars of demand shall be expressed with reasonable and convenient certainty, as to dates and all other matters; and where credit is given in such account to the debtor, the notice shall require payment of the difference, or balance only, which appears to be due on such account.

23. If the affidavit for summoning a debtor under the said act shall not be filed within one calendar month after service of the particulars of demand and notice, the plaintiff (or creditor) shall not afterwards be at liberty to proceed without serving new particulars or demand and notice.

24. Every affidavit under the said act shall be intituled of "The Court of Bankruptcy in London," or "The Court of Bankruptcy for the — District," as the case may be.

25. Every affidavit for summoning a debtor under the said act shall state the nature of the debt with the same degree of certainty and precision as is now required in an affidavit to hold to bail by order of a judge in the superior courts at Westminster.

26. Every summons of a debtor under the said act shall describe the parties in the same manner as they were described in the particulars of demand and notice.

27. Every such summons shall be indorsed with a notice, as follows:—

" Notice to the Party Summoned.

" This Summons is served upon you pursuant to the provisions of the 5th and 6th Victoria, c. 122, intituled " An Act for the amendment of the law of Bankruptcy," and is founded on an Affidavit of Debt which was filed in the Court of Bankruptcy in London [or the Court of Bankruptcy for the — District at —] on the — day of —, 184—.

" If you shall fail to appear in person to this summons at the time and place within specified (having no lawful impediment made known to and proved to the satisfaction of the said Court at the same time, and allowed), and if you also fail within fourteen days after service of this summons, or within such enlarged time as the said Court may grant, to pay, secure, or compound for the demand within mentioned to the satisfaction of the summoning creditor, or to enter into a bond, with two sureties, to be approved of by the said Court, to pay such sum as shall be recovered in any action which shall have been brought or shall thereafter be brought for recovery of the same, together with such costs as shall be given in such action, you will be deemed to have committed an act of bankruptcy on the 15th day after the service of this summons, provided a fiat in bankruptcy shall issue against you within two calendar months from the filing of the above-mentioned affidavit.

" If you shall appear, and on appearance shall refuse to sign an admission of the said demand in the form required by the said act, and shall not make a deposition on your oath, in the form required by the said act, that you believe you have a good defence to such demand, and shall also fail, within fourteen days after service of this summons, or within such enlarged time as aforesaid, to pay, secure, or compound as above mentioned, or to enter into such bond as above mentioned, the same consequence will follow as in the case first supposed, subject to the same proviso as regards the issuing a fiat in bankruptcy.

" If you shall appear, and on appearance shall sign an admission of the said demand, and shall not within fourteen days next after the filing of such admission pay, or tender and offer to pay, to the said creditor the amount of such demand, or secure or compound for the same to the satisfaction of such creditor, you will be deemed to have committed an act of bankruptcy on the 15th day after the filing of such admission, subject to the same proviso as before-mentioned with regard to the issuing a fiat in bankruptcy.

" If you shall appear, and on appearance shall sign an admission for part of the said demand, and shall not make a deposition on your oath, in form required by the said act, that you believe you have a good defence to the residue, then, if, as to the sum so admitted, you shall not, within fourteen days next after the filing of such admission, pay, or tender and offer to pay, to the said creditor, the sum so admitted, or secure or compound for the same to the satisfaction of such creditor, and as to the residue of such demand shall not within fourteen days from the service of the summons, or such enlarged time as may be granted by the said court in that behalf, pay, secure, or compound for the same to the satisfaction of such creditor, or enter into a bond, with two sureties to be approved of by the court, to pay such sum as shall be recovered in any action which shall have been brought or shall thereafter be brought for recovery of the same, together with such costs as shall be given in such action, you will be deemed to have committed an act of bankruptcy on the 15th day after the service of this summons, subject to the same proviso as before mentioned with regard to the issuing the fiat in bankruptcy.

"If you shall appear, and on appearance shall, as to the whole of the said demand, or part of it, make a deposition on your oath, in the form required by the said act, that you believe you have a good defence to the same, you will be entitled to a discharge from the summons.

"You are moreover to observe, that an admission made by you after the service of this summons, though signed out of court, may afterwards be filed in court, and will be as effectual as if you had appeared and signed it in court; provided there be present at the time of the signature an attorney of one of her majesty's superior courts of law on your behalf, expressly named by you, and attending at your request, to inform you of the effect of such admission before it is signed by you; and provided also that such attorney do subscribe his name to the admission as a witness, and in such attestation declare himself to be attending for you, and state therein that he subscribes as such attorney; and provided also, that the admission be in the following form:—

"I, the undersigned, E. F., of — in the county of —, do hereby confess that I am indebted to A. B., of —, in the sum of ——" Signed, E. F.

"Dated this — day of —, 184—.

"Witness, G. H., attorney for the said E. F., and subscribing witness to the execution hereof as such attorney."

28. Every summons of a debtor under the said act shall be indorsed with the name and place of residence (according to the form of specifying name and place directed by rule 20) of the attorney actually suing out the same; and in case such attorney shall not be an attorney of the Court of Bankruptcy, then also with the name and place of residence (according to the same form) of the attorney of such court in whose name the summons shall be sued out; but in case no attorney shall be employed for the purpose, then with a memorandum expressing that the same has been sued out by the summoning creditor "in person."

29. Every such summons shall be served four days at least before the time for appearance therein mentioned.

30. Every such summons shall be served between the hours of nine o'clock in the forenoon and nine o'clock in the evening.

31. If the plaintiff (creditor) shall make default in appearance at the time appointed in that behalf, the defendant (debtor) shall be entitled to his discharge from the summons; and a memorandum of such discharge shall be indorsed on the summons.

32. If the defendant shall appear at the time appointed in that behalf, and shall refuse to admit such demand, but shall, as to the whole of the said demand, or part of it, make a deposition on oath, in the form required by the said act, that he believes he has a good defence to the same, the defendant shall be entitled to his discharge from the summons, and a memorandum of such discharge shall be indorsed on the summons.

33. Any want of compliance on the part of the plaintiff with these rules and orders in the particulars of demand and notice, and in the affidavit for summoning the defendant, and in the summons and service thereof, or in any or either of such matters, may be waived by the defendant; or, if made known to and proved to the satisfaction of the court at the time required by the summons for the appearance of the defendant, shall be deemed and taken to be a good objection to requiring the defendant to state whether or not he admits the demand sworn to by the plaintiff, or any part thereof; and in such case, if such want of compliance be not waived, the defendant shall be entitled to his discharge from the summons, and a memorandum of such discharge shall be indorsed on the summons.

34. Every application to enlarge the time for calling on the defendant to state whether or not he admits the demand or any part thereof, or for entering into a bond, with sureties, shall be supported by affidavit.

35. Before any defendant shall be allowed to enter into a bond, with sureties, according to the provisions of the said act, he shall give to the plaintiff or his attorney a notice in writing, signed by the defendant or his attorney, of the defendant's intention so to proceed.

36. Such notice of sureties shall be accompanied with a true copy of the affidavit of sufficiency; which affidavit shall be in the following form; viz.

"In the Court of Bankruptcy, London,
[or, In the Court of Bankruptcy for the — District].

"Between — and —"

"A. B. of — in the &c., and C. D. of &c. (adding their places of residence respectively, according to the particulars set forth in Rule 21), severally make oath and say: And first, the said A. B. for himself saith, that he is one of the proposed sureties for the above-named defendant, and that he the said A. B. resides at — aforesaid, and that he is worth property to the amount of £ — over and above what will pay and satisfy all his just debts and incumbrances; that he is not surety in any manner for the above-named defendant, or any other person, except on the present occasion (or, if he is surety on any other occasion, substitute for the words in Italics the following, 'and every other sum for

which he is now surety*); that his, the said A. B.'s, property, to the amount aforesaid, consists of [*Here specify the nature and value of the property according to the circumstances of the case, as follows:—Stock in trade in his business of a —, carried on by him at —, of the value of —; of good book debts owing to him, to the amount of —; of furniture in his house at —, of the value of —; of a freehold (or leasehold) farm of the value of —, situated at —, occupied by —; or of a dwelling house of the value of —, situated at —, occupied by —; or of other property, particularising each description of property, with the value thereof.*] And the said A. B. further saith, that for the last six months he has resided at — aforesaid (or, *if he has resided at several places, then say, at the following places, particularising them according to the form of describing places directed by Rule 21.*) And the above-named deponent C. D. for himself saith, that—(*Here pursue the same form as with respect to the former surety.*)”

37. The amount of property so sworn to shall be the sum demanded, fractional parts of a pound excepted, and one-fourth more.

38. The plaintiff shall be at liberty, within four days after service of notice of sureties, to except to the proposed sureties or either of them, by delivering a written notice to the defendant or his attorney, to the effect generally, that he excepts to such surety, or sureties, as the case may be.

39. Two days after the service of such notice of exception, the defendant or his attorney shall attend at eleven o'clock in the forenoon in open court, with the bond duly stamped, and with an affidavit by the subscribing witness of the execution of such bond; and the plaintiff or his attorney shall be at liberty to oppose the sureties, or either of them, upon affidavit, or on the ground of any defect appearing on the face of the proceedings.

40. The bond shall be taken in a penal sum, to the amount of double the sum demanded, and shall be executed by the defendant and both sureties to the plaintiff; and the form of the condition shall be as follows:—

“Whereas the said—(plaintiff) and one C. D., by their affidavit, sworn and filed in the Court of Bankruptcy [*or, in the District Court of Bankruptcy at —*], on the — day of —, 184—, according to an act passed in the session of parliament holden in the fifth and sixth years of the reign of Queen Victoria, intituled &c. severally deposed as follows; that is to say,—The deponent (plaintiff) for himself said, [*here set forth the affidavit for summons*]: and whereas the said Court did, upon the filing such affidavit, issue a summons according to the said act, which was duly served on the said (defendant) on the — day of — in the year 184—: and whereas the said (defendant), upon his appearance to the said summons [*or, at an enlargement or adjournment of the said summons, as the case may be*], refused to admit such demand, and made no deposition, according to the said act, that he believed he had a good defence to such demand [*or signed an admission for part only of such demand, viz., the sum of —, and did not make a deposition according to the said act that he believed he had a good defence to the residue of such demand*]: and whereas the said defendant has requested the said (sureties), as sureties for him, to join him in the present obligation, conditioned as hereinafter appearing, to which they have consented; and the said defendant has given notice thereof to the said plaintiff: * and whereas the said plaintiff hath brought an action at law for recovery of the said demand [*or of the residue of the said demand, as the case may be*]: Now the condition of the above-written obligation is such, that if the said (defendant), his executors or administrators, shall pay such sum or sums to the said (plaintiff), his executors, administrators, or assigns, as shall be recovered in the said action, or any other action which may have been brought or shall hereafter be brought for the recovery of the said demand [*or the said residue of the said demand, as the case may be*], together with such costs as shall be given in the same, then the present obligation shall be void; otherwise it shall be and remain in full force and virtue.”

41. Where no notice of exception is served, the defendant or his attorney shall attend in open court on the sixth day after the service of notice of sureties, at eleven o'clock in the forenoon, with the bond and affidavit of execution aforesaid, and also with an affidavit of the service of notice of sureties, and an office copy of the affidavit of sufficiency.

42. All affidavits used in court shall be filed.

43. In all cases in which any particular number of days is above described, or shall be mentioned in any of these rules and orders, or any other rule or order of court, for the doing of any act, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned exclusive of that day also.

* If no action has been brought, leave out the words printed in *Italic*.

44. Any writ of attachment or other writ issued by a Subdivision Court, or court authorized to act in the prosecution of any fiat in bankruptcy, or an order of such court for the nonpayment of costs, on the deputy-registrar's *allocatur*, shall be sealed with the seal of the Court of Bankruptcy by the chief registrar of such court in Basinghall-street.

45. Printed copies of these rules shall be supplied by the Lord Chancellor's Secretary of Bankrupts to the several courts authorized to act in the prosecution of fiats in bankruptcy in London, and in the several districts in the country, and to the chief registrar of the Court of Bankruptcy in Basinghall-street; and one copy shall be posted up in some conspicuous place in every such court, and in the office of the chief registrar.

ORDER OF THE LORD CHANCELLOR.—Nov. 12, 1842.

OFFICIAL ASSIGNEES.

IT IS ORDERED, AS FOLLOWS; that is to say,—

1. That each official assignee appointed to act as official assignee in bankruptcies prosecuted in the country shall find security to the like amount, and be subject to the same rules in relation thereto, as the official assignees appointed to act in bankruptcies prosecuted in the city of London.

2. That each official assignee, appointed to act as such in bankruptcies prosecuted in the country, shall be subject to the like prohibition not to carry on any trade or business, or hold or be engaged in any office or employment other than his said office and employment of official assignee, as the official assignees appointed to act in bankruptcies prosecuted in the city of London.

3. That, until further order, the commissioner in the country shall appoint his official assignees to act in rotation under the several bankruptcies prosecuted before him, unless in any case the commissioner shall see cause to the contrary.

4. That this order, in the said several matters hereinafter mentioned, shall from henceforth (except in matters otherwise herein specially directed) apply to every official assignee, whether acting under bankruptcies prosecuted in London or in the country, and to every such bankruptcy.

5. That the official assignee shall, on the 1st day of January in every year, or within one week then next following, make a declaration in writing, to be filed with the Chief Registrar of the Court of Bankruptcy in Basinghall-street, that, to the best of his knowledge and belief, his sureties are alive and solvent, and in such declaration state, to the best of his knowledge and belief, any change of residence of any or either of such sureties.

6. That the official assignee shall enter in a book, to be called the Register Estate Book, the names of the bankrupts in the commissions and fiats to which he shall have been or shall be appointed.

7. That the official assignee shall keep the following set of books, in size and form hereinafter referred to; that is to say—Register Estate Book (No. 1); Register Book of Bankrupts' Books delivered to official assignee under each estate (No. 2); Debtor and Property Book; Rough Cash Book; Fair Cash Book; Rough Journal; Fair Journal (for bills of exchange, securities, &c.); Ledger; Letter Book; Petty Cash and Postage Book; Audit Book.

The size of such several books, and of any other books kept by the official assignee in his official capacity, and the form of entry in all such books, to be settled by the accountant in bankruptcy.

8. That the official assignee, forthwith after his appointment under any bankrupt's estate, shall sort and number the books, papers, and writings of the bankrupt, with the number of the estate in the Register Estate Book, and the number of each book, thus:—

54 The number of the estate in the Register Estate Book.

75 The number of the book, paper, or writing received by the official assignee.

And the official assignee shall file a list thereof with the proceedings, and shall also forthwith after his appointment deliver to the bankrupt a written notice or letter in the form specified in the Schedule hereunto annexed (No. 1).

9. That the official assignee shall direct, in the form specified in the Schedule hereunto annexed (No. 2), the payment of all moneys due to any bankrupt's estate from any one person, or from two or more persons being partners, and carrying on business or residing in England, and exceeding in amount the sum of 500*l.*, and all moneys being in the hands or under the control of any assignee or assignees chosen by the creditors of any bankrupt's estate to which such official assignee shall have been appointed, into the Bank of England, to the credit of the accountant in bankruptcy, and for the particular estate to which such money shall belong.

10. That when any money shall be paid into the Bank of England, pursuant to the directions aforesaid, the party so paying such money shall receive a certificate, in the form specified in the Schedule hereunto annexed (No. 3), from one of the cashiers of such Bank, of his paying the same, and of its being placed to the account of the accountant in bankruptcy for the proper estate; and a voucher for such payment, to be sent by the Bank on the same day to the said accountant.

11. That, as soon as conveniently may be after every such payment, the accountant in bankruptcy shall certify in writing to the proper official assignee that such payment has been made, and the name of the bankrupt or bankrupts to the credit of whose estate the money has been placed in the books kept in the office of the accountant in bankruptcy.

12. That the accountant in bankruptcy and the Governor and Company of the Bank of England are hereby authorized to make from time to time such further regulations, to be settled by one or more of the commissioners of the Court of Bankruptcy acting in London, and subject to the approval of the lord chancellor, for facilitating the making of such payments, and certifying the same to the official assignee, as to them shall seem meet.

13. That no official assignee shall keep under his control upon any one estate more than 100*l.*, or, in the aggregate of moneys of bankrupts' estates, more than 1000*l.*; and any excess beyond such sum shall be paid by him forthwith into the Bank of England.

14. That the official assignee, at the time of paying any moneys into the Bank of England, shall state in writing, delivered therewith to the cashier of the Bank, in the form specified in the Schedule hereunto annexed (No. 4), the date and amount of the payment, the name of the official assignee making it, the name and description of the bankrupt or bankrupts to whose estate the money belongs, and that it is to be placed to the credit of the accountant in bankruptcy. And the official assignee shall take a receipt for the same from the cashier of the Bank, and on the same day carry or transmit it to the office of the accountant in bankruptcy, who will give a proper voucher for such receipt, and that the money is placed to the credit of the estate of the said bankrupt or bankrupts in the books kept in the office of the accountant in bankruptcy; such voucher to be produced when called for by the court.

15. That all moneys, without exception, received by the official assignee, and not paid by him forthwith into the Bank of England to the credit of the accountant in bankruptcy, shall be paid by the official assignee, as soon as they shall amount to 100*l.*, into the hands of a banker, with whom such official assignee shall keep an account as such official assignee, such account to be entitled "as official assignee," and in which account no moneys shall be entered except such as are received by the official assignee in his official capacity.

16. That all moneys paid into the Bank of England to the credit of the accountant in bankruptcy for the estate of any person adjudged bankrupt, or in matters of bankruptcy, shall be subject to the order of a commissioner of the Court of Bankruptcy, in writing under his hand, and testified by a deputy-registrar as to the application thereof: provided, that every such order shall specify the amount of any payment to be made by such order, the purpose to which it is to be applied, and the name of the official assignee to whom the same is to be made for such purpose, and, in cases where the sum to be paid exceeds 500*l.*, the name of the person beneficially entitled (to whom in such case the payment shall be made). And the accountant in bankruptcy shall and may, pursuant to such order, pay the sum of money specified therein out of such bankrupt's estate by a draft, subscribed to and on the same paper with the said order; such order and draft to be in the form specified in the Schedule hereunto annexed (No. 5).

17. That all orders by the commissioner for payment of money, or for the transfer and sale (as hereinafter provided) of any stock or securities being part of a bankrupt's estate, be signed in triplicate; and that one copy of any such order be filed with the proceedings in bankruptcy, and that one copy be left with the Bank of England, and that one copy be left with the accountant in bankruptcy.

18. That the official assignee shall, before any audit, enter in the book called the Debtor and Property Book the names of all the debtors to the bankrupt's estate, as returned in his balance-sheet, and shall state the reasons why debts are not paid on the opposite page; such book to be produced to the court at every audit.

19. That each official assignee shall deposit in the Bank of England, to the credit of the accountant in bankruptcy, all bills, notes, and other negotiable instruments, except unaccepted bills of exchange, as soon as he shall receive the same; and shall deposit in like manner all unaccepted bills of exchange as soon as the same shall have been accepted or refused acceptance; and shall, at the time of such deposit leave a statement in writing with the cashier of the Bank of England, specifying the date and contents of the instruments so deposited, the name of the official assignee making such deposit, the name and description of the bankrupt or bankrupts, and the particular estate to which the same respectively belong, and that such instruments respectively are to be deposited to the credit of the said accountant in bankruptcy; and shall also take a receipt for the same from the cashier of

the Bank, and carry or transmit it to the office of the said accountant in bankruptcy, who will give a proper voucher, to be produced when called for by the court.

That when and as soon as any bill, note, or other negotiable instrument deposited as aforesaid in the Bank of England in the name of the said accountant, shall become due, the Governor and Company of the Bank of England shall, without any direction from the said accountant, deliver such bill, note, or other negotiable instrument to one of the cashiers of the Bank, who is to present the same for payment, and receive the sum of money due thereon, and forthwith to pay the sum so received, if any, into the Bank of England, to be there placed to the credit of the said accountant.

That in case any such bill, note, or other negotiable instrument shall not be paid, the said Governor and Company of the Bank of England shall cause such bill, note, or other negotiable instrument as is by law required to be noted and protested to be delivered to a notary for that purpose, and to be noted and protested accordingly, and shall, after the same shall have been so noted and protested, as the case may be, again deposit the same in the Bank of England, to the credit of the said accountant.

And that the said Governor and Company of the Bank of England are forthwith, after every such receipt of money or deposit of any note, bill, or other negotiable instrument, to certify to the said accountant the sum of money received, if any, on each such bill, note, or negotiable instrument, and placed to the credit of the said accountant, or that such bill, note, or negotiable instrument has been dishonoured; and such dishonoured bill, note, or other negotiable instrument shall be forthwith delivered by the Bank to the proper official assignee.

And that as often as any bill, note, or other negotiable instrument that shall have come to the hands of any official assignee shall have been or shall be dishonoured, such official assignee shall forthwith give such notice thereof as is by law required from the holder of such bill, note, or other negotiable instrument respectively.

20. That any one of the commissioners of the Court of Bankruptcy acting in the prosecution of any fiat in bankruptcy may from time to time make order relative to the delivery out to an official assignee of any bill of exchange or promissory note which may stand in the Bank of England to the credit of the accountant in bankruptcy for the estate under such fiat; provided that the purpose of such delivery be stated in the order, and such order be testified by a deputy-registrar.

21. That any one of the commissioners of the Court of Bankruptcy acting in the prosecution of any fiat in bankruptcy may, as often as it shall appear to him expedient, by order under his hand, in the forms specified in the Schedule hereunto annexed (Nos. 6, 7, and 8), direct any money which may have been paid into the Bank of England on account of the estate of the bankrupt named in such fiat, to be invested in the purchase of Exchequer-bills to be lodged in the Bank of England; and may in like manner direct the sale or exchange of such Exchequer-bills, and also the exchange, sale, or transfer of any stock in the public funds or in any public company, or of any Exchequer-bills, India bonds, or other public securities, which shall have been transferred, delivered, or paid into the Bank of England on account of such bankrupt's estate; and may direct the proceeds thereof to be laid out in the purchase of Exchequer-bills, and that such Exchequer-bills, when so purchased, be deposited in the Bank of England to the credit of the said accountant for such particular estate. And the said accountant shall and may, pursuant to such order, make such sale, purchase, or transfer, without any further order or direction; and the expences thereof may be charged to the account of the estate for the benefit of which the same shall have been respectively made.

Provided always, that the signature of the commissioner be attested by a deputy-registrar; and that the order of the accountant in bankruptcy be subscribed to the order of the commissioner, and on the same paper with the said order.

Provided further, that no stock or public fund be transferred upon any sale, and that no Exchequer-bill, India bond, or public security be delivered for the purpose of sale, except to a cashier of the Bank of England, until the price or value thereof be paid into the Bank of England to the credit of the accountant in bankruptcy for the particular estate to which it belongs; and that no sum be paid for the purchase of any Exchequer-bill, India bond, or other public security, until such Exchequer-bill, India bond, or public security be deposited in the Bank of England to the credit of the said accountant in bankruptcy, and for such particular estate.

22. That the official assignee shall, within one week after the declaration of a dividend, give notice by advertisement in the London Gazette, and to each creditor by a printed circular letter in the form specified in the Schedule hereunto annexed (No. 9), to be sent through the Post-office at the cost of the bankrupt's estate, to be settled by the commissioner, of the time and place of the delivery of the dividend warrants as hereinafter provided; and that at such time the official assignee will require the production of such securities, if any, as the creditor exhibited at the time of his proof; and that no dividend warrant will be delivered to the creditor holding any security for his debt until such security shall be produced, without the special directions of a commissioner in that behalf.

23. That this order, so far as relates to the mode of payment of dividends, shall commence and take effect on the 2d day of January next; and that no dividend under any bankrupt's estate to which an official assignee shall have been appointed, shall be declared by any District Court of Bankruptcy until after the said 2d day of January.

24. That when a dividend has been or may be declared, the solicitor to the estate shall forthwith make out three lists of the creditors in alphabetical order, and shall state, in separate columns, after the name of each creditor, the amount of his debt, and the dividend to which he is entitled, and in two of such lists the securities exhibited at the time of proof, and shall to each name prefix a number in regular series, together with the date of the order of dividend, according to the form in the Schedule hereunto annexed (Nos. 10 and 11), and shall sign such several lists, and shall cause one of such lists which specifies such securities to be filed with the proceedings, and the other of such lists which specifies the securities he shall deliver to the official assignee together with the list not specifying the securities. And the official assignee shall examine and sign the several lists, if correct; and shall prepare books, at the expence of the estate, containing as many blank warrants as may be necessary, according to the form in the Schedule hereunto annexed (No. 12) for London, and (No. 13) for the country, and shall number and fill up a warrant for each dividend, and insert in each warrant the name of the creditor to which the number of such warrant is prefixed in the list, and the dividend payable to him, and shall keep the list specifying the securities in his custody, and shall take or send the books containing such warrants, together with the lists not specifying the securities, to the accountant in bankruptcy, who shall ascertain that the amount of such warrants does not exceed the sum standing in his name to the credit of the bankrupt's estate, and shall compare the warrants with the lists, and if correct shall certify the same, by affixing the seal of his office, to be provided for that purpose, in the margin of the warrants: and he shall keep in his custody the list of creditors, and return the warrants to the official assignee, for delivery to the creditors as hereinafter mentioned.

25. That when a creditor, or any person duly authorized under his hand to receive his dividend warrant, shall apply for the same, the official assignee shall require the production of such securities, if any, as the creditor exhibited at the time of his proof, and, if satisfied that the amount of the said dividend still remains due, shall fill up the date in the warrant and receipt, and upon the creditor or such other person authorized as aforesaid signing the receipt the official assignee shall mark the securities (if any) with the amount of the dividend, and shall sign and deliver the warrant for the same. Provided, that no dividend warrant shall be delivered to any creditor holding any security for his debt until such security shall be produced. Provided, that upon the statement of a creditor that he is unable to produce his security, and that the same has not been parted with for any valuable consideration, nor assigned to any person, he shall be examined on oath before a commissioner as to the cause of such inability; and his examination shall be filed with the proceedings; and the commissioner shall adjudge whether in his opinion the creditor is or is not able to produce the security; and if the commissioner is of opinion that the security cannot for a sufficient cause be produced, the creditor shall give a sufficient indemnity to the official assignee, to be approved by the commissioner, and upon such indemnity being given the official assignee shall deliver the dividend warrant to the creditor.

26. That the payment of the dividend warrant may be obtained by the creditor, or any person duly authorized by him under his hand to receive his dividend, or by the executor or administrator of any such creditor, upon production of the dividend warrant at the office of the accountant in bankruptcy, or, in a country bankruptcy, at any branch of the Bank of England, or such other bank as shall be named by the Bank of England in that behalf.

That if any other person than the creditor or person duly authorized by him, or the executor or administrator of any such creditor, claim to receive the dividend, the person so claiming the same must obtain an order for payment thereof indorsed upon the warrant by a commissioner under his hand; and if any dividend warrant be above twelve months date, a like order for payment thereof by a commissioner shall be required. Provided always, that in no case shall any dividend warrant be paid to an official assignee, unless such official assignee be the payee, or the executor or administrator of the payee, or the assignee of any bankrupt payee.

27. That when a dividend has been or may be declared under any fiat, the commissioner acting in the prosecution of such fiat may, by order under his hand, testified by a deputy-registrar, in the form specified in the Schedule hereunto annexed (No. 14), direct the sum ordered to be divided, or such part thereof as may be required, to be carried from the general account of such estate to an account to be kept in the books of the accountant in bankruptcy, intituled "The Dividend Account," and to the particular estate. Provided, that when it shall appear that any part of the money directed to be applied in payment of any dividend is not called for to make such payment, the commissioner may, by order under his hand, testified as aforesaid, and in the forms specified in the Schedule hereunto annexed (Nos. 15, 16, 17, 18, and 19, as the case may be), direct such sum to be carried back to the original account of the estate to which it belongs.

28. That all dividend warrants under any bankrupt's estate, which shall have been delivered to any official assignee by the accountant in bankruptcy for more than twelve calendar months, the same having been previously stamped by such accountant, but which shall not have been delivered to any creditor of such estate, shall, forthwith after the expiration of such twelve months, be brought or sent by such official assignee, together with two lists thereof, under each bankrupt's estate, to the said accountant, who shall thereupon compare the warrants with such lists, and cancel such warrants; and one of such lists shall be certified by the said accountant, and returned to the official assignee, who shall file such list with the proceedings of the respective bankruptcies; and the other of such lists to be retained by the said accountant; and the payment of the dividend to any such creditor to be made in manner to be hereafter ordered by the lord chancellor.

29. That the official assignee shall once in every quarter of a year deliver to the court to which he shall be attached an account made up to the last day of the preceding month, together with the cash-book, and banker's pass-book, duly balanced, and any other books that the commissioner may require; and such account shall show the balances placed to the credit of the accountant in bankruptcy, and of every estate under the charge of such official assignee in the books kept in the office of the accountant in bankruptcy, such balances to be certified by the said accountant; and such account shall also show the balances of every bankrupt's estate then in the hands or under the power or control of the official assignee.

30. That such quarterly account shall be kept by the deputy-registrar of the court to which such official assignee shall be attached, and shall be open to the inspection of creditors; and that notice shall be given in each court of such account having been delivered, and that any creditor applying to the court may inspect the same without fee at such convenient time as may be appointed by the court.

31. That all moneys, bills of exchange, notes, and other negotiable instruments hereinbefore directed to be paid or delivered to or by the Bank of England, may be paid or delivered to or by the Bank of England by or through any of the branch banks thereof, or any other bank that may be named by the Governor and Company of the Bank of England for that purpose; and all business arising in the country with the Bank of England may, when necessary or convenient, be transacted with the Bank of England by or through any of such branch banks, or other banks so named.

32. That the several forms specified in the Schedule hereunto annexed for the several purposes therein stated, and not hereinbefore referred to, be followed in all cases where the same may be applicable.

33. That if the official assignee shall keep under his control more than 100% of money belonging to any one estate, or more than 1000% in the aggregate of moneys belonging to bankrupts' estates, for more than one week, he shall be charged in his accounts by the commissioner with such sum as shall be equal to interest at the rate of 20% per cent, on the excess of the said sum of 100% or 1000%, as the case may be, for such time as such money shall be under his control beyond the said week; and, unless the money has been kept from proper causes, the official assignee shall be dismissed from his office, upon the report of the commissioner, or upon petition to the lord chancellor by the creditors' assignee or assignees, or by any creditor, and be liable to the costs and expences, and have no claim to remuneration.

34. That, subject to the provisions of this order, the official assignee shall follow the directions of the commissioner under whom he shall act.

35. That all forms relating to the payment or delivery into or out of the Bank of England of any money, bills, notes, or other securities under commissions and flats in bankruptcy prosecuted in the country be printed in red ink.

36. That printed copies of this order, and of the rules herein referred to, shall be supplied by the Lord Chancellor's Secretary of Bankrupts to the several courts authorized to act in the prosecution of flats in bankruptcy in London, and in the several districts in the country, and also to the accountant in bankruptcy, the Governor and Company of the Bank of England, and the chief registrar of the Court of Bankruptcy, and each official assignee; and that one such copy of this Order be posted up in some conspicuous place in every such court, and in the respective offices of the accountant in bankruptcy, chief registrar, and official assignees.

LYNDHURST, C.

CHAPTER XXVI.

Proceedings for the Relief of Insolvent Debtors

IN THE COURTS OF BANKRUPTCY.

SECT. I.—*Of Petitions for Protection from Process.*

THE bankruptcy laws, we have seen, are confined in their operation to a particular class of insolvents, none but traders being entitled to avail themselves of their provisions, and of these only such as are indebted to a certain amount. "The law of England," says Blackstone, "is cautious of encouraging prodigality and extravagance by indulgence to debtors; and therefore it allows the benefit of the laws of bankruptcy to none but actual traders, since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts without any fault of their own." This distinction with which the law regards the insolvency of traders and that of other debtors, though less important at the present day than in former times, is still attended with the following results: that the modes of proceeding for relief which are open to the latter class are not only different, but the relief itself is less extensively beneficial than that which the law of bankruptcy has provided for the former. After the various proceedings in bankruptcy have been gone through, if nothing be discovered to impeach the honesty of the debtor, he is allowed a certificate, which discharges him entirely from all his previous debts and engagements, and he is moreover entitled to an allowance from the proceeds of his estate according to the dividend which it yields. The insolvent, on the other hand, though protected from imprisonment if no fraud be proved against him, remains liable to the last moment of his life for the payment of his debts *in full*, and a power is expressly reserved to his creditors to compel such payment whenever he shall be in a condition to do so.

Another circumstance which formerly constituted an important difference in the two systems of proceeding was, that an insolvent could obtain no relief from his embarrassments, even by the surrender of his property, until he had undergone an *actual imprisonment*, of shorter or longer duration according to circumstances. Under the earlier insolvent acts, the debtor could not petition for his discharge until he had been imprisoned for a certain period. It was soon found, however, that this delay answered no other purpose than to enable insolvents to make away with what little property might have remained to them when they went into prison. The subsequent acts accordingly provided, that parties should not only be entitled to make their application for relief at the earliest possible period, but required it to be done within the first fourteen days after their commitment to custody. Still a considerable interval necessarily elapsed between the filing of the

insolvent's petition and the time when he could be brought before the court for a hearing, during the whole of which time he formerly remained in actual custody.* This evil was in some measure remedied by the 1 & 2 Vic. c. 110, which empowers the Court for Relief of Insolvent Debtors to release the insolvent upon bail between the period of his petitioning and the time appointed for hearing the matter of his petition; but still, with regard to proceedings in that court, imprisonment is even now the necessary preliminary to relief. Another step was therefore required for a more perfect assimilation of the law in its proceedings with regard to bankrupts and other insolvents; which step was at length taken, by the adoption on the part of the legislature of the measure which is the subject of our present consideration.

This mode of relief was first introduced in the year 1842 by the 5 & 6 Vic. c. 116, but has since been considerably improved by the 7 & 8 Vic. c. 96. Under these acts an insolvent, *not being a trader*, of whatever amount his debts may be,—or *being a trader*, if his debts do not exceed *three hundred pounds*,—by presenting a petition to a court of bankruptcy, together with a schedule of his debts and property, may obtain, first, what is called an *Interim Order*, which will protect him against all process either against his person or property, or if he be already in prison, procure his discharge therefrom; which order continues in force until a day fixed for his examination before a commissioner, when if it appear that his debts have not been contracted by fraud, breach of trust, crime, wilful extravagance, &c., it will be renewed until a day appointed for making a *Final Order*; which final order will operate as a protection in respect of all the debts mentioned in his schedule. His property becomes vested in an official assignee together with an assignee or assignees chosen by the creditors, and, being taking possession of under the orders of the court, is distributed among his creditors, in the same manner as if he had been made a bankrupt; for which purpose, as also in the examination of the insolvent and all other persons for the discovery of his effects, the commissioner to whom his petition is referred has the same powers as with regard to bankrupts under the bankrupt laws.

For the better carrying these acts into execution, certain general rules and orders have been made by the commissioners of the Court of Bankruptcy, agreeably to powers given them for that purpose by the 5 & 6 Vic. c. 116. The first were dated 1st November 1842, the day on which that act came into operation; but, since the passing of the 7 & 8 Vic. c. 96, these have been superseded by others, dated 21st December, 1844; and in a schedule annexed are forms for the various proceedings, with a table of fees.

We need only further premise, before entering upon the following detail, in which we have endeavoured to bring together the scattered provisions of these acts under distinct heads, that they are to be construed by analogy to the laws of bankruptcy, and in the most beneficial manner for promoting the ends intended by them; and that nothing in the latter act is to repeal or in any manner alter the provisions of the former, except so far as is therein expressly provided, or except as the former is inconsistent with or at variance with the provisions of the latter act.—7 & 8 Vic. c. 96, § 73.

I. WHO MAY PETITION.

The 5 & 6 Vic. c. 116, § 1, reciting that "it is expedient to protect from all process against the person such persons as may have become indebted without any fraud or gross or culpable negligence, so as nevertheless their estates may be duly distributed among their creditors, enacts, "That if any person *not being a trader within the meaning of the statutes now in force relating to bankrupts*, or if any person *being such trader but owing debts amounting in the whole to less than three hundred pounds*, shall give notice, &c. he may present a petition for protection from process to the Court of Bankruptcy if he has resided twelve calendar months in London or within the London district, or to the commissioners of bankruptcy in the country within whose district he may have resided twelve calendar months." The 7 & 8 Vic. c. 96, § 1, dispenses with the notice above referred to, enacting, "That a petition for protection for process under the said act may be presented to any court or district court of bankruptcy within the district of which the petitioner shall have resided twelve calendar months, without any notice whatever being given to any creditor, or in the London Gazette or any newspaper."

Under the first-mentioned act it had been decided that persons *already in custody* were not entitled to the benefit of its provisions; but now the 7 & 8 Vic. c. 96, § 6, expressly enacts, "That any prisoner in execution upon a judgment obtained in any action for the recovery of any debt (either not being a trader within the meaning of the statutes relating to bankrupts, or being a trader within the meaning of the said statutes but owing debts amounting in the whole to less than 300*l.*) may be a petitioner for protection from process.

It was a question under the former act, whether those classes of traders which were first expressly made subject to the bankruptcy laws by the 5 & 6 Vic. c. 122, § 10 (see *ante*, p. 757) were disabled from availing themselves of the protection of the act, since, at the time of the passing of the 5 & 6 Vic. c. 116, that was not a statute *then* in force relating to bankrupts; and Mr. Commissioner Sergeant Stephen held, that they were not excluded from its provisions.¹ But now, it is presumed, as the petitioner must swear in his petition (the form of which is fixed by the act, and for any variation from which the petition will be dismissed) that he is not a trader within the meaning of the statutes *now* in force relating to bankrupts, such persons cannot petition if their debts amount to 300*l.*

It has also been determined, that if any one of the debts in the petitioner's schedule has been contracted whilst he was a trader subject to the bankruptcy laws, he is not entitled to protection, if his debts amount to 300*l.*, although he may have been out of business for twelve months previously to filing his petition.²

II. INSOLVENT'S PETITION, SCHEDULE, &c.

PETITION.—The 5 & 6 Vic. c. 116 did not prescribe any particular form for the insolvent's petition; but the General Rules and Orders,

¹ *Re Bannet*, Bristol District Court.

² *Re Lowe*, Birmingham District Court, before Mr. Commissioner Balguy.

of the 1st of November, 1842, ordered, that every petition should be, as far as the case would admit, in the form set forth in the schedule to those orders. The 7 & 8 Vic. c. 96, however, prescribes a form which must now be strictly followed. It requires also, that the petition and schedule be verified by an *affidavit* of the petitioner annexed, in a form likewise prescribed; and enacts, that if either the petition or the affidavit be not in the prescribed form, the petition shall be dismissed.

Form of PETITION FOR PROTECTION FROM PROCESS.

To the Court of Bankruptcy, London, or
To the — District Court of Bankruptcy.

The humble Petition of

[Insert at full length the name, address, and quality of the Petitioner, and also the description of the trade or business or (if more than one) trades or businesses which he carries on or has carried on during his twelve months residence within the district of the court.]

Showeth, That your Petitioner is not a trader within the meaning of the statutes now in force relating to bankrupts.

[If a trader, strike out the word "not," and add, after the word "bankrupt," the words "but owing debts amounting in the whole to less than £300.]"

That your Petitioner has resided twelve calendar months within the district of this Honourable Court; that is to say,—

[Insert the places and periods of residence.]

That your Petitioner has become indebted to divers creditors, whose names are inserted in the Schedule (A) [or *as the case may be*] to this his Petition annexed; and that he is unable to pay his debts in full.

That your Petitioner has examined the said Schedule: And that such Schedule contains a full and true account of your Petitioner's debts, and the claims against him, with the names of his creditors and claimants, and the dates of contracting the debts and claims severally, as nearly as such dates can be stated, the nature of the debts and claims, and securities (if any) given for the same; and that there is reasonable ground, in his belief, for disputing so much of the debts as are thereby mentioned as disputed; and also a true account of the nature and amount of his property, and an inventory of the same, and of the debts owing to him, with their dates, as nearly as such dates can be stated, and the names of his debtors, and the nature of his securities (if any) which he has had for such debts: And that the said Schedule doth also contain a Balance Sheet of so much of his receipts and expenditures as is required by this Honourable Court in that behalf, and doth fully and truly describe the wearing apparel, bedding, and other such necessities of your Petitioner and his family, and his working tools and implements.

That your Petitioner has not parted with or charged any of his property, except for the necessary support of himself and family, and the necessary expences (not exceeding £ —) of this his Petition, or in the ordinary course of trade, at any time within three months of the date of filing this his Petition, or at any time with a view to this Petition.

That your Petitioner is desirous that his estate should be administered under the protection and direction of this Honourable Court; and that he verily believes such estate is of the value of £ — at the least unencumbered, and beyond the value of his wearing apparel and other matter which your Petitioner is authorized to except by this act, and that the same is available for the benefit of his creditors.

* That your Petitioner submits to this Honourable Court the proposal for the payment of his debts contained in the said Schedule.

* *[Omit this paragraph if no special proposal.]*

That your Petitioner is ready and willing to be examined from time to time touching his estate and effects, and to make a full and true disclosure and discovery of the same.

Your Petitioner, therefore, prays such relief in the premises as by the statutes now in force for the relief of insolvent debtors may be adjudged by this

Honourable Court.

Signed by the said Petitioner on the — day of —

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Attorney or Agent in the matter of the said Petition.

Affidavit verifying Petition and Schedule.

In the Court of Bankruptcy, London, or
In the — District Court of Bankruptcy.

A. B., of —, the Petitioner named in the Petition hereunto annexed [*if the petitioner affirm, alter accordingly*] maketh oath and saith, That the several allegations in the said Petition, and the several matters contained in the Schedule hereunto annexed, are true.

Sworn, &c.

The affidavit may be sworn in the same manner as affidavits in matters of bankruptcy; that is, before the Court of Review, a subdivision court, a commissioner, the master or any registrar or deputy registrar in bankruptcy, or before a master ordinary or extraordinary in chancery.

SCHEDULE.—The 5 & 6 Vic. c. 116, § 1, requires that the petition shall have annexed to it “a full and true schedule of the insolvent’s debts, with the names of his creditors, and the dates of contracting the debts severally, the nature of the debt, and the security (if any) given for the same,—also of the nature and amount of his property, and the debts owing to him, with their dates, the names of his debtors, and the nature of the securities (if any) which he may have for such debts.

Excepted Articles.—No provision was made by that act for any reservation of the petitioner’s working tools or other necessities; but the 7 & 8 Vic. c. 96, § 9, enacts, “That the wearing apparel, bedding, and other necessities of the petitioner and his family, and the working tools and implements of the petitioner, not exceeding in the whole the value of twenty pounds, may be excepted by the petitioner in his petition from the operation of the said recited act and of this act, and in such case shall be altogether excluded from the operation of the said acts. Provided always, that such excepted articles, with the values thereof respectively, to be ascertained and appraised, if the commissioner shall think fit, in such manner as he shall direct, be fully and truly described by the petitioner in his schedule, but otherwise the exception thereof shall be of no force as to any part of the same.

Amending Schedule.—We have seen that the commissioner has no power to permit the amendment of any error or omission in the petition or affidavit,¹ but that for any variation therein the petition will be dismissed. It is otherwise with respect to the schedule: the commissioner may allow the petitioner to amend his schedule, and correct any mis-statement therein.—7 & 8 Vic. c. 96, § 3.

And sec 30, after reciting that “whereas it may sometimes happen that a debt of, or claim upon, or balance due from a petitioner for protection from process may be specified in his schedule so sworn to as aforesaid at an amount which is not exactly the actual amount thereof, without any culpable negligence or fraud or evil intention on the part of such petitioner,” enacts, “That in such case the commissioner shall allow the schedule to be amended in that behalf; and in every case in which an amendment of the schedule shall be allowed, the said petitioner shall be entitled to every benefit and protection of the said recited act and of this act; and the creditor in that behalf

¹ 5 & 6 Vic. c. 122, § 67. See *ante*, 755.

shall be entitled to the benefit of all the provisions made for creditors by the said recited act and by this act in respect of the actual amount of such debt, claim, or balance, and neither more nor less than the same, to all intents and purposes, such error in the said schedule notwithstanding."

Wilful Omission in Schedule.—But the wilful and fraudulent omission of property from the schedule, or the retaining or excepting thereof as necessities to a greater amount than 20*l.*, is a *misdemeanor*. By sec. 39, "In case any petitioner for protection from process shall, with intention to defraud the creditors of such petitioner, wilfully and fraudulently omit in his schedule so sworn to as aforesaid any property whatsoever, or retain or except out of such schedule as wearing apparel, bedding, or other necessities, or working tools or implements, property of greater value than twenty pounds, every such person so offending, and any person aiding and assisting him to do the same, shall, upon being thereof convicted by due course of law, be adjudged guilty of a misdemeanor; and thereupon it shall be lawful for the court before whom such offender shall have been so tried and convicted to sentence such offender to be imprisoned and kept to hard labour for any period not exceeding three years. And in every indictment or information against any person for any offence under this act, it shall be sufficient to set forth the substance of the offence charged on the person offending, without setting forth the petition, or any proceeding whatever in the matter of such petition, except so much of the schedule of such petitioner as may be necessary for the purpose."

Estate Paper, &c.—With the petition and schedule must be delivered what is termed an *estate paper* (as described in the following orders), which must be in duplicate, and, if the petitioner be in custody, a *certificate from the gaoler* of the cause or causes for which he is detained.

By General Orders of 21st December, 1844, it is ordered, "That the schedule shall be annexed to the petition at the time of filing it, and shall be, *mutatis mutandis*, in the form in use under the 5 & 6 Vic. c. 116."—Rule 2.

"That in all cases in which a petitioner shall be in custody there shall be filed with his petition a *certificate from the gaoler*, of the cause or causes of the detention of the petitioner.—Rule 3.

"That every petitioner shall deliver with his petition an account in writing (in the form set forth in the schedule to these orders, marked B, No. 1), signed by the petitioner, of all his books of account and vouchers, and of all his personal estate and effects then in his possession or control, or in the possession or control of any other person by his authority or in trust for him, and the place or places where the same are or are believed to be, and whether the same are liable for rent or any other charge, and to whom by name, and the particulars of the demand, in order that such property may be duly ascertained and given up to the official assignee or the messenger; and that the said account shall be signed and delivered in duplicate."—Rule 4.

¹ That is, as directed by the General use in the Court for Relief of Insolvent Orders of November, 1842, in the form in Debtors.

"That one copy of the estate paper mentioned in the preceding order shall be forthwith transmitted to the broker appointed by the court; and such broker shall forthwith proceed to appraise the personal estate and effects of such petitioner, and shall make such return as is set forth in the schedule marked B, No. 2, annexed to these orders."—Rule 5.

Presenting and Filing the Petition, &c.—The petition and schedule, when completed, are, with the affidavit annexed, and other documents, to be taken to the chief registrar of the Court of Bankruptcy in Basinghall-street, or to the deputy registrar of the district court of bankruptcy, (as the case may be in London or in the country), between the hours of eleven in the forenoon and two in the afternoon, who shall file¹ and number such petition.—Gen. Orders, rule 1.

"And such registrar shall thereupon allot such petition by ballot, or in rotation, to one of the commissioners in London, or of the district court in the country (where there are two commissioners), and shall forthwith certify to such commissioner the filing of such petition, and such allotment to him; which *certificate* shall be filed with the proceedings in the matter of such petition. And such petition shall be prosecuted before such commissioner, or before the district commissioner where there is only one commissioner."—*Ibid.*

"Provided always, that any one commissioner in London or in the country may, in the absence of any other commissioner, act for him."—*Ibid.*

"Provided also, that where a petition shall have been previously filed by the same petitioner, whether such petition shall have been dismissed or not, the new petition shall be allotted to the commissioner to whom the first petition was allotted."—*Ibid.*

When the petition, with schedule &c., has been thus duly filed, the commissioner to whom the same is allotted appoints the official assignee. And, by rule 7, "Every petitioner shall, immediately after an official assignee shall have been appointed to his estate, deliver over to the official assignee so appointed, all moneys, bills, notes, and securities in his possession or power, together with all books of account, papers, and writings relating to his estate and effects." The commissioner then appoints a day for the first examination of the insolvent, and signs an interim order, for his protection from process in the mean time.

Effect of Filing the Petition.—Upon the petition being filed, the commissioner shall possess the like power and authority touching the seizure of the property of the petitioner, except as otherwise directed (that is, saving as to the excepted articles), and also to compel the attendance of, and to examine the petitioner and his wife, and every person known or suspected to have any of his property in their possession, or who is supposed to be indebted to him, and every person whom the commissioner believes capable of giving any information concerning the person, trade, business or calling, dealings, or property of the petitioner, or any information material to the full

¹ An insolvent's petition is said to be filed when it reaches its place of final custody, and not when it first comes to the hands of the officer of the court.—Garlick v. Sangster, 9 Bing. 46; 2 Moo. & Scott, 68

disclosure of his dealings, and to enforce both obedience to such examination, and the production of books, deeds, papers, writings, and other documents, as by any law now in force relating to bankrupts are possessed by the several courts authorized to act in the prosecution of fiats in bankruptcy touching the seizure of property and the examination of any bankrupt or other person under a fiat in bankruptcy.—7 & 8 Vic. c. 96, § 5.

And all the estate and effects of the petitioner shall forthwith become vested in the official assignee who shall be nominated by the commissioner. And such official assignee shall and may forthwith take possession of so much thereof as can be reasonably obtained and possessed without suit, and shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue of the statutes relating to bankrupts.—5 & 6 Vic. c. 116, § 1.

If the petitioner shall die after the filing of his petition, the commissioner may proceed in the matter of his petition, for the discovery and distribution of his property, as he might have done if the petitioner were living.—7 & 8 Vic. c. 96, § 8.

Allowance to the Petitioner.—The official assignee may make such allowance out of the property of the petitioner for the support of himself and his family as the commissioner shall direct.—*Ib.* § 10.

Revesting of Property in Petitioner in case of Dismissal of Petition.—Whenever any such petition shall have been or shall be dismissed, all sales and dispositions of property, and payments duly made, and all other acts theretofore done by any assignee, or any person or persons acting under his authority, or by any messenger or other person under the authority of the commissioner, according to the provisions of the said recited act and of this act or either of them, shall be good and valid, but the property of the petitioner shall otherwise in such case revert in such petitioner. Provided, however, that no action or suit shall be prosecuted or commenced against such assignee, messenger, or other person acting as aforesaid, except to recover any property of the petitioner detained after an order made by the commissioner for the delivery thereof, and demand made thereupon.—*Ibid.*

III. INTERIM ORDER FOR PROTECTION.

When the above-mentioned proceedings have been duly taken, the commissioner signs what is termed an Interim Order, which appoints a day for the examination of the petitioner, and protects him from all process either against his person or property in the mean time. If, however, he be already a prisoner in execution upon a judgment for debt, a notice must be given to the detaining creditor, that he may be heard against the granting of the interim order, which will then, if granted, contain also an order for his liberation from custody.

The 5 & 6 Vic. c. 116, § 1, enacts "That it shall thereupon (*i.e.* upon the presentation of the petition) be lawful for the judge or commissioner of the court of bankruptcy to whom the same shall be referred, or for the commissioner in the country to whom it shall be presented, to give a PROTECTION to the petitioner from all process whatever, either

against his person or his property of every description; which protection shall continue in force, and all process be stayed, until the appearance of the prisoner in court as hereinafter provided."

By Gen. Orders, rule 8, "The protection from process to be given to any petitioner upon or after his petition shall be called the 'Interim Order for Protection,' and shall be prepared in duplicate, in the form set forth in the schedule (marked C, No. 2) annexed to these orders, one copy to be filed with the proceedings."

Prisoners.—By 7 & 8 Vic. c. 96, § 6, "Every such petitioner to whom an interim order for protection shall have been given shall not only be protected from process, as provided by the said recited act (5 & 6 Vic. c. 116), but also from being detained in prison in execution upon any judgment obtained in any action for the recovery of any debt mentioned in his schedule. And if any such petitioner, being a prisoner in execution, shall be detained in prison in execution upon any such judgment, it shall be lawful for the commissioner to order any officer who shall have such petitioner in custody by virtue of such execution to discharge such petitioner out of custody as to such execution, without exacting any fee; and such officer shall be indemnified for so doing; and no sheriff, gaoler, or other person whatsoever shall be liable to any action as for the escape of any such prisoner by reason of such his discharge. And such petitioner so discharged shall be protected by his interim order from all process for such time as the commissioner shall by such interim order, or any renewal thereof, think fit to appoint, until the making of the final order for protection, in the same manner as if such petitioner had not been a prisoner in execution. Provided always, that after the time allowed by any such interim order or any renewal thereof (as the case may be) shall have elapsed, such petitioner shall not by such discharge be protected from being again taken in execution upon such judgment, but such judgment shall remain in full force and effect notwithstanding such discharge."

By rule 9, "Where a petitioner for protection from process shall be a prisoner in execution upon any judgment obtained in any action for the recovery of any debt, such petitioner shall, before the granting of the interim order for protection, give such notice to the detaining creditor under such execution as the court in which the petition is prosecuted shall direct, so that such creditor may be heard against the granting of the interim order, and the discharge of such petitioner out of custody."

And by rule 10, "The order for discharging out of custody (under sec. 6 of 7 & 8 Vic. c. 96) any petitioner being a prisoner in execution upon any judgment obtained in any action for the recovery of any debt mentioned in his schedule shall be in the form set forth in the schedule (marked C, No. 3) annexed to these orders, and shall be prepared in duplicate, one copy to be filed with the proceedings."

The interim order is *no protection from arrest under a judge's order*. The 2d section of the 5 & 6 Vic. c. 116 expressly enacts, "That nothing herein contained shall be held or construed to hinder or prevent the said insolvent from being arrested or held to bail under the authority of any judge's order for that purpose, in like manner as

may now by law be done, notwithstanding any protection which may be granted under the authority of this act."

Nor is the interim order a protection from process at the suit of the crown.¹

Under the 5 & 6 Vic. 116 it was not so effectual a protection as it is now made; for that act contained no indemnification of the sheriff, such as is given by the 6th section of the 7 & 8 Vic. c. 96. An insolvent, therefore, being taken in execution after having obtained the interim order, but of which the sheriff was ignorant at the time of the arrest, and the plaintiff in the action refusing to consent to his release, though the court ordered his discharge, it refused to make either the sheriff or the plaintiff pay the costs of the motion: as to the sheriff, because if he had discharged him, he would have been liable to an action for escape; and as to the plaintiff, because if he had consented to discharge him, and the insolvent should have failed in obtaining his final order, the discharge by the plaintiff would have been a bar to future remedies under his judgment.²

At the examination of the petitioner, the commissioner renews the order, by signing an indorsement on the back of it, and so from time to time until the final order.—5 & 6 Vic. c. 116, § 5.

But after the time allowed by the interim order or any renewal thereof shall have elapsed, the petitioner may be again taken in execution upon the same judgment, which will remain in full force and effect notwithstanding his discharge.—7 & 8 Vic. c. 96, § 6.

IV. NOTICE TO CREDITORS.

When the day has been fixed for the examination of the insolvent, notice thereof is to be given to the creditors. The practice in this respect is different from what it was under the 5 & 6 Vic. c. 116; notice to the creditors being then the first step in the proceedings. By that act the insolvent was required to give notice to one-fourth in number and value of his creditors of his intention to petition, and to cause the same to be inserted twice in the London Gazette, and twice in some newspaper circulating in the county wherein he resided. But the 7 & 8 Vic. c. 98 enacts, that a petition for protection from process under the said act may be presented without any previous notice to any creditor, or in the London Gazette or any newspaper. And by § 3, "the commissioner authorized to act in the matter of such petition shall, forthwith after such petition shall have been filed, cause notice of the filing of such petition to be given, in such manner as the commissioner shall direct, to the creditors named in the schedule of the petitioner, and resident within the United Kingdom, and whose debts respectively shall amount to the sum of five pounds, and to be inserted in the London Gazette, and in some newspaper or newspapers circulating within the county wherein the petitioner shall reside, and shall thereby appoint a public sitting of the court, whenever the commissioner shall think fit, for the first examination of the petitioner.

¹ *Rex v. Selon*, 8 Price, 671. *In re Bilson*, Court of Exchequer, 2 L. T. 313.

² *Marsh v. Woolley*, 3 Dowl. 93; 7 Jurist, 975.

The course therefore now is, for the messenger of the court to send the notices to the creditors, and insert the advertisements. For this purpose the insolvent or his attorney prepares the necessary notices, which are left with the messenger in due time for service, with a list of the creditors to be served; at the same time paying the sum of three pounds as a deposit towards the expenses. The advertisement is inserted once in the London Gazette, and once in some newspaper circulating in the county in which the petitioner resides.

Creditors residing out of the United Kingdom, and those whose debts do not amount to five pounds, have no further notice than the advertisement in the gazette and newspapers. And as to other creditors, from the 22d section of the act it would appear that the petitioner will be protected by the final order in respect of all the debts named in his schedule, even though notice should not have been given to some of them. The only effect of want of notice would be to cause an adjournment of his examination. The same inference may be drawn from the decisions on the analogous clause of the 1 & 2 Vic. c. 110 (Insolvent Debtors Court Act): a replication to a plea of discharge under that act, that the creditor had no notice, has been held to be bad.¹

V. EXAMINATION OF INSOLVENT.

On the day notified by such notice as aforesaid, the commissioner shall proceed to examine upon oath the petitioner, and any creditor who may attend such examination, and any witness whom the petitioner or any creditor may call. And the commissioner may adjourn the examination from time to time, and summon to be examined before him any debtor of such petitioner, or any creditor of such petitioner, or any other person, whose evidence may appear necessary for the purposes of the inquiry.—5 & 6 Vic. c. 116, § 4.

As to the *powers of the commissioner* for the examination of the insolvent and other persons, and for the production of books and documents, the 5 & 6 Vic. c. 116, § 6 enacts, "That it shall be lawful for the commissioner, by warrant under his hand and seal, to commit to prison any petitioner who shall appear to him to have prevaricated or made any false statement before him, for such time as he shall think fit, not exceeding one calendar month; and touching all persons other than the petitioner who shall be examined before him, or being lawfully summoned shall refuse or neglect to attend him, the said commissioner shall have the same powers in respect of commitment as he has by any law now in force relating to bankrupts."

And by 7 & 8 Vic. c. 96, § 5, the commissioner shall possess the like power to compel the attendance of and to examine such petitioner and his wife, and every person known or suspected to have any of the property of such petitioner in his possession, or who is supposed to be indebted to such petitioner, and every person whom the commissioner believes capable of giving any information concerning the person, trade, business, or calling, dealings, or property of such peti-

¹ Read v. Croft, 5 Bing. N. C. 68; 7 Dowl. P. C. 122; 6 Scott, 770. Pugh Hookham, 5 Car. & P. 376.

tioner, and to enforce both obedience to such examination, and the production of books, deeds, papers, writings, and other documents, as by any law now in force relating to bankrupts are possessed by the several courts authorized to act in the prosecution of fiats in bankruptcy touching the seizure of property and the examination of any bankrupt or other person under a fiat in bankruptcy.

And the commissioner may allow the petitioner to amend his schedule, and correct any mis-statement therein.—*Ibid.* § 3.

And by § 40, if any person who shall make or take any oath or affirmation under or in pursuance of the said recited act or of this act shall therein be guilty of wilful falsehood, every such person, being duly convicted thereof, shall be subject to the same pains, penalties, and forfeitures, to which persons convicted of wilful and corrupt perjury are or shall be subject."

Though the petitioner is a prisoner under any process, attachment, execution, commitment, or sentence, and not entitled to his discharge, the commissioner may, by warrant under his hand directed to the person in whose custody he is confined, cause him to be brought before him for examination at any sitting of the court, either public or private; and the expence of bringing him up shall be paid out of his estate; and such person shall be indemnified by the warrant of the commissioner.—7 & 8 Vic. c. 96, § 7.

Grounds of Opposition.—By the 24th section of the 7 & 8 Vic. c. 96, "If on the day for the first examination of the petitioner, or at any adjournment thereof, it shall appear to the commissioner that the debts of the petitioner, or any of them, were contracted by any manner of fraud, or breach of trust, or by any prosecution whereby he had been convicted of any offence, or without having at the time a reasonable or probable expectation of being able to pay such debt or debts, or that such debts, or any of them, were contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out a fiat of bankruptcy, or malicious trespass, or that the petitioner has parted with any of his property since the presenting of his petition, the commissioner shall not be authorized in any such case to name any day for making such final order, or to renew such interim order; and in every such case wherein such petitioner shall have been a prisoner in execution, and discharged out of custody by order of the commissioner under the provision herein in that behalf contained, such petitioner shall be remanded by an order of the commissioner to his former custody. But if none of the matters aforesaid shall so appear, and the commissioner shall be satisfied that the petitioner has made a full discovery of his estate, effects, debts, and credits, it shall then be lawful for the commissioner to cause notice to be given that on a certain day to be named therein he will proceed to make such final order unless cause be shown to the contrary.

And to the same effect is the 4th section of the 5 & 6 Vic. c. 116, but with the following addition: *if it shall appear to the commissioner that the allegations in the petition, and that the matters in the*

schedule are true, he may cause such notices to be given; and as the preamble of that act recites that the act is for the benefit of persons who are *indebted without fraud or culpable negligence*, these words are to be read with the 4th clause.¹

Fraud.—A wilful misrepresentation of circumstances by which a false credit is obtained is such a fraud as will cause the dismissal of a petition.²

Where the petitioner has been a party to an accommodation bill which he cannot pay, the commissioner will dismiss the petition, on the principle that a bill thus accepted by an insolvent is akin to fraud.³

The petitions of insolvents indebted as sureties to loan societies have been dismissed on the same principle.

Breach of Trust.—Where a debt has been incurred by a breach of trust, no subsequent conduct of the creditor will be held to condone the offence. An attorney who had received the sum of 2000*l.* to lay out, had appropriated it to his own use. The creditor received part of the money, and took a warrant of attorney for the remainder. Being opposed on his interim order as having been guilty of a breach of trust, it was argued that the offence had been condoned, and the practice of the Court for Relief of Insolvent Debtors was referred to,⁴ to shew that where a creditor, with a full knowledge of the fraud or misconduct of the insolvent, takes a higher security than he before possessed, he is presumed to have pardoned the original offence. But Commissioner Fane observed, that he could not shut his eyes to the fact, that the debt had been contracted by a breach of trust, and the petition was dismissed.⁵

A difference of opinion for some time prevailed as to whether a *vexatious defence* to an action is a good ground of opposition; some of the commissioners regarding the costs to which a creditor is put in consequence of such a defence as a debt incurred by the petitioner without a probable expectation of being able to pay it; others holding that such costs could not be considered as a *debt contracted*. In a late case, however, Mr. Commissioner Fane announced that the commissioners had met and determined that a vexatious defence is a ground of opposition.⁶

Whether the incurring costs vexatiously as a *plaintiff* may be treated as contracting debts improperly, is questionable.⁷

A *fraudulent preference* is not specifically named as an objection to the granting of the final order; and Mr. Commissioner Stephens, in two cases,⁸ held it not to be within the 5 & 6 Vic. c. 116. The 7 & 8 Vic. c. 96, § 18, however, provides that a fraudulent preference shall be void against assignees.

Parting with Property after presenting Petition.—Mr. Commissioner Fane expressed himself compelled to dismiss the petition of an insolvent who, on coming up for his final order, stated that he had,

¹ Per Holroyd, C., *In re Stutely*, Feb. 24th, 1844.

² Sturg. *Insolv. Pr.* 109, 173.

³ A person who cannot pay his own debts is not a proper person to enter into engagements for others. Per Fane, C., *In re Dunn*, 1 L. T. 318. *In re Bracher*, ib. 598.

⁴ Cooke's *Insolvent Practice*, p. 210.

⁵ *In re Cunningham*, May 23, 1844.

⁶ *In re Cunningham*, Aug. 2, 1844.

⁷ *In re M'Namara*, 1 L. T. 263.

⁸ *In re Rudge*, 2 L. T. 266; *In re Garland*, *Ibid.* 355, 375.

out of a quarter's salary received since his first hearing, paid various trifling sums to the tradesmen by whom his family were supplied, and who were named in his schedule. The commissioner observed, that he ought to have paid it over to the assignee.

It has also been laid down, that an insolvent ought not to *distribute* his estate when all his creditors are not agreed on the distribution, but should at once apply to the court. An insolvent executed an assignment of his effects for the benefit of his creditors; all of them would not join in it, but he paid those who did. Mr. Commissioner Holroyd said, that he ought to have come to the court, instead of taking the distribution upon himself. As he now came when there was nothing to divide, this was not a case within the act.

No one is allowed to appear in support or in opposition of an insolvent, unless he be a counsel, attorney, or creditor. If as an attorney, he must be admitted of the Court of Bankruptcy. And a creditor, before opposing, may be required to prove his debt, as in the Court for Relief of Insolvent Debtors.

The *choice of the creditors' assignee* takes place at the first public sitting for the examination of the insolvent, by the majority in number and value of the creditors attending, by themselves or their attorneys duly authorized by letters of attorney. But to this subject we shall refer more particularly hereafter, under the head of *Assignees*.

VI. FINAL ORDER.

Notice of.—If none of the grounds of objection which have been enumerated appear against the insolvent on his first examination, and the commissioner is satisfied that he has made a full discovery of his estate and effects, it shall then be lawful for the commissioner to cause notice to be given that on a certain day, to be named therein, he will make a final order unless cause be shown to the contrary.—7 & 8 Vic. c. 96, § 24.

And by General Orders, rule 11, "The time for making a final order in the matter of each petition shall be appointed by the commissioner acting in the same; of which time the commissioner shall cause notice to be given ten days at least before the time appointed; which notice shall be by advertisement in the form set forth in the schedule (marked E, No. 1) annexed to the orders."

Form of.—The final order may be made without specifying therein any debts, or sums of money, or claims, or naming therein any creditors. It must be in the following form, as given in the schedule to the act 7 & 8 Vic. c. 96:—

FINAL ORDER FOR PROTECTION FROM PROCESS.

In the Court of Bankruptcy, London, or
In the ——— District Court of Bankruptcy.

In the matter of the Petition of ———, of ———, in the ——— of ———, an Insolvent Debtor, and not being a trader within the meaning of the statutes now in force relating to bankrupts [or, and being a trader within the meaning of the statutes now in force relating to bankrupts, but owing debts amounting in the whole to less than £300.]

Be it remembered, That the said ——— having presented his Petition for protection from process to this Honourable Court, and such petition having been duly filed in court, and the said Petitioner having duly appeared, and been examined touching his debts, estate, and effects, and it appearing to the undersigned Commissioner that the said ——— by virtue of the statutes in that case made and provided, is entitled to the protection of his

person from being taken or detained under any process whatever in respect of the several debts and claims hereinafter mentioned, a Final Order is hereby made to protect the person of the said — from being taken or detained under any process whatever in respect of the several debts and sums of money due or claimed to be due at the time of filing his Petition from the said Petitioner to the several persons named in his Schedule as creditors, or as claiming to be creditors for the same respectively, or for which such persons shall have given credit to the said Petitioner before the time of filing his Petition, and which were not then payable, and as to the claims of all other persons not known to the said Petitioner at the time of making this order, who may be indorsees or holders of any negotiable security set forth in his said Schedule: And it is hereby directed, that the proposal of the said Petitioner set forth in his Petition, for the payment of his debts, be carried into effect in the following manner; that is to say—

Given under my hand, this — of — 184

(Signed)

— Commissioner.

The final order is made in duplicate, one copy to be filed with the proceedings, and one copy to be delivered to the petitioner.—General Orders, rule 12.

When there is a proposal made by the insolvent in his petition, the commissioner directs in his final order whether such proposal shall be carried into effect, and in what manner. But whether he has made any such proposal or not, the courts frequently make the final order conditional on certain payments being made, especially where the petitioner is in possession of a salary or pension, which they have no authority by the acts to apportion, like that possessed by the Insolvent Court.

Effect of Final Order.—The 5 & 6 Vic. c. 116, § 4, declares that the final order shall be for the protection of the person of the petitioner from all process, *and for vesting of his estate and effects in an official assignee, together with an assignee chosen by the creditors*, or for the carrying into effect such proposal as the petitioner shall have set forth in his petition. But now, by the 7 & 8 Vic. c. 96, § 10, the vesting of the insolvent's estate does not relate to the final order; it vests in the assignees by virtue of their appointment.

And by 7 & 8 Vic. c. 96, § 22, the final order shall protect the person of the petitioner from being taken or detained under any process whatever in the cases hereinafter mentioned, that is to say, from all process in respect of the several debts and sums of money due, or claimed to be due, at the time of filing the petition, from such petitioner to the several persons named in his schedule as creditors, or as claiming to be creditors for the same respectively, or for which such persons shall have given credit to such petitioner before the time of filing such petition, and which were not then payable, or in respect of the claims of any other persons not then known to such petitioner at the time of making the final order, who may be indorsees or holders of any negotiable securities set forth in such schedule.

And by sec. 26, the final order shall extend to all process issuing from any court for any contempt of court, ecclesiastical or civil, for non-payment of money or of costs and expences in any such court; and in such case the final order shall extend also to all costs which the petitioner would be liable to pay in consequence or by reason of such contempt, or on purging the same.

And the final order, as to any debt or damages of any creditor, shall extend also to all costs incurred by such creditor before the filing of the petitioner's schedule in any action or suit brought by

such creditor against the petitioner for the recovery of the same. And all persons as to whose demands for any such costs, money, or expences as aforesaid the final order extends, shall be deemed creditors of such petitioner in respect thereof, and entitled to the benefit of all the provisions made for creditors by these acts; subject, nevertheless, to such ascertaining of the amount thereof by taxation or otherwise, and to such examination thereof, as is herein provided in respect of all claims to a dividend of such petitioner's estate and effects.—7 & 8 Vic. c. 96, § 26.

Annuities are declared to be debts within the meaning of the act. By sec. 25, "Every sum of money which shall be payable, by way of annuity, or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever, shall be deemed and taken to be debts within the meaning of the said recited act and of this act. Provided always, that every person who would be a creditor of any petitioner for protection from process for such sum or sums of money, if the same were presently due, shall be admissible as a creditor of such petitioner for the value, and no more, of such sum or sums of money so payable as aforesaid; which value the commissioner so authorized to act in the matter of the petition shall, upon application at any time made in that behalf, ascertain, regard being had to the original price given for such sum or sums of money, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the time of filing such petition; and such creditor shall be entitled in respect of such value to the benefit of all the provisions made for creditors by the said recited act or by this act, without prejudice nevertheless to the respective securities of such creditor, excepting as respects the effect of the final order which shall be obtained by such petitioner under the provisions of the said recited act and of this act.

If any petitioner, being a prisoner in execution at the time of filing his petition, shall be detained in prison for any debt or claim in respect of which he is protected from process by his final order, it shall be lawful for the commissioner to order any officer who shall have such petitioner in custody by virtue of such execution to discharge such petitioner without exacting any fee; and such officer shall be indemnified for so doing.—7 & 8 Vic. c. 96, § 23.

And if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized; whereof the production of the order signed by the commissioner, with proof of his hand-writing, shall be sufficient evidence.—5 & 6 Vic. c. 116, § 10.

Refusal of Final Order, or Adjournment thereof sine die—The commissioner, at the time appointed for making the final order, or at any adjournment thereof, may adjourn the consideration of such final order *sine die*.—7 & 8 Vic. c. 96, § 21.

If, for any of the causes in that behalf aforesaid, no day be named for making the final order, or if the consideration of such final order be adjourned *sine die*, or such final order be refused, the com-

missioner shall have the power, after the expiration of such time subsequent to the filing of the petition as, having regard to all the circumstances of the insolvency, and the conduct of the petitioner as an insolvent debtor before and after his insolvency, the commissioner shall think just, and after hearing the petitioner or any of his creditors, or his or their counsel or attorneys, to make an order to protect the petitioner from being taken or detained under any process whatever for or in respect of the several debts and sums of money due or claimed to be due, at the time of filing his petition, from the said petitioner to the several persons named in his schedule as creditors or as claiming to be creditors for the same respectively, or for which such persons should have given credit to the said petitioner before the time of filing his petition, and which were not then payable, and as to the claims of all other persons not known to the said petitioner at the time of making such order, who may be indorsers or holders of any negotiable security set forth in his said schedule.—*Ib.* § 28.

And it is provided, that no debtor shall be imprisoned on any process for more than twelve calendar months for any debt contracted before filing his petition, in case the final order shall be refused or shall not be made, or in case the protecting order shall not be renewed. *Ib.*

And if such petitioner shall be taken or detained under any process whatever for any debt or claim in respect of which he is protected from process by such order as last aforesaid, it shall be lawful for the commissioner to order any officer who shall have such petitioner so in custody to discharge such petitioner therefrom, without exacting any fee; and such officer shall be hereby indemnified for so doing.—*Ib.* § 29.

Previous to making any application to the court for any order under the foregoing sections, the petitioner must give such notice of the application by advertisement, and to the creditors of the petitioner, as the court under the circumstances of the case shall think fit to direct.—General Orders, rule 13.

Where a petition shall have been previously filed by the same petitioner, whether such petition shall have been dismissed or not, the new petition shall be allotted to the commissioner to whom the first petition was allotted.—*Ib.* rule 1.

Rescinding the Final Order.—At any time after the final order shall have been made, any creditor, or the official or other assignee, may give one month's notice to the petitioner (either by personal service, or, if he cannot be found, by service at the place of residence mentioned in his petition) that he intends to apply by motion to the commissioner (or, in case of his death, resignation, or removal, to the commissioner appointed to succeed him) that the final order be rescinded, so far as relates to the protection of the prisoner's person from process, and as to the effect of such order in bar of suits and actions.—5 & 6 Vic. c. 116, § 12.

And the commissioner shall, upon hearing the matter of such motion, and any evidence in support of it, and what the petitioner has to allege against it, and any evidence against it, and upon exa-

mining the petitioner, if he shall desire to be examined, or if the commissioner shall think fit, proceed to make such rescinding order as is hereinbefore mentioned, if he sees reason to believe that the petitioner *had not*, before the making of the order sought to be rescinded, *made a full disclosure of his estate, effects, and debts*, or had, since the making of such order, *not given notice to the assignees of any property after acquired by him*.—*Ibid.*

Provided, that, on any such motion by a creditor, the official and other assignees shall be duly served with a *month's notice* to attend the said commissioner; and provided further, that *notice* of the hearing of such motion shall be given twice in the London Gazette, and twice in the same paper in which notice of the petition had been given, or in some other paper circulating in the same county; and provided always, that the said commissioner, in case he shall refuse to make the rescinding order, shall, if he think fit, order the *petitioner's costs of the motion to be paid* by the creditor making the motion, or by the assignee chosen by the creditors in case he shall make the motion, but not out of the petitioner's estate and effects.—*Ibid.*

VII. OF THE ASSIGNEES.

Official Assignee.—We have already seen, that the official assignee is appointed by the commissioner, upon the application of the insolvent or his attorney, immediately after the filing of the petition; that the estate and effects of the petitioner become vested in him by virtue of his appointment; and that the petitioner must, immediately after, deliver to him all moneys, bills, notes, and securities in his possession or power, together with all books of account, papers, and writings, relating to his estate and effects.

The official assignee shall and may forthwith take possession of so much of the petitioner's estate and effects as can be reasonably obtained and possessed without suit; and he shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue of the statute relating to bankrupts.—5 & 6 Vic. c. 116, § 1.

The warrant of seizure and possession to be granted to the messenger under any petition shall be in the same form, *mutatis mutandis*, as that now in use in matters of bankruptcy, and shall be issued in the same manner; but shall not be executed without the special direction of the commissioner, or of the assignee or assignees for the time being.—Gen. Orders, rule 6.

Until an assignee shall be chosen by the creditors, the official assignee shall be enabled to act, and shall be deemed to be, to all intents and purposes, a sole assignee of the property of the petitioner. And if the commissioner shall so order, he may sell or otherwise dispose of it or any part of it, and make such allowance out of it for the support of the petitioner and his family as the commissioner shall direct.—7 & 8 Vic. c. 96, § 10.

And the property of the petitioner shall in every case be possessed and received by the official assignee alone, save where it shall be otherwise directed by the commissioner.—*Id.* § 4.

In the event of the official assignee's death, resignation, or removal from office, the property vested in him will go and be vested in the successor of such official assignee, either alone or jointly with the creditor's assignee, as may be.—*Ib.* § 10.

If the petition be dismissed, all sales and dispositions of the property, payments duly made, and acts theretofore done by him or by any person under his authority, or by any messenger or other person under the authority of the commissioner, will be good and valid; but the property otherwise will, in such case, revert in the petitioner. And no action or suit shall be commenced against such assignee, messenger, or other person acting as aforesaid, except to recover any property of the petitioner detained after an order made by the commissioner for the delivery thereof, and demand made thereupon.—*Ibid.*

Creditors' Assignee.—The choice of the creditors' assignee takes place at the public sitting of the first examination of the petitioner, or at an adjournment thereof, by the majority in number and value of the creditors who may attend, by themselves or their attorneys duly authorized by letters of attorney in that behalf, before the commissioner on such day. Provided, that the commissioner shall have power to reject any person so chosen who shall appear to him unfit to be such assignee as aforesaid; and upon such rejection or removal a new choice of another assignee shall be made in like manner.—*Ib.* § 3.

With respect to the *voting of creditors*, sec. 14 provides, that in all matters wherein creditors shall vote, or wherein the assent or dissent of the creditors shall be exercised in pursuance of or in carrying into effect the recited act or this act, every creditor shall be accounted such in respect of such amount only as upon an account fairly stated between the parties, after allowing the value of mortgaged property and other such available securities and liens, shall appear to be the balance due; and that all disputes arising in such matters concerning any such amount shall, upon application duly made in that behalf, be examined into by the commissioner, who shall have power to determine the same, and, if it seem fit, to refer the examination thereof to an officer of the said court. Provided always, that the amount in respect of which any such creditor shall vote in any such matter shall not be conclusive of the amount of his or her debt for any ulterior purposes in pursuance of the provisions of this act.

Every such assignee shall be deemed to be an officer of the court in which the petition is filed, and liable as such to the control thereof.—*Ib.* § 4.

The property of the petitioner vests in the assignee or assignees for the time being by virtue of their appointment, but is, in every case, to be received by the official assignee alone, except when otherwise directed by the commissioner.—*Ibid.*

And as often as any such assignee shall die or be lawfully removed, and a new assignee be duly appointed, all estate real and personal, and such effects and credits as were or remained vested in such deceased or removed assignee, shall vest in the new assignee, either alone or jointly with the existing assignees, as the case may require, without any deed of conveyance for that purpose.

VIII. OF THE PROPERTY PASSING TO THE ASSIGNEES.

The 5 & 6 Vic. c. 116, § 7 enacts, "That from and after the passing of the final order, the whole estate, present and future, as well real as personal, and as well in the colonies, dominions, and plantations belonging to her majesty, as in the United Kingdom of Great Britain and Ireland, all the effects and all the credits of the petitioner, shall become absolutely vested in the official assignee and the assignee chosen by the creditors, without any deed or conveyance; which assignees shall hold the same as fully as if the petitioner had been made a bankrupt and they had been assignees under the fiat.

Sec. 8 provides, that a certificate of the appointment of the assignees shall be registered in any case where by law a registry is required on the conveyance or assignment of property.—See *post*, *Evidence of Proceedings*.

And by sec. 9, the said assignees shall be entitled to claim and demand from the said petitioner, at any time after the said final order, any estate and effects acquired by him at any time after such order shall have been made. And all such estate and effects, of what kind soever and wheresoever situate, shall be absolutely vested in such assignees upon their filing a copy of their claim, served upon the petitioner personally, or by leaving it at the place of residence mentioned in his notice of petition; and they shall hold the same in like manner as they hold the estate and effects of the petitioner transferred by force of the final order as hereinbefore provided. Provided always, that no assignee of any insolvent shall be authorized by virtue of this act to take possession of any estate or effects which the insolvent shall have acquired or become possessed of *after the making of the final order* herein mentioned, except under the authority of an order of the said commissioner, or of the Court of Review in Bankruptcy, made for that purpose, and then only to the extent and at the time and in manner directed by such order, and after giving such notices and doing such acts, matters, and things, as by the rules, orders, and regulations made under the authority of this act shall be required and directed in that behalf.

Such are the provisions of the 5 & 6 Vic. c. 116. The 7 & 8 Vic. c. 96, however, vests the property of the petitioner in the assignees *by virtue of their appointment*, not, as in the former act, from *the passing of the final order*. It also allows, as we have already seen, the petitioner to *except from the operation of the acts the wearing apparel, bedding, and other necessaries of himself and family, and his working tools and implements, not exceeding in the whole the value of 20l.* It will be observed also, that in speaking of the petitioner's estate and effects the last-named act invariably uses the word *property* only; which word is defined by the 78d clause to mean and include "all the real and personal estate and effects of the petitioner within this realm and abroad (except the wearing apparel and such other articles of the value in that behalf aforesaid as may by this act be excepted from the operation of the said recited act and of this act), and all the *future* estate, right, title, interest, and trust of such petitioner in or to any real or personal estate and effects within this

realm or abroad which such petitioner may purchase, or which may revert, descend, be devised, or bequeathed, or come to him, *before he shall have obtained the final order*, and all debts due or to be due to such petitioner before he shall have obtained such final order." This definition renders the word "*property*" in this act co-extensive (saving the excepted articles) with the words "*whole estate, present and future,*" of the 5 & 6 Vic. c. 116, as to any effects coming or due to the petitioner *up to the period of the passing of the final order* only. Any claims, therefore, which the assignees may have to his *after-acquired* property, rest solely on the 9th section of the 5 & 6 Vic. c. 116, which, as not being incompatible with or at variance with any of the provisions of the last act, may be considered as still in force, though only to be called into operation under the authority of the commissioner, or of the Court of Review, as provided by that act. It must be observed also, that in addition to the total silence of the last act on the subject, no rules or orders have been made as to the notices to be given, or the acts to be done, in the prosecution of such claims.

The modes of taking possession of the estate and effects of the petitioner, of realizing the same, and depositing the produce thereof, and of keeping and examining the accounts of the assignees, are in conformity with the like proceedings in bankruptcy.

Actions &c. by and against Assignees.—The assignees may sue and be sued in the same manner as assignees under a fiat in bankruptcy.—5 & 6 Vic. c. 116, § 7.

They may sue, from time to time, as there may be occasion, in their own names, for the recovery, obtaining, and enforcing of any property or rights of the petitioner, but in trust for the benefit of the creditors; and may give such discharges to persons indebted to petitioner as may be requisite.—7 & 8 Vic. c. 96, § 13.

They may *make compositions* with any debtors or accountants to petitioner, where necessary, and take such reasonable part of any debts as can upon such composition be gotten in full discharge of such debts and accounts.—*Ibid.*

They may *submit to arbitration* any difference or dispute between them and any persons for or on account of or by reason of any matter, cause, or thing relating to the property of the petitioner.—*Ibid.*

But no such composition, or submission to arbitration, shall be made, nor any suit in equity be commenced by any such assignee or assignees, without the consent in writing of the major part in value of the creditors of such petitioner, who shall meet together pursuant to a notice of such meeting to be published at least fourteen days before such meeting in the London Gazette, and also in some newspaper usually circulated in the neighbourhood of the place where such petitioner had his last usual residence before the filing of his petition, nor without the approbation of the commissioner.—*Ibid.*

No action at law or suit in equity shall be abated by the death, resignation, or removal of any assignee; but the court in which any action or suit is depending may, upon the suggestion of such death, resignation, or removal, and new appointment (if any), allow the name or names of the surviving or new assignees to be substituted in the place of the former, and such action or suit shall be prosecuted

in the name or names of the said surviving or new assignee, in the same manner as if he had originally commenced the same.—*Ib.* § 16.

Outstanding Debts.—If, at the expiration of twelve months from the filing of any petition for protection from process there shall remain any outstanding debts or other property due or belonging to the estate of the petitioner, which cannot, in the opinion of the commissioner, be collected and received without unreasonable or inconvenient delay, it shall be lawful for the assignees, under the direction of the commissioner, to sell and assign such debts and other property in such manner as shall be ordered by the commissioner.—*Ib.* § 32.

Powers.—All powers vested in any petitioner for protection from process, whose estate shall, under the provision of the said recited act, or this act, or of either of them, have been vested in an assignee or assignees, which such petitioner might legally execute for his own benefit (except the right of nomination to any vacant ecclesiastical benefice), shall be hereby vested in such assignee or assignees, to be by such assignee or assignees executed for the benefit of the creditors of such petitioner under this act, in such manner as such petitioner might have executed the same.—*Ib.* § 11.

Leases.—In all cases in which any such petitioner shall be entitled to any lease, or agreement for a lease, and his assignee or assignees shall accept the same, and the benefit thereof, as part of such petitioner's property, the said petitioner shall not be entitled to pay any rent accruing after the filing of his petition, nor be in any manner sued after such acceptance in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained. Provided, that in all such cases as aforesaid, it shall be lawful for the lessor, or persons agreeing to take such lease, his heirs, executors, administrators, or assigns, if the said assignee or assignees shall decline, upon his or their being required so to do, to determine whether he or they will or will not accept such lease or agreement for a lease, to apply to the commissioner, praying that he or they may either so accept the same, or deliver up such lease or agreement for a lease, and the possession of the premises demised or intended to be demised; and the commissioner shall thereupon make such order as in all the circumstances of the case shall seem meet and just, and such order shall be binding on all parties.—*Ib.* § 12.

This clause is exactly the same as the 50th section of the 1 & 2 Vic. c. 110; consequently the cases decided on that clause will apply to the present. Thus, a term of years will not vest in the assignees unless they do some unequivocal act to manifest their acceptance: a mere attempt to make it available to the estate is not such an exercise of ownership as to create an implication of assent.¹ The assignees are entitled to a reasonable time in which to decide whether they will accept the lease or not.² A forfeiture of a lease³ accruing on the

¹ *Lindsay v. Lambert*, 12 Moore, 209; the equity of redemption, see *Waldron v. 2 Car. & P. 526.*

² *Ibid.* And see *Doe d. Palmer v. Andrews*, 2 Car. & P. 593; 4 Bing. 348. As to

Powell, 3 Russ. 376.

³ *Doe d. Gatehouse v. Rees*, 4 Bing. N.C. 364; 6 Scott, 161. And see *Topham v. Dent*, 4 M. & P. 264; 6 Bing. 515.

lessee's insolvency is waived by acceptance of rent from him after his final order.

Stock.—If any such petitioner shall, at the time of filing his petition, or at any time before such petitioner shall become entitled to his final order according to this act, have any government stocks, funds, annuities, or any of the stock or shares of or in any public company, either in England, Scotland, or Ireland, standing in his own name in his own right, it shall be lawful for the commissioner, whenever he shall deem fit so to do, to order all persons whose act or consent is thereto necessary to transfer the same into the name of such assignee or assignees as aforesaid; and all such persons whose act or consent is so necessary as aforesaid shall be hereby indemnified for all things done or permitted pursuant to such order.—*Ib.* § 15.

Goods in the Disposition of Petitioner.—If any petitioner for protection from process shall, at the time of filing his petition, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels whereof such petitioner was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the same shall be deemed to be the property of such petitioner, so as to become vested in the assignee or assignees for the time being of the estate and effects of such petitioner. Provided, that no transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of the 3 & 4 Wm. IV. c. 55, intituled, *An act for the registering of British vessels*, shall be invalidated or affected by reason of such possession, order, or disposition of the same as aforesaid.—*Ib.* § 17.

Distress for Rent.—No distress for rent made and levied, after the filing of any petition for protection from process, upon the goods or effects of the petitioner, shall be available for more than one year's rent accrued prior to the filing of such petition; but the landlord or party to whom the rent shall be due shall and may be a creditor for the overplus of the rent due, and for which the distress shall not be available, and entitled to all the provisions made for creditors by the said recited act or by this act.—*Ib.* § 18.

Voluntary Preferences.—If the petitioner shall, before or after the filing of his petition, in contemplation of his becoming insolvent, or being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, or to any person who is or may be liable as surety for such petitioner, every such conveyance, assignment, transfer, charge, delivery, and making over shall be deemed fraudulent and void as against any assignee or assignees of the estate and effects of such petitioner appointed under the provisions of the said recited act and of this act, or either of them. Provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over shall be so deemed fraudulent and void, if made at any time prior to three months before the filing of the petition, and not with the view or intention, by the party so

conveying, assigning, transferring, charging, delivering, or making over, of petitioning the court for protection from process.—*Id.* § 14.

A voluntary payment by a debtor to his creditor, such debtor being at the time in insolvent circumstances, and within three months before the filing of his petition, although in discharge of a bonâ fide debt, is a fraudulent delivery of money, and void.¹

A warrant of attorney given in contemplation of insolvency has been held to be a charge upon the estate of the insolvent, and void as against the assignees.²

Warrants of Attorney, &c.—The provisions of the 3 Geo. IV. c. 39, intituled “An act for preventing frauds upon creditors by secret warrants of attorney to confess judgment,” shall extend to the assignees of every petitioner whose estate shall, after the expiration of twenty-one days next after his execution of such warrant of attorney, or of giving such cognovit actionem as therein mentioned, be vested in an assignee or assignees under the provisions of the said recited act and of this act or either of them, as if the said act so intituled as aforesaid had been expressly herein enacted; and every such warrant of attorney, and judgment and execution thereon, and every such cognovit actionem, and judgment entered up thereon, and execution taken out on such judgment, as are declared by the said last-mentioned act to be fraudulent and void against the assignees mentioned therein shall be deemed equally fraudulent and void against the assignees of the estate of such petitioner, and such assignees shall be entitled to recover back and receive, for the use of the creditors, all the monies levied and effects seized under or by virtue of any such judgment or execution.—7 & 8 Vic. c. 96, § 20.

And in all cases where any petitioner for protection from process, whose estate shall have been vested in an assignee or assignees under the provisions of the recited act and of this act or either of them, shall have executed any warrant of attorney to confess judgment, or shall have given any cognovit actionem or bill of sale, whether for a valuable consideration or otherwise, no person shall, after the filing of the petition of such petitioner, avail himself of any execution issued or to be issued upon any judgment obtained or to be obtained upon such warrant of attorney or cognovit actionem, either by seizure or sale of the property of such petitioner or any part thereof, or avail himself of such bill of sale; but any person to whom any sum of money shall be due in respect of any such warrant of attorney or cognovit actionem, or of such bill of sale, shall and may be a creditor for the same under the said recited act and this act.—*Id.* § 21.

A sale of the goods of the insolvent under a *fi. fa.* issued upon a warrant of attorney given by the insolvent, is invalid if it take place after the filing of the petition, notwithstanding the goods may have been seized under the writ before such filing.³ In such case an action of trover would lie at the suit of the assignees.

Where the goods of an insolvent are sold under an execution founded on a warrant of attorney, and the produce of the sale is paid to the ex-

¹ *Herbert v. Wilcox*, 3 M. & P. 515; 6 Bing. 416.

² *Bing*, 208.

³ *Kelley v. Minter*, 1 Scott, 616; 1 Bing.

⁴ *Sharp v. Thomas*, 4 M. & P. 87; N.C. 721; 1 *Hodges*, 177.

cution creditor after the filing of the petition, his assignees may recover such produce as money had and received to their use.¹

IX. DIVIDEND, PROOF OF DEBTS, &c.

Whenever, after an audit, there shall appear to the commissioner to be in the hands of the official assignee any balance wherewith a dividend may be made, proceedings shall be had forthwith, under the direction of the commissioner, for making such dividend, and also, when it shall appear necessary, for correcting and ascertaining the list of creditors entitled to receive the same.—7 & 8 Vic. c. 96, § 31.

Notice of any sitting of the court ordered to be held for such ascertaining of debts, or for an audit, or for declaring a dividend thereupon, or for all such purposes, shall be given for such time and in such manner as the commissioner shall from time to time direct.—*Ib.*

Such dividend shall be made amongst the creditors of the petitioner whose debts shall be admitted in his schedule, and amongst such other creditors (if any) who shall prove their debts in pursuance of any order of the commissioner in that behalf, in proportion to the amount of the debts so admitted, or so admitted and proved, as the case may be.—*Ib.*

If the petitioner, or any creditor or assignee, shall object, in whole or in part, to any debt tendered to be so proved, or to any debt mentioned in the schedule,—or if any person whose demand is stated in such schedule, but is not admitted therein to the extent of such demand, shall claim to be admitted as a creditor for the whole of such demand, or for more thereof than is so admitted,—the said objections and claims shall, upon application duly made, be examined into by the commissioner, and his decision thereon shall be conclusive with respect to the title of such creditor or creditors to his or their share of such dividend.—*Ib.*

Provided always, that if in any case it shall appear expedient, it shall be lawful for the commissioner, by notice as may be directed in that behalf, to cause all or any of the creditors to prove their debts in such manner as the commissioner shall require, and to decide upon such debts, and the right to receive dividends thereupon, and to do all things requisite thereto as aforesaid.—*Ib.*

X. EVIDENCE OF PROCEEDINGS, &c.

Any petition for protection from process, and any proceeding in the matter of such petition, purporting to be signed by a commissioner of the Court of Bankruptcy, or a copy of such petition or other proceeding purporting to be so signed, shall in all cases be receivable in evidence of such proceedings having respectively taken place.—7 & 8 Vic. c. 96, § 8.

Evidence of the Appointment of Assignees.—The like evidence of the appointments of assignees shall be received as sufficient to prove such appointments, in all courts and places whatsoever, as is received by the laws now in force relating to bankrupts to prove such appointments.—5 & 6 Vic. c. 116, § 11. That is, the production of the certi-

¹ Gage v. Hitchcock, 5 Nev. & M. 660; Cowham, 10 Bing. 5. But see Squire, 4 Adol. & Ellis, 84. See also Tabram v. v. Hewetson, 4 Per. & D. 663; 5 Jurist, Freeman, 2 Dowl. P. C. 375 Groves v. 810.

ificate of appointment purporting to be sealed with the seal of the Court of Bankruptcy.—1 & 2 Wm. IV. c. 56; 2 & 3 Wm. IV. c. 96, § 33.

Registration of, for Conveyance of Property.—Where, according to any laws now in force, any conveyance or assignment of any real or personal property of a petitioner would be required to be registered, enrolled, or recorded in any registry office in England, Wales, or Ireland, or in any registry office, court, or other place in Scotland, or any of the dominions, plantations, or colonies belonging to her majesty, then in every such case such certificate of the appointment of an assignee or assignees as is described in the 1 & 2 Wm. IV. c. 56, intituled “An act to establish a court in bankruptcy,” shall be registered in the registry office, court, or place wherein such conveyance or assignment as last aforesaid would require to be registered, enrolled, or recorded. And the registry hereby directed shall have the like effect, to all intents and purposes, as the registry, enrolment, or recording of such conveyance or assignment as last aforesaid would have had. And the title of any purchaser of any such property as last aforesaid for valuable consideration, who shall have duly registered, enrolled, or recorded his purchase-deed previous to the registry hereby directed, shall not be invalidated by reason of such appointment of an assignee or assignees as aforesaid, or the vesting of such property in him or them consequent thereupon, unless the certificate of such appointment shall be registered as aforesaid within the times following, that is to say, as regards the United Kingdom of Great Britain and Ireland, within two months from the date of such appointment, and as regards all other places, within twelve months from the date thereof.—5 & 6 Vic. c. 116, § 8.

Proceedings not liable to Stamp Duty.—No letter of attorney, affidavit, certificate, or other proceeding, instrument, or writing whatsoever, in the matter of any petition for protection from process, nor any copy thereof, nor any advertisement inserted in any newspaper by the direction of any commissioner of the Court of Bankruptcy relating to any such matter, shall be liable to or charged with the payment of any stamp or other duty whatsoever.

Nor Sales to Auction Duty.—And no sale of any real or personal estate of any such petitioner as aforesaid, for the benefit of his creditors, under the said recited act or this act, shall be liable to any auction duty. Provided always, that no such exemption from auction duty shall be allowed, unless such sale shall be conducted by a licensed auctioneer, and such auctioneer shall at the time of passing his account thereof produce to the officer of excise a catalogue, signed and certified by the assignees by whose order such sale shall have been made, in manner and form required by the laws of excise.—7 & 8 Vic. c. 96, § 33.

XI. FEES, &c.

Per-Centage on Insolvent's Estate.—Under every petition for protection from process after the passing of this act in the Court of Bankruptcy in London, or in any district court of bankruptcy in the country, there shall be paid by the official assignee of the estate and effects of the petitioner, into the Bank of England, to the credit of the accountant in bankruptcy, to the account intituled “The Secre-

tary of Bankrupt's Account," a sum not less than *one-eighth of a pound per centum*, and not exceeding *five pounds per centum* on the gross produce from time to time of the petitioner's estate; such sum, within the limits aforesaid, and the time or times for payment thereof, to be fixed by the lord chancellor by any general order for those purposes, and to be applicable to all the purposes of the said account, and to be subject to the like orders as other moneys directed to be paid in to the said account; and it shall be lawful for the lord chancellor from time to time to lessen or increase such sum, within the limit aforesaid, as to the lord chancellor may seem just and reasonable, upon consideration of the amount standing to the said account, and of the claims from time to time chargeable thereupon.—7 & 8 Vic. 96, § 34.

Remuneration of Official Assignee.—The commissioner authorized to act in the matter of any petition may direct remuneration to the official assignee for his services in the matter of such petition, in like manner as in bankruptcy, but nevertheless so as such remuneration shall in no case exceed the rate of *five pounds per centum* on the sum received as produce of the property of the petitioner.—*Ibid.* § 35.

Court Fees.—The fees authorized in the annexed table, and no other, shall be taken in the respective courts:—

	£.	s.	d.
On Filing Petition	0	1	0
On Swearing every Affidavit	0	1	6
On Filing Affidavits and other documents	0	1	0
For every Search	0	1	0
For an Office Copy of the Schedule and Accounts annexed for the Official Assignee, unless the Petitioner has delivered one at the time of filing his Petition, per folio of ninety words	0	0	1½
For every Sitting held in the matter of any Petition, by way of charge for the use of the Court	0	5	0

All bills of fees and disbursements of any attorney or messenger for business done under the aforesaid acts shall be taxed by the court in which the petition shall have been filed, or by the taxing master of the Court of Bankruptcy. Provided always, that no charge shall be made by the messenger for executing the warrant of seizure or possession, unless the execution thereof shall be specially directed by the court.—General Orders, rule 14.

SECTION II.

OF COMPOSITIONS OR ARRANGEMENTS BETWEEN DEBTORS AND CREDITORS IN THE COURT OF BANKRUPTCY.

COTEMPORANEOUSLY almost with the passing of the last of the two statutes which form the subject of the preceding section, another measure received the sanction of the legislature for the relief of insolvent debtors *not being traders*,—namely, the 7 & 8 Vic. c. 70, intituled "An act for facilitating arrangements between debtors and creditors."

We have already referred to the subject of these arrangements in another part of the work, when we observed that they were

much less frequently carried into effect than, from their evident advantage both to debtor and creditor, it might be expected. This has been partly owing, perhaps, to the state of the law respecting them. Not unfrequently some two or three of the creditors, generally those of the least amount, with the hope of securing to themselves the payment of their debts in full, refuse to join in them, and thus prevent their being effected; or if the debtor, by tampering with such and giving them advantages beyond those afforded to the general body of creditors, procure their concurrence, such preferences are not only void in themselves, but frequently defeat and render void the whole composition. Again, so strict are the courts of law in their construction of such agreements, that any failure on the part of the debtor to pay the sum compounded for, or any part of it, at the time or in the manner agreed on, will defeat them; and any creditor may in such an event resort to his original claim for the whole debt; though if he afterwards accept the composition without objecting to the default, he will be bound by it.

With the view, therefore, of affording greater security as well as facility to such arrangements, the act referred to enables them to be carried into execution under the contröol and superintendence of the Court of Bankruptcy.

After reciting that "whereas it is expedient that trust deeds and other amicable modes of arrangement between debtors and their creditors should be facilitated, and that better means should be provided for carrying the same into effect," the act enacts, that from and after the 1st day of September, 1844, it shall be lawful for any debtor who is unable to meet his engagements with his creditors, *such debtor not being a trader within the meaning of the statutes now in force relating to bankrupts*, with the concurrence of one-third in number and value of his creditors (testified by their signing his petition), to present a petition to the Court of Bankruptcy, praying that such proposals as he shall therein make for the payment or compromise of his debts may be carried into effect under the superintendence and control of the said court, and that he may in the mean time be protected from process.—Sec. 1.

Contents of Petition.—The petition must set forth a full account of his debts, and the consideration thereof, with the names, residences, and occupations of his creditors,—also a full account of his estate and effects, whether in possession, reversion, or expectancy, and of all debts and rights due to or claimed by him, and of all property of what kind soever held in trust for him; and state that he is unable to meet his engagements with his creditors, and the true cause of such inability. It must also set forth such proposal as he is able to make for the future payment or the compromise of such debts or engagements; that one-third in number and value of his creditors have assented to such proposal; and pray that such proposal (or such modification thereof as by the majority of his creditors shall be determined on) may be carried into effect under the superintendence and control of the said court, and that he the said petitioning debtor may in the mean time be protected from arrest by order of the said court.—Sec. 1

Preliminary Examination of Debtor.—On the presentation of the petition, one of the commissioners of the Court of Bankruptcy (in such rotation as by order of the court is appointed) is privately to examine into the nature of the petition. And for this purpose he has power to examine upon oath the petitioning debtor, any creditor concurring in the petition, and any witness produced by the petitioning debtor.—Sec. 2.

If, on such examination, the commissioner shall be satisfied of the truth of the several matters alleged in the petition; and that the debts of the petitioner had not been contracted by reason of any manner of fraud or breach of trust, or without reasonable probability at the time of contract of being able to pay the same, or by reason of any judgment in any prosecution for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out a fiat in bankruptcy, or malicious trespass; and that the petitioning debtor has made a full disclosure of his debts and credits, estate and effects, and is desirous of making a *bonâ fide* arrangement with all his creditors; and that his proposal to that effect is reasonable, and proper to be executed under the direction of the court,—the commissioner may direct a meeting of all the creditors to be convened.—Sec. 2.

And the commissioner shall appoint a fit and proper person (being a registrar or official assignee of the court, or one of the principal creditors) to preside at such meeting of creditors, and to report the resolutions thereof to him.—Sec. 3.

Interim Protection.—On the examination of the petition, the commissioner may grant to the petitioning debtor a temporary and limited protection from arrest; and such debtor shall be accordingly free from arrest for such time, and within such limits and conditions as shall be specified therein, with the like penalties on any officer arresting him as in cases of bankruptcy.—Sec. 7.

The commissioner may also require him to give *bail* for his appearance at the several meetings of his creditors.—*Ib.*

And every petitioning debtor shall have such protection from arrest when going to, remaining in, and returning from his necessary attendance on the commissioner, or the said meetings of creditors, as is enjoyed by any party or witness attending a court of record.—*Ib.*

First Meeting of Creditors.—Notice of this meeting is to be given in writing to every creditor, not less than seven nor more than twenty-eight days before it is held.—Sec. 2.

The notices to creditors are sent or delivered by the messenger of the court; a sum of money (between 10*l.* and 20*l.*, as the commissioner shall direct) being deposited with him by the petitioning debtor previous to the appointment of any meeting of creditors, for the costs of the meetings, serving notices, and other necessary expences.—See General Orders of the Court, *post*.

If, at the first meeting of creditors, the major part in number and value, or nine-tenths in value, or nine-tenths in number whose debts exceed twenty pounds, assent to the proposal of the petitioning debtor, or any modification thereof, the president shall appoint another

meeting of the creditors, to be held not earlier than seven nor later than twenty-eight days from the first meeting.—Sec. 4.

Second Meeting of Creditors.—Notice in writing of the second meeting, and of the purpose thereof, is to be *personally* served on every creditor who was not present by himself or his appointed agent at the first meeting, three clear days at least before the day appointed for the meeting.—Sec. 4.

But the commissioner may, if he think fit, make an order, in any special case, that service of the notice at the last place of abode or business of any creditor shall be deemed good service.—*Ib.*

If, at the second meeting of creditors, three-fifths in number and value of the creditors present, or nine-tenths in value, or nine-tenths in number whose debts exceed 20*l.*, agree to accept the arrangement or composition assented to at the first meeting, and shall reduce the terms thereof into writing, and sign the same, such resolution or agreement (subject to confirmation as hereinafter enacted) shall thenceforth be binding and of full force, as well against the petitioning debtor as against all persons who were creditors at the date of the petition, and who had notice of the said several meetings. Provided, however, that it shall not be valid unless one full third in number and value of all the creditors of such petitioning debtor were present at the second meeting, either in person or by an authorized agent.—Sec. 5.

Confirmation and Filing of Agreement.—Such resolution or agreement, within fifteen days after the passing of it, is to be submitted to the commissioner, who, if he think it reasonable and proper to be executed under the direction of the court, shall cause it to be filed and entered of record therein.—Sec. 6.

Certificate of Filing, and Protection of Debtor.—On the filing of the resolution or agreement, the commissioner shall grant to the petitioning debtor a *certificate* of such filing, and shall from time to time indorse on such certificate his *protection* of such debtor from arrest.—*Ib.*

Such debtor will then be free from arrest at the suit of any person who was a creditor at the date of his petition and who has had such several notice or notices as aforesaid. And any officer arresting him at the suit of any such creditor, and on sight of such certificate and protection not releasing him, will be liable to such penalty as is provided respecting bankrupts in the like case by the statutes now in force concerning bankrupts.—Sec. 6.

But no such protection shall be valid in favour of any petitioning debtor who shall be proved to have been about to abscond beyond the jurisdiction of the Court of Bankruptcy, or who has concealed or is concealing any part of his estate or effects; nor against any creditor whose debt is not truly specified in his petition, or whose debt has been contracted by reason of any manner of fraud or breach of trust.—*Ib.*

Vesting of Estate in Trustee.—From and after the date of the filing of the resolution and agreement, all the estate and effects of the petitioning debtor shall vest in the trustee (if any such be appointed) by virtue of such resolution, and without any deed, as fully as if such trustee were an assignee under the statutes relating to bankrupts.—Sec. 8.

And every such trustee may sue and be sued as if he were such assignee in bankruptcy.—*Ib.*

Trustee's Accounts.—Such trustee, once at least in every six months (or oftener if the commissioner, or any two or more of the creditors whose debts amount to one tenth part of the whole, require it) shall produce to the commissioner, on oath or solemn declaration, a full and true account of all moneys, property, and effects of the petitioning debtor which have come to his hands, and of the disposal thereof.—Sec. 9.

Payment of Creditors.—And the commissioner shall examine such account, and certify the result of his examination; and shall, if need be, order payment to the creditors according to the terms of the resolution or agreement.—*Ib.*

Re-examination of Debtor.—If it shall at any time appear to the commissioner, on the representation of the trustee, or of any two creditors as aforesaid, that the petitioning debtor has not made a true discovery of his estate and effects, or has not duly accounted for any subsequently acquired property (if required by the true intent and meaning of the said resolution or agreement), or has wilfully made any false return of creditors, the commissioner may summon the petitioning debtor to be examined before him upon oath touching such matters. And such summons and examination shall be enforced in such manner as is now practised in the summoning and examination of bankrupts.—Sec. 10.

Special Meeting—If any difficulty arise in the execution of the resolution or agreement, the commissioner may cause a special meeting of the creditors to be assembled; and the resolution of the majority at such meeting to confirm, alter, or annul the whole or any part thereof, shall be as valid as if it had been part of the original resolution or agreement. Provided, however, that if one third in number and value of the creditors do not attend such meeting, the resolution thereof shall not be valid unless it be approved and confirmed by the commissioner.—Sec. 11.

Final Meeting before Commissioner.—So soon as the resolution or agreement shall have been carried into effect, and the creditors shall have been satisfied according to the tenor of the same, the commissioner shall cause a meeting of the creditors to be held before him, and, on being satisfied that the trustee has fully performed his trust, shall give to such trustee a certificate thereof under his hand and seal. And such certificate shall be a full release and acquittance to the said trustee, both in law and equity, for all matters done by him as such trustee.—Sec. 12.

Trustee's Remuneration.—It shall be lawful for such trustee to receive for his services in the execution of his trust such sum of money as the major part in number and value of the creditors assembled at such last-mentioned meeting shall appoint, subject to the approval and allowance of the commissioner.—*Ib.*

Certificate to Petitioning Debtor.—At such last-mentioned meeting the commissioner shall give to the petitioning debtor a certificate, under his hand and seal, of the filing of the petition, and of the resolution or agreement of the creditors, and that the resolution or agree-

ment has been fully carried into effect. And such certificate shall thenceforth operate to all intents and purposes as fully as if the same were a certificate of conformity under the statutes relating to bankrupts, excepting only that no debt herein excepted from the operation of this act shall be barred by it.—Sec. 13.

The act is to be construed beneficially to creditors; and if any doubts should arise in the construction of it, it is to be construed by analogy to the bankrupt laws. It extends to aliens, denizens, and women; but not to Scotland or Ireland.—Sec. 15.

The Court of Bankruptcy is empowered to make rules and orders for carrying the act into execution. (Sec. 14.) The following orders have accordingly been issued:—

GENERAL RULES AND ORDERS,

Made under the Statute 7 & 8 VICTORIA, c. 70.—Feb. 1845.

IT IS ORDERED,—

1. That petitions under the act shall be delivered, fairly written on parchment, to the Registrar of the day sitting at the Court of Bankruptcy, between the hours of 11 and 2 o'clock; who shall number the same as they are received, and at the rising of the court shall deliver the same to the commissioner of the day; who shall allot the petitions by ballot among the commissioners of the Court of Bankruptcy in London and the commissioners of the country districts, regard being had to the usual place of residence of the petitioner, the residence of the major part and value of his creditors, and to the situation of the property to be administered. And every petition, and the number and allotment thereof, shall be entered in the private minute-book of the commissioner of the day. Provided, that if for any sufficient cause, agreed by any two commissioners, a commissioner shall decline to act in the matter of any petition, or any cause shall be shown for altering the allotment, such petition shall be allotted in such manner as such two commissioners shall direct.
2. That two fair copies of every such petition shall be delivered to the same registrar at the same time with the original petition—one for the use of the commissioner to whom the same shall be allotted, and one for the use of the person to be appointed to preside at the meeting, and for the inspection of creditors.
3. That the sum of £10, or such other sum not exceeding £20, as the commissioner to whom the petition is allotted shall direct, shall be deposited with the messenger previous to the appointment of any meeting of creditors, for the costs of such meeting or meetings, and the costs of serving notices upon creditors, and other necessary expences; the residue, if any, after the payment of such expences, to be accounted for to the petitioner.
4. That the notices required by the 2d section of the act shall be transmitted through the post by the messenger of the court, who shall be allowed the sum of 5d., and no more, for the filling up of the forms, addressing the same, the messenger's signature, and the postage stamp.
5. That the notices required by the 4th, 11th, and 15th sections of the act shall be served by the messenger of the court if within ten miles of the General Post Office or of the Court, or by his agent if at a greater distance.
6. That no person, not being a creditor, or the authorized agent or attorney of a creditor, except the appointed president and a clerk, and the petitioner accompanied by two persons, shall be permitted to be present at any meeting, or to inspect the schedule or documents, unless so directed in writing by the commissioner.

CHAPTER XXVII.

Proceedings for the Relief of Insolvent Debtors ;

SECONDLY,

BY PETITION TO "THE COURT FOR THE RELIEF OF INSOLVENT DEBTORS."

It was not until the year 1813 that any distinct tribunal existed for the purpose of receiving the property of insolvents (not being traders), and distributing it among their creditors. In that year "The Court for the Relief of Insolvent Debtors" was established by the 53 Geo. III. c. 102; but so great was the prejudice against the measure at the time among the mercantile classes of society, that it was only enacted for three years, and it was confidently anticipated that it would not be allowed to reach even that limited period of duration.¹ It has, however, since become better understood and more properly appreciated. That act, after having been amended and continued by several subsequent acts,² was superseded by the 1 Geo. IV. c. 119; which also, after receiving several improvements,³ gave way to the 7 Geo. IV. c. 57, by which the law was again consolidated; and this, in its turn, with all its amending and continuing acts,⁴ having been allowed to expire, the law is once more consolidated, and for the first time permanently established by the 1 & 2 Vict. c. 110, the statute now in force.

It has been repeatedly decided, that the statutes passed for the relief of insolvent debtors are to be equitably and liberally construed in their favour.⁵

I. THE COURT FOR THE RELIEF OF INSOLVENT DEBTORS.

Under the 1 Geo. IV. c. 119, the court consisted of a chief and two other commissioners; but a fourth commissioner was added by the 5 Geo. IV. c. 61. The court thus established has since been continued; and the powers of all the former acts have been continued to it in so far as they relate to or may be exercised in the matters of the petitions of persons who have been discharged under them.

The commissioners, who must be barristers of ten years standing at the least, are appointed by the crown during good behaviour, but removable on an address of both houses of parliament. The chief clerk, provisional assignee, and other officers, are appointed by the court; which has power also to appoint such other officers as the lord chancellor, the lords chief justices of the Courts of Queen's Bench and Common Pleas, and the lord chief baron of the Exchequer, shall judge necessary.

¹ See 3 Evans's Statutes, 146, note.

² 54 Geo. III. c. 23; 56 Geo. III. c. 112;
57 Geo. III. c. 101; 59 Geo. III. cc. 129,
130; 1 Geo. IV. cc. 3, 97.

³ 3 Geo. IV. c. 123; 5 Geo. IV. c. 61.

⁴ 11 Geo. IV. & 1 Wm. IV. c. 38;
2 & 3 Wm. IV. c. 44.

⁵ Chitty's Statutes, 577, note b.

The court is a court of record for the purposes of the act; and any of its proceedings, purporting to be signed by the proper officer, certifying the same to be a true copy, and to be sealed with the seal of the court, are evidence in all courts whatever.¹

The court, or a single commissioner, has the power of adjournment, of administering oaths, and examining parties and witnesses on oath for the purposes of the act, of compelling the attendance of witnesses after a tender of reasonable expences, of requiring and compelling the production of books and writings, of ordering prisoners to be brought up, of committing persons for contempt, and also of fining or removing any of its officers who shall be guilty of negligence, wilful delay, or misconduct. But it has not the power of awarding costs against any person, except in cases expressly provided for by the act.

The court is to sit for the dispatch of business twice a week at least throughout the year; except that, from the expiration of six weeks from the last day of Trinity term until the 1st of November, the court may regulate its sittings at such time as may appear fit and necessary, so that no adjournment exceed six weeks.

The court-house is in Portugal-street, Lincoln's-Inn-fields, but the court has power to appoint its sittings at any other place.—1 & 2 Vic. c. 110, §§ 23—27.

Commissioners.—A single commissioner was empowered, by sec. 28, upon summons to the parties, to hear and determine, out of court, all matters relating to petitioners, their estates and effects, or the assignees thereof, except the hearing, re-hearing, or examination of an insolvent: his order, however, was subject to be altered or rescinded by the court at its next sitting. But now, by the 10 & 11 Vic. c. 102, § 6, every commissioner shall henceforth, singly, be and form a court for every purpose under all acts now in force or which may hereafter be in force relating to insolvent debtors.

Circuits of Commissioners abolished: New County Courts Jurisdiction.—Formerly only the petitions of prisoners in the gaols of London, Middlesex, Surrey, and the borough of Southwark, were heard before the court in London, and these were called *Town* cases; all others (except in Berwick-upon-Tweed, which were brought before the justices of peace at the quarter sessions) were heard before a commissioner at the assize or other town of the county where the gaol was situate, and were called *Country* cases. Three of the commissioners, therefore, (one being constantly attendant in the court in London) severally made circuits to the different assize towns three times a year, the time and place of their attendance being previously advertised in the London Gazette, &c.; and in these country cases the clerk of the peace or town clerk had the custody of the duplicate petitions and schedules, books, &c., issued subpoenas, and attended at the hearing, acting as clerk to the commissioner. But by the 10 & 11 Vic. c. 102, the circuits of the commissioners were abolished from the 15th September, 1847; and thenceforth the petitions of all insolvents in any gaol within twenty miles from the General Post-Office are to be heard by the court in London, and of those imprisoned

¹ But it seems that such copies are only evidence for the insolvent or his creditors.—*Nicholls v. Downes*, 4 C. & P. 480; and 1 M. & Rob. 18.

at a greater distance, by the New County Court within the district of which the insolvent is in custody. In the latter case, the court in London, or some commissioner thereof, is, forthwith after the filing of the petition and schedule, to make an order referring such petition for hearing to such county court, and transmit the petition and schedule accordingly. The judge shall then appoint a time and place for the prisoner to be brought up before the court, and cause the usual notices to be given. And such court shall have the same power and authority with respect to every such petition, and shall make all such orders, give all such directions, and do all such matters and things requisite for the discharging or remanding, and otherwise respecting such prisoner, his schedule, creditors, and assignees, as the said Court for the Relief of Insolvent Debtors may in the matter of petitions heard before it. And every such petition and schedule, and all judgments, rules, orders, directions, and proceedings thereon by such county court, signed by the judge, shall be returned to the Court for Relief of Insolvent Debtors, to be a record of the court. And the county court, in the matter of every petition so referred and transmitted, shall have power to issue a warrant or order to the keeper of any gaol, directing him to bring the insolvent before the county court on the day appointed for the hearing of his petition, or at any adjourned sitting held in the matter of his petition; and may order the expence of bringing him up to be paid by the provisional assignee out of his estate and effects, or if the same be insufficient, out of the interest arising from the unclaimed moneys of insolvents estates.

Officers of the Court.—Besides the *chief clerk* and the *provisional assignee* already mentioned, there are, a *master*, or *taxing officer*, to whom also references are made by the court; a *clerk of the rules*, and other clerks in the various departments of the office in Portugal-street; *messengers*, who serve notices within London and ten miles thereof; *brokers*, for valuing the insolvent's excepted property; and *auctioneers*, appointed for the sale of the property of insolvents.

In any action brought against any judge, commissioner, justice of the peace, sheriff, gaoler, keeper of a prison, or any person, for performing the duty of his office in pursuance of this act, the general issue may be pleaded, and this act and the special matter given in evidence; and the defendant, if successful, shall have treble costs.—§ 110.

Attorneys.—The court may at its discretion admit, without fee, any number of persons (being attorneys of the superior courts) to practise as attorneys on behalf of prisoners in custody; and any other person so practising is guilty of contempt, and liable to fine and imprisonment.—§ 114.

And by the Rules of Court (October 1st, 1838) it is ordered, that any attorney of the superior courts may be admitted to practise on behalf of prisoners in the gaols of London, Middlesex, and Surrey, on proving his certificate for the current year, excepting such as have been heretofore removed by the court.—Rule 1.

The attorney's retainer and his acceptance thereof must be in the

¹ See *Whitelegg v. Richards*, 3 B. & B. 188; and same (in error), 2 B. & C. 45.

form given in Rule 2, and be filed with the first proceeding in court. Provided, that in case of the illness of such attorney, or of his absence from London or the place where he practises, such retainer may be received and accepted for him by some other duly certificated attorney, the cause thereof being stated in such acceptance.—Rule 2.

The attorney of a prisoner, where the total of his demand exceeds six pounds, shall cause a bill to be taxed by the proper officer, and shall, on such taxation, prove by affidavit or affidavits the actual payment of every sum of money charged as paid, and the actual performance of every matter charged as done, up to the time of swearing such affidavit, and that all payments and matters so charged are essentially necessary to the prisoner's discharge; and further, that the sum of ——— and no more has been paid to or for such attorney on account of such bill. And the said bill and affidavits shall in all cases be prepared in the printed form. And any such affidavit shall be sworn, in the country not before the signing of the schedule, and in town not sooner than eighteen days before the day of hearing. And on such bill, with name and number indorsed, being delivered to the proper officer, he shall have the schedule &c. ready for taxation on the following day; and he shall, if requested, sign the allocatur in duplicate. And the attorney shall deliver his bill so taxed, with the allocatur thereon, to the prisoner, two days at least before the day appointed for hearing, in order that the prisoner may be able at the hearing to take objection to such bill so taxed *ex parte*.—Rule 3.

No attorney shall, directly or indirectly, employ any gaoler, turnkey, prisoner, or other person confined or residing within any gaol or prison, as a clerk or agent to solicit retainers, or to transact any business whatever relating to proceedings in this court touching the relief or discharge of any prisoner, on pain of being removed from the files of the court. And no attorney shall continue to practise in the court while he shall himself be a prisoner for debt or otherwise.—Rule 4.

An attorney, after filing an insolvent's schedule, must proceed without any delay by reason of nonpayment of costs or otherwise.

Affidavits.—All affidavits must be sworn before the court or a commissioner thereof, or a commissioner appointed by the court for the purpose of taking affidavits, or a master extraordinary in chancery, or a commissioner for taking affidavits in the superior courts, or in Scotland or Ireland before a magistrate.—§ 112. They must be entitled "In the Court for Relief of Insolvent Debtors," and must (except on applications for leave to file petitions) be headed "In the matter of the Petition of —," stating the insolvent's name, address, and description. And all papers annexed to any affidavit and referred to in the same are to be marked as *exhibited* by the commissioner or other person before whom the affidavit is sworn.—Rule 24.

Documents to be numbered.—After a case has been numbered, in all applications made to the court, whether in court or in the office, the motion paper, petition, or other document by which the application is made, shall be marked with the number of the case, and T. or C., as it may be. And every order &c. delivered from the office shall be marked in like manner.—Rule 29.

II. WHO ARE, AND WHO ARE NOT, ENTITLED TO PETITION.

The act enacts, (§ 35) that any person who shall be in *actual custody* within the walls of any prison in England, upon any process whatsoever, for or by reason of any *debt, damages, costs, sum or sums of money*, or for or by reason of any *contempt of any court whatsoever for nonpayment of any sum or sums of money or of costs*, taxed or untaxed, either ordered to be paid, or to the payment of which such person would be liable in purging such contempt, or in any manner in consequence or by reason of such contempt, *at any time within the space of fourteen days* next after the commencement of his actual custody, whether such commencement shall have been in the same or in any other prison, or in the rules or liberties of any prison, *or afterwards* if the court shall in any case think reasonable to permit the same, may apply by PETITION in a summary way to the Court for the Relief of Insolvent Debtors, for his discharge from such custody according to the provisions of this act.

All persons, whether traders or not, and whether natural-born subjects, aliens, or denizens, in actual custody for any of the causes above enumerated, may petition the court for their discharge. The benefit of the act extends even to married women, lunatics, and persons of unsound mind,—classes of persons who are in general not capable of divesting themselves of property; though there are some peculiar provisions relating to these, which will be noticed separately hereafter. Infants are not specially provided for by the act; and it has been held in a court of equity, that an infant cannot be an insolvent debtor,¹ but that case has been questioned; and indeed there can be little doubt, if an infant were in custody for any of the causes above mentioned, he would be entitled to petition the court.

The only objects of exclusion from the benefits of the act are—criminals; persons imprisoned for actual contempt of any court, or for not performing some act other than the payment of money; revenue debtors, without the consent of the Treasury; and persons not in actual or proper custody, who are not entitled upon their own petition.

Criminals.—A prisoner confined under sentence of any court of criminal jurisdiction, or a magistrate's warrant, not conditioned for payment of money, although detainers of a civil nature be also lodged against him, cannot petition this court until the period of his sentence has expired.

Contempts.—Persons imprisoned for actual contempt of any court, or for the nonperformance of any specific act other than the mere payment of money (as the delivering up of papers, &c.) cannot be discharged by this court. When, therefore, they are committed for such causes *only*, they cannot petition. If committed for the nonperformance of any such act *and* for the nonpayment of money, they may petition; and when they have purged their contempt by performing the act required, their discharge under this act will extend to such nonpayment of money and of the costs incurred by their contempt.

Revenue Debtors.—The act does not extend to discharge any pri

¹ Burton v. Heworth, 5 Mad. 50.

soner with respect to any debt due to her majesty or her successors, or to any debt or penalty with which he shall stand charged at the suit of the crown or of any person for any offence against any act of parliament relating to any branch of the public revenue, or at the suit of any sheriff or other public officer upon any bail bond entered into for the appearance of any person prosecuted for any such offence, unless three of the commissioners of the Treasury shall certify under their hands their consent to such discharge.—§ 103.

And any person imprisoned under any writ of *capias* or extent issued and remaining in force at the instance or for the benefit and reimbursement of any surety or other person, or of the inhabitants of any parish, ward, or place, who have paid the debt to the crown, and by reason whereof the commissioners of the Treasury may not be authorized to give their consent as aforesaid, may apply to the barons of the Court of Exchequer in England or Scotland for his discharge, giving one month's previous notice in writing to the parties at whose instance or for whose benefit such *capias* or extent shall remain in force, and an enumeration and description of all the property, debts, and effects whatsoever of such person, in his own possession or power, or in the possession or power of any other person for his use; and the said court, to whom such application shall be made, may order such person to be brought before them, or before any baron of the said court, to be examined upon oath concerning his property and effects; and if such person shall make a full disclosure of all his property and effects, and it shall otherwise appear to the satisfaction of such court reasonable and proper that such person should be no longer imprisoned under such writ, such court or baron may order a writ of *supersedeas quoad corpus* to be issued out for the liberation of such person: provided, that no such liberation shall be held to satisfy or supersede such extent, or any proceedings thereon, except as to such imprisonment, or the debts seized under and by virtue thereof, and for which such person shall be so imprisoned.—§ 104.

Persons not in proper Custody.—Sect. 39 enacts, that no prisoner, on his own petition, shall be entitled to the benefit of this act who shall not be, at the time of filing his petition, and during all the proceedings thereon, in *actual custody* within the walls of the prison, without any intermission of such imprisonment by leave of any court or otherwise.

The court is indeed empowered, after the order has been made for the hearing of a prisoner, to dispense with his actual custody within the walls, upon the oath of a physician, surgeon, or apothecary as to the health of such prisoner or of the prisoners generally; but in such case he must not go beyond the rules of the prison, or he would disentitle himself from the benefits of the act. Power is also given to the court, in any case in which it may think fit, after such order has been made, to discharge the prisoner out of custody on his finding two sufficient sureties to produce him at the time and place fixed for his being brought up for hearing; to which subject we shall revert more particularly hereafter. But at the time of filing his petition he must be in actual custody within the walls of the prison, and, except in the cases above mentioned, must continue in such actual custody during all the proceedings. He is

neither permitted to have the benefit of the rules or liberties of the prison, nor to enjoy those indulgences called *day-rules*.

And the confinement must not only be actual, but *bonâ fide*, that is, not collusive or fraudulent. Friendly arrests were frequent under the former law of arrest upon mesne process, but they were always discountenanced by the court, and the petitions of prisoners were uniformly dismissed when it appeared that such a proceeding had been resorted to.

And, to prevent prisoners removing themselves by *habeas corpus* from a country gaol to the Queen's Bench or other prison with the view of having their petition heard before the court in London, at a distance from the principal body of their creditors, it is enacted by section 95, that the benefit of the act shall not be allowed to any prisoner *upon his own petition* who (having been arrested in any county or place where he had his usual abode at or lately before such arrest, other than in the counties of Middlesex or Surrey, or the city of London, or borough of Southwark, such usual place of abode being distant more than twenty miles from the court-house of the court) shall be removed by writ of *habeas corpus* sued out on his own behalf, or by his procurement or request, from custody in such county or place to any other custody. Provided, that it shall be lawful for the court, if in any case it think fit, at any time within ten days after the filing of the petition, or within such further time as it shall allow upon the request of any prisoner, to order such prisoner to be taken, at the expence of any person or persons who will pay the same, from the gaol in which he shall then be to the gaol of the county or place where he was arrested as aforesaid, and thereupon the same proceedings may be had as in other cases.

But this section does not apply where an insolvent residing in one county is arrested in another, and is then removed by *habeas corpus* to London; nor where an insolvent has one residence in London and another in the country, and he is arrested at the latter, and then removes himself by *habeas* to a London prison.

And, by sect. 94, if, on any prisoner being brought before the court it shall appear that his usual place of abode lately before his arrest was in any county or place other than in Middlesex or Surrey or the city of London or borough of Southwark, the court may order him to be removed, on the request of any creditor and at his expence (to be re-paid to such creditor out of the prisoner's estate) to the gaol of the county or place where he had lately before such arrest his usual place of abode; and if such place of abode was in Scotland or Ireland, then to such gaol as to the court shall appear just and reasonable. And the court shall order such removal to be made on or before a day to be named in the order. And if such prisoner be not removed accordingly on or before such day, or on or before a day to be named in any enlargement of the order, then the court shall, upon application duly made, appoint a time for his being brought up before the court, and such notices thereof to be given and to such persons as the court shall direct. And when any prisoner shall have been so removed, the court shall appoint a time and place for him to be brought up in the county or place where the gaol is situate, and such notice to be given and to

such persons as the court shall direct. Provided, that when a prisoner shall be brought up to be heard after such removal or failure of removal, it shall be lawful for all the creditors to oppose his discharge as in other cases, although no creditor may have given notice of opposition at the time first appointed for the bringing up of such prisoner.

Previous Insolvency or Bankruptcy.—Under the late General Insolvent Act, 7 Geo. IV. c. 57, § 64, no person who had been discharged by virtue of that or any other act for the relief of insolvent debtors, or who had been declared bankrupt and had not obtained his certificate, was entitled to the benefit of that act within the space of five years after such discharge or declaration of bankruptcy, unless three fourths in number and value of the creditors signified their assent, or it was made to appear to the satisfaction of the court that such person had, since his former discharge or declaration of bankruptcy, endeavoured by industry and frugality to pay all just demands upon him, and had incurred no unnecessary expence, and that his subsequent debts had been necessarily incurred for the maintenance of himself and family, or that his insolvency had arisen from misfortune, or from inability to acquire subsistence for himself and family. But this provision is not re-enacted in the present statute.

III. THE PETITION OF THE INSOLVENT.

As soon as a prisoner is in actual custody, he may file his petition; and it should be done within fourteen days after the commencement of such custody, or in country cases within twenty-one days; otherwise the leave of the court must be first obtained.

In such petition (sec. 35) must be stated the time and place of his first arrest in the cause or causes wherein he shall then be detained,—the time of his committment to the prison where he shall then be confined, and if he shall not have been in the same custody from the time of such first arrest, then the means and manner by which the change of custody has taken place,—and also the name or names of the person or persons at whose suit or prosecution such prisoner shall at the time of presenting such petition be detained in custody,—and the amount of the debt or debts, sum or sums of money, and of such costs as aforesaid, so far as the amount of such costs is ascertained, for which he shall be so detained. And such prisoner shall in such petition state whether such prisoner has given notice to the keeper of the gaol or prison in which he shall be confined, of his intention to present the said petition; which notice the said prisoner is hereby required to give in writing to the keeper of such gaol or prison. And such prisoner shall in such petition state, that he is willing that all his real and personal estate and effects shall be vested in the provisional assignee for the time being of the estates and effects of insolvent debtors in England, according to the provisions of this act; and shall pray to be discharged from custody, and to have future liberty of his person against the demands for which such prisoner shall be then in custody, and against the demands of all other persons who shall be or claim to be creditors of such prisoner at the time of presenting such petition. Which petition shall be subscribed by the prisoner, and shall forthwith be filed in the court.

And by the Rules of Court it is ordered, That every petition, in form prepared by the court, shall be signed in the presence of the attorney of the prisoner or creditor petitioning, or of the keeper of the gaol in which the prisoner petitioning shall be confined, and such attorney or keeper shall attest the same accordingly.—Rule 5.

And in all cases there shall be filed with the petition a *certificate from the gaoler* of the day or days and the cause or causes of detainer against the prisoner.—Rule 6.

And with a prisoner's petition shall be filed an *estate paper*, that is, an account in writing, in form prepared by the court, signed by the prisoner, and attested by his attorney (or in country cases by the keeper of the gaol), of all the real and personal estate and effects of such prisoner then in his possession or under his control, stating the value, and, if liable for rent, stating landlord's name and the particulars of his demand, in order that such property may be duly ascertained and given up to the provisional assignee. And the said account shall be signed, attested, and filed in duplicate. And in the cases of persons confined in the prisons of London, Middlesex, or Surrey (excepting the gaol of Kingston-upon-Thames), every such estate paper shall have indorsed thereon a duplicate of the *notice for appraisement* given to the brokers of the court, with the day of leaving the same at their office marked thereon by them or their clerk.—Rule 10.

The retainer of the prisoner's attorney must also be annexed to the petition or other first proceeding in court.—Rule 2.

If the insolvent should not have presented his petition within the fourteen days allowed by the act from the commencement of his imprisonment, or within twenty-one days in country cases, an application must be made to the court for leave so to do. And, by the Rules of Court, every such application must be supported by an *affidavit* of the prisoner in the form prepared by the court, in which shall be stated the degree, profession or trade, and last place of abode of the prisoner—the time of his first arrest in the action wherein he is then detained—and the time of his commitment to the prison where he is then confined; together with a statement of all moneys paid or spent, and of all property spent, sold, made over, assigned, disposed of, or in any manner parted with by him since his first arrest, and in what manner and to whom; and also the cause of his not having sooner presented such petition. And such application shall be made by petition, with the said affidavit and the gaoler's certificate annexed. And there shall also be annexed such account in writing of his estate and effects as is in all cases required by the 10th rule of the court to be filed with the petition; which account shall be verified by the said affidavit. And on such application being granted, the duplicate of the said account shall be delivered to the officer of the court at the time of filing the petition. The gaoler's certificate will be transferred to the petition.—Rule 11.

If the application be made within three months, the court will generally grant leave upon any reasonable cause being stated; as, that the insolvent was endeavouring to effect a compromise with his creditors, that he is too poor, or was from any other cause unable to comply with the rule; indeed, almost any statement (which *must*

be upon affidavit), showing that the delay was not for the purpose of making away with his property or creating an unnecessary expenditure, will suffice, and the court will grant a rule absolute in the first instance. But if the delay has exceeded three months, the court will require very explicit and precise information as to the cause of it, and will only grant a rule *nisi*, with which the detaining creditor must be served, in order that he may have an opportunity of detecting any mis-statement in the account of property, as well as of receipts and expenditure, which the insolvent is obliged to set forth on these occasions.

The filing of a petition by a person subject to the bankrupt laws is an act of bankruptcy, provided a fiat be issued and he be declared bankrupt before the time advertised for his being brought up for hearing, or within two calendar months from the time of making such order.—§ 39.

IV. COMPULSORY PROCESS ON THE PETITION OF A CREDITOR OR CREDITORS.

If the prisoner shall not, within twenty-one days after his commitment or being charged in execution for any of the causes above recited for which he might voluntarily petition the court for his discharge, satisfy the creditor or creditors at whose suit he shall be so detained or charged in execution, then (by sec. 36) such creditor or creditors may apply by petition to the court in a like summary way for an order vesting the real and personal estate and effects of such prisoner in the provisional assignee according to the provisions of this act.

And (sec. 36) such petition shall be signed by the party or parties so applying. And in such petition shall be stated the time and place of the commitment or charge in execution of such prisoner at the suit of the party or parties so applying, and the amount of the debt or sum of money for which he shall have been so committed or charged in execution. And such petition shall be supported by such evidence, by affidavit or otherwise, of the truth of the matters therein stated, as the court shall think fit to require. And the party or parties presenting such petition shall thereby state, that he or they is or are desirous that such prisoner should be ordered to file a schedule of his property according to the provisions of this act, and should thereupon be brought up before the court, to be dealt with according to the provisions of this act. And such petition, and the evidence in support thereof, shall forthwith be filed in the said court. And the court shall and may require such prisoner to file his schedule, and shall and may cause such prisoner to be brought up to be dealt with according to this act, and all things to be done thereupon as in other cases.

And by the Rules of Court it is ordered, that with the petition of a creditor there shall be filed an *affidavit* of such creditor, stating the accounts between himself and the prisoner, the securities held by him, the benefit accrued from his judgment, and other matters as contained in the form of affidavit prepared together with the petition under direction of the court.—Rule 7.

And, before a vesting order is made on petition of a creditor, there shall be annexed to such petition a *certificate* of the proper officer, that

no prior petition has been filed in the same case since the commencement of the prisoner's custody.—Rule 8.

When a vesting order of the estate of a prisoner has been made on the petition of a creditor, *notice thereof*, together with an *order to file his schedule*, shall forthwith be given to such prisoner, by service of a copy of the same by a messenger of the court. And delivery to the gaoler or other known officer of the prison in which, or in the rules or liberties of which, such prisoner is confined, shall be deemed good service of such notice and order upon the prisoner in such case; which delivery shall be made personally when the gaol is within ten miles from the court house in Portugal street, and by letter (post-paid) when the gaol is at a greater distance.—Rule 9.

V. VESTING ORDER AND PROVISIONAL ASSIGNEE.

Upon the filing of a petition by the prisoner, or on the filing of such petition by a creditor or creditors as aforesaid and the evidence in support thereof, the court is authorized and required (sec. 37) to order that all the real and personal estate and effects of such prisoner, both within this realm and abroad, (except the wearing apparel, bedding, and other such necessities of such person and his family, and the working tools and implements of such prisoner, not exceeding in the whole the value of twenty pounds), and all the future estate, right, title, interest, and trust of such prisoner in or to any real and personal estate and effects within this realm or abroad which such prisoner may purchase, or which may revert, descend, be devised or bequeathed, or come to him, before he shall become entitled to his final discharge in pursuance of this act according to the adjudication made in that behalf; or in case such prisoner shall obtain his full discharge from custody without any adjudication being made by the court, then before such prisoner shall be so fully discharged from custody; and all debts due or growing due to such prisoner, or to be due to him or her before such discharge as aforesaid, shall be vested in the provisional assignee for the time being of the estates and effects of insolvent debtors in England.

And such order shall be entered of record in the same court, and such notice thereof shall be published as the said court shall direct.

And such order, when so made, shall, *without any conveyance or assignment*, vest all the real and personal estate and effects of such prisoner, and all such future real and personal estate and effects as aforesaid, of every nature and kind whatsoever, and all such debts as aforesaid, in the said provisional assignee.

In case the petition of any prisoner shall be dismissed by the court, such vesting order made in pursuance of such petition shall from and after such dismissal be null and void to all intents and purposes; but all acts theretofore done by the provisional assignee, or any person acting under his authority according to the provisions of this act, shall be good and valid.

When such vesting order shall have been made on the petition of a creditor as aforesaid, it shall be lawful for the court, if it shall seem just and right, (but not without proof made to the satisfaction of the court of the consent of the petitioning creditor), to make order declaring

such vesting order to be null and void, and the same shall thereupon be null and void to all intents and purposes.—§ 37.

The filing of a petition by a person subject to the bankrupt laws is an act of bankruptcy, provided a fiat in bankruptcy be issued and he be declared bankrupt before the time appointed by order of the court for his being brought up for hearing, or within two calendar months from the time of such order being made. And a fiat in bankruptcy so issued will have the effect of making void the vesting order, and divesting the estate and effects of the prisoner out of the provisional assignee. § 39. But it is provided (§ 40) that the said order shall nevertheless, together with the petition of the prisoner, if any, remain of record in the court; and the court shall require such prisoner to file his schedule, and shall cause such prisoner to be brought up to be dealt with according to this act, and all things to be done thereupon as in other cases; and the court may appoint other assignees in the same manner as in other cases. And if the prisoner shall obtain his certificate under such fiat in bankruptcy, the rights, powers, title, and interest of the provisional and other assignees appointed under this act in, over, and respecting any property whatsoever remaining to such prisoner after the obtaining of such certificate, or thereafter in any way coming to him, and under or in pursuance of the warrant of attorney to be executed under the provisions of this act, shall, from and after the obtaining of such certificate, be the same as if the vesting order made under this act had been valid at the time of the making thereof. Provided, that nothing herein contained shall be construed to affect the title, rights, and interests of the assignees under such fiat in bankruptcy, or to alter or diminish the effect of any such certificate as aforesaid, but the title, rights, and interests of such last-mentioned assignees, and the benefit of such certificate to the prisoner, shall be the same to all intents and purposes as if this act had not been made.

After the making of such vesting order, (sec. 41) the prisoner shall not be discharged out of custody as to any action, suit, or process for or concerning any debt, sum of money, damages, or claim with respect to which an adjudication can under the provisions of this act be made, by virtue of any supersedeas, judgment of non-pros, or judgment as in the case of a nonsuit for want of the plaintiff proceeding therein.

And in case the prisoner shall, by the consent or default of his detaining creditors, be discharged out of custody without any adjudication being made by the court, all the acts done before such discharge by the provisional or other assignees or other persons acting under their authority, according to the provisions of this act, shall be good and valid; and in such case, or in case such vesting order shall be avoided by any fiat in bankruptcy thereafter issuing against him as hereinbefore provided, no action or suit shall be commenced against such provisional assignee, or against any assignees appointed under this act, nor against any person duly acting under their authority, except to recover any property, estate, money, or effects of such prisoner detained after an order made by the court for the delivery thereof, and demand made thereupon.—§ 44.

And, by sec. 42, it shall be lawful for the provisional assignee to take possession, himself, or by means of a messenger of the court or other

persons appointed by him, of all the real and personal estate and effects of the prisoner, and, if the court shall so order, to sell or otherwise dispose of such goods, chattels, and personal estate, or any part thereof, and of his real estate, according to the provisions hereinafter made with regard to the sale of real estate, and out of the proceeds to defray, in the first place, all such costs and expences of taking possession or of seizing or selling the same as shall be allowed by the court, and to account for the produce of such sale or disposition to the court. And it shall be lawful for the provisional assignee to sue in his own name, if the court shall so order, for the recovering, obtaining, and enforcing of any estates, debts, effects, or rights of any such prisoner.

And the 26th rule of court directs, that the provisional assignee shall in each case, after vesting order made, sell all goods, chattels, and personal estate of the prisoner of which he shall take possession according to the statute, and shall account for the produce to the court.

The provisional assignee does not in practice interfere with the real estate of the prisoner. The provisions of the act relative to the sale of such real estate therefore will be noticed when we come to speak of the assignees appointed on behalf of the creditors.

VI. INSOLVENT'S SCHEDULE, BALANCE SHEET, &c.

Schedule, and Special Balance Sheet.—By sec. 69, every prisoner whose estate shall by an order made under this act be vested in the provisional assignee (whether upon his own petition or on the petition of any creditor) shall, *within the space of fourteen days* next after such order shall have been made, or next after notice in writing of such order having been made shall have been given to him in case such order shall not have been made on his own petition, or within such further time as the court shall think reasonable, deliver in to the court a SCHEDULE, containing a full and fair description of such prisoner, as to his name or names, trade or trades, profession or professions, together with the last usual place of his abode, and the place or places where he has resided during the time when his debts were contracted; and also a full and true description of all debts due or growing due from such prisoner at the time of making such order, and of all and every person or persons to whom such prisoner shall be indebted, or who, to his knowledge or belief, shall claim to be his creditors, together with the nature and amount of such debts and claims respectively, distinguishing such as shall be *admitted* from such as shall be *disputed* by such prisoner;—and also a full, true, and perfect account of all the estate and effects of such prisoner, real and personal, in possession, reversion, remainder, or expectancy; and also of all places of benefit or advantage held by him, whether the emoluments of the same arise from fixed salaries or from fees or otherwise; and also of all pensions or allowances, in possession or reversion, or held by any other person or persons for or on behalf of the said prisoner, or of and from which he derives or may derive any manner of benefit or advantage; and also of all rights and powers of any nature and kind whatsoever, which such prisoner, or any other person or persons in trust for him, or for his use, benefit, or advantage, in any manner whatsoever, shall be seised or pos-

sessed of, or interested in, or entitled unto, or which such prisoner, or any other person or persons in trust for him or for his benefit, shall have any power to dispose of, charge, or exercise for his benefit or advantage; together with a full, true, and perfect account of all the debts at the time of making such order due or growing due to him, or to any person or persons in trust for him or for his benefit or advantage, either solely or jointly with any other person or persons, and the names and places of abode of the several persons from whom such debts shall be due or growing due, and of the witnesses who can prove such debts, so far as he can set forth the same. And the said schedule shall also contain a **BALANCE-SHEET** of so much of the receipts and expenditures of such prisoner, and of the items composing the same, as shall be at any time required by the court in that behalf; and also shall fully and truly describe the wearing-apparel, bedding, and other necessaries of such prisoner and his or her family, and the working-tools and implements of such prisoner, *not exceeding in the whole the value of twenty pounds*, which may be excepted by such prisoner from the operation of this act, together with the values of such excepted articles respectively. And the said schedule shall be subscribed by such prisoner, and shall forthwith be filed in the court, together with all books, papers, deeds, and writings in any way relating to such prisoner's estate or effects, in his or her possession, or under his or her custody or control.

The balance sheet referred to in the foregoing section of the act is called the *Special Balance Sheet*; it forms part of the schedule, and, with it, is sworn to by the insolvent. It must be in the form prepared by the court, and according to the instructions printed thereon, which require,—that the accounts shall in no case begin later than four calendar months before the prisoner's last commitment to custody;—that if he was before that time arrested in any suit which is still continued, it shall begin not later than the time of such arrest;—that if before those periods, but since the commencement of his present embarrassments, any property has gone away from him by sale, assignment, mortgage, distress, execution, or any means other than the ordinary course of trade, the account shall commence so as to include all such transactions;—that the blanks in the description of the Dr. side of the account shall be filled with a date early enough for compliance with the above directions;—that the specific appropriation of each sum received shall be separately shown, where the case admits of it;—that the date of each item in the account shall be given, by stating the day as well as the year, where the same can be ascertained;—that money and other property, which was in possession of the prisoner or his family, or of any other person for his or their benefit, at the time when he was last taken into custody, shall in all cases be made a specific item or items in the account.

Inventory and Valuation of Excepted Articles.—With the schedule must be filed, in all cases, an *inventory of the excepted articles*, with the *valuation* of the same respectively. To which shall be added a *certificate of the appraiser*, signed by him; which certificate, when made by a broker of the court, shall be according to the printed form ordered to be used by them, and in other cases in form following:—

I certify, that I have, on the — day of — been at the late residence of the said prisoner [or, residence of the said prisoner's family, *as the case may be*] at — and have then and there seen, examined, and valued each and every of the above-mentioned articles; and that the said sum of £ — is a just and fair value of the same. I certify also, that there was on the same premises, besides the said articles, the following property: [*Here add a description of such property (if any), and state the representations made concerning it by the insolvent, his family, or any person on the premises.*]

All such appraisements in London or within ten miles thereof shall be made by the brokers of the court; who shall be allowed for completing the same six clear days on notices given from the 28th of October to the 1st of March, and five clear days on notices given during the rest of the year; and they shall have their return ready for delivery to the prisoner or his attorney not later than ten o'clock on the morning following the days allowed for valuation.—Rule 13.

General Balance Sheet.—Besides the special balance sheet included in the schedule, it is ordered by rule 14, That every prisoner shall with his schedule file a *General Balance Sheet*, in form prepared by the court, of his receipts and expenditures from the date of the earliest debt in his schedule up to the time of signing his petition, if the prisoner petitioned, or up to the time of signing his schedule if a creditor petitioned, including all property of every kind, with a description of the same, which he may have had at any time during that period; together with the time when, the person to whom, and the consideration for which any part thereof shall have been disposed of or parted with by him. And in the said general balance sheet reference may be made, for the particulars of any matter, to the special balance sheet contained in the schedule; but in the schedule reference may not be made to such general balance sheet. And the prisoner shall also state in the said general balance sheet the cause of his or her present insolvency, and the amount of debts (if any) still due by him under any prior insolvency or bankruptcy.

This general balance sheet does not form a part of the schedule; the insolvent, therefore, does not swear to it. But he is liable to be examined by the court and the creditors upon every part of it; and he may be required to verify the truth in each particular by reference to books, receipts, or such other evidence as the court may demand. A form is prepared by the court, which contains special printed instructions, to which it is expected that insolvents should adhere. It is required to contain, on the Dr. side, the amount of all the property in the insolvent's possession at the date of the earliest debt on his schedule; the amount of debts since contracted, distinguishing those for which no consideration may have been received, and those which may have been twice entered, as bills of exchange, &c.; the gross profits in each year, distinguishing them as such; and an account of all property received by salaries, gift, legacy, intestacy, marriage, or purchase. On the Cr. side are to be stated the amount of the debts owing to the insolvent, distinguishing those which are set-off to his own—good, bad, or doubtful; the gross amount of rent, taxes, and necessary or ordinary outlays, for the number of years elapsed since the contracting of the earliest debt; losses in trade or upon sale; and extraordinary expenditure.

Every schedule and balance sheet, and every amendment thereto, shall be read over to the prisoner by or in the presence of the attorney named in the retainer before such prisoner shall sign the same; and the balance sheet, and every side of every sheet of the schedule and of any amendment thereof, shall be signed by the prisoner. And such signature shall be attested by the said attorney, and not by any clerk. And such reading over, signature, and attestation shall be verified by the affidavit of such attorney to be filed with the schedule; for preparing and swearing which affidavit no charge shall be made. Provided, that in case of the illness of such attorney, or of his absence from London or the place where he practises, the matters aforesaid, whether concerning the petition or schedule, may be done by some other attorney of the court; in which case the cause thereof shall be stated in such attestation, and also in such affidavit as aforesaid.—Rule 15.

If the schedule be not filed *within fourteen days* from the filing of the prisoner's petition, or from the notice to file it on a creditor's petition, then application must be made to the court for leave so to do; which application must (by rule 16) be supported by the affidavit of the prisoner, in form prepared by the court, in which shall be stated the cause of not having filed such schedule in due time. And if the prisoner shall have filed his petition without a special application to the court, the *said* affidavit shall also contain such a statement concerning the arrest, commitment, and property of the prisoner as is required in an affidavit made on application for leave to file his petition.

In every case to be heard by a commissioner on circuit, or by the justices in Berwick-upon-Tweed, *where the petition was filed by a creditor*, an office copy of such petition, with the affidavit in support thereof, shall be annexed to the schedule, to be lodged therewith with the clerk of the peace or other person appointed to receive the same according to the statute. And if the prisoner shall have obtained leave to file petition or schedule, or both, on affidavit made for such purpose, an office copy of such affidavit or affidavits shall be annexed in like manner.—Rule 17.

Books of Account, &c.—With the schedule are also to be filed all books and papers of account, and all deeds and other documents in the possession, power, or control of the insolvent, relating to his estate and effects. If he should not have any books of account, deeds, or other documents, he must so state the fact in his schedule; and if they happen to be in the possession of other persons from whom he cannot procure them, he must fully set forth in his schedule the names and residences of such persons, and by what means they had fallen into their hands, and what claim or lien the holders may have upon them.

In country cases, the schedule is to be prepared in duplicate; and every insolvent who obtains an order for hearing before a commissioner on circuit or before justices of the peace, shall, within ten days after such order issued, or on such earlier day as shall be named in such order, cause the duplicate of his petition (if a petition shall have been presented by the prisoner) and a duplicate of his schedule, and all books, papers, and writings relating thereto in his possession or power, to be lodged with the clerk of the peace of the county &c. or his deputy, or the town clerk or other officer of the borough &c.—§ 106.

The schedule is an instrument of great importance, and considerable care is necessary in its preparation. All the insolvent's names, aliases (if any), and misnomers,¹ as well as all his trades, businesses, or professions, places of abode or lodging, during all the time he has been in debt, should be inserted; and if he were formerly in partnership, or if his wife carried on any trade or business distinct from his, such facts must be stated. Care should be taken that all his debts and liabilities are set forth; for if any be omitted, he will be liable to the payment of them after his discharge. They should be set down at the full amount; and where that is not precisely known, the word *about* should be written, and the outside amount stated. The holders of all bills of exchange and promissory notes on which he is liable should be inserted so far as they are known; though, if not known, he is protected from any after liability by the 75th section. It is, however, his duty to make diligent inquiry on this head, and to insert the bills in his schedule, with a statement that he believes them to be in the hands of the persons to whom he gave them. The schedule should also contain a correct account of all debts owing to the insolvent, stating whether *good*, *bad*, or *doubtful*, with such information as will enable the assignees to sue for them. And where there are cross demands, the party must be entered both as creditor and debtor, and the word *set-off* written under the amount. Even property that has been taken possession of by the provisional assignee must nevertheless be fully entered in the schedule.

If the insolvent, either wilfully or otherwise, omit items from his schedule which ought to be set forth in it, the least he can expect is an adjournment in order to amend it, when he will have to re-advertise, and re-serve his creditors with notices. But if he wilfully and fraudulently, with intent to defraud his creditors, omit from his schedule any effects or property whatsoever, or retain or except thereout as wearing apparel, bedding, working tools, and implements, or other necessities, property of greater value than twenty pounds, then, by sect. 99, every such person so offending, and any person aiding and assisting him to do the same, shall, upon being thereof convicted by due course of law, be adjudged guilty of a misdemeanor; and thereupon it shall be lawful for the court before whom such offender shall have been so convicted, to sentence such offender to be imprisoned and kept to hard labour for any period not exceeding three years. And in the indictment or information for any offence under this act it shall be sufficient to set forth the substance of the offence, without setting forth the petition, vesting order, appointment of assignees, balance sheet, order for hearing, adjudication, order of discharge or remand, or any warrant, rule, order, or proceeding of the court, except so much of the prisoner's schedule as may be necessary for the purpose.

If he have been before bankrupt or insolvent, it should state the fact, and the amount of debts unsatisfied.

¹ If an insolvent has been sued by any other name than his own proper name, it is absolutely requisite to state it in the petition, schedule, and all the other proceedings; as, for instance, "John Davis, sued by the name of James Davis;" or if he has gone by a different name than his real one, his proper

name must be stated with the *alias*, as, "John Davis, otherwise George Giles, sued by the name of James Davis;" or if he was sued with any other person, it must be so stated, as "John Jones (sued with one Thomas Jackson)," &c.

And by sec. 100, if any prisoner or other person shall wilfully forswear and perjure himself in any oath to be taken under this act, and be convicted thereof, he shall suffer such punishment as may by law be inflicted on persons convicted of wilful and corrupt perjury. And in all cases wherein by this act an oath is required, the solemn affirmation of any person being a Quaker or other person by law allowed to affirm shall be taken in lieu thereof; and every person making such affirmation who shall be convicted of wilful false affirmation, shall suffer the same penalties as are inflicted upon persons convicted of wilful and corrupt perjury.

The schedule, with the necessary accompanying documents, is filed at the Rule and Order office; from whence, on the second day after filing it, exclusive of Sunday, the order for hearing will be issued.

VII. ORDER FOR HEARING, AND NOTICE TO CREDITORS.

After the schedule has been filed by the prisoner, the court will forthwith appoint a time and place for his being brought up to be dealt with according to the provisions of the act. And (sec. 70) the time so appointed shall in no case be more than four calendar months after the date of the appointment. And where the prisoner shall be in any gaol within the counties of Middlesex or Surrey, or the city of London, or borough of Southwark, the court shall order such prisoner to be brought before the court; and where such prisoner shall be in any other gaol in England or Wales (except in the town of Berwick-upon-Tweed), the court shall order him to be brought before one of the commissioners on his circuit, at such assize or other town or place within the county or county of the city or town wherein such gaol shall be situate as may be directed by order of the court; and where the prisoner shall be in any gaol within the town of Berwick-upon-Tweed, the court shall order him to be brought before the justices of the peace for the said town, in open court at their general or general quarter sessions of the peace, or some adjournment thereof.

Every order for hearing by a commissioner on circuit (the circuit appointments having been gazetted), also every order for hearing by justices of the peace, shall be ready for delivery at the opening of the office on the second day (exclusive of Sunday) after the filing of the schedule; but the same shall not be issued before that time. And in every such case the duplicate of the petition and schedule shall be given out with the order for hearing; and the warrant of attorney shall be prepared and ready to be given out on the seventh day after the issuing of such order. Provided, that no order for hearing by a commissioner on circuit shall be issued later than the twenty-eighth day before the day notified in the Gazette for the attendance of the commissioner; and no order for hearing by justices of the peace shall be issued later than the twenty-eighth day before the day to be appointed for such hearing.—Rule 18.

Notice to Creditors—The court (sec. 71) shall cause notice of the making of every such vesting order, and of the filing of every such schedule, and of the time and place so appointed for such prisoner to be brought up, to be given, by such means as the court shall direct, to

¹ But now, "not later than the *twenty-first* day."—Rule of Court, 9th Jan. 1845.

the creditor or creditors at whose suit such prisoner shall be detained in custody, or the attorney or agent of such creditor, and to the other creditors named in the schedule of such prisoner, and resident within the United Kingdom, and whose debts shall amount to the sum of *five pounds*, and to be inserted in the London Gazette, and also (if the court think fit) in the Edinburgh and Dublin Gazettes or either of them, and also in such other newspapers as the court shall direct.

And by the 20th Rule of Court it is ordered, That notice of the making of the vesting order and filing of schedule, and of the time and place appointed for the prisoner to be brought up, shall be given to creditors and persons claiming to be creditors, whether such debts are admitted or disputed in the schedule, in the following manner:—

- 1 In all cases, by *personal service* of a copy of the Order for Hearing, made *twenty-one¹ days* at least before the day of hearing, upon every detaining creditor, and every creditor for five pounds or more, resident or carrying on business in *London or within ten miles thereof*; also upon the attorney or agent (resident as aforesaid) of every detaining creditor suing by attorney.—N.B. Delivery of the said copy to the wife, son, daughter, clerk, or servant of the party at the usual place of abode or business of such party, or, where the party is assignee of a bankrupt, to the solicitor of such assignee or his clerk or servant at the usual place of business of such solicitor, shall be deemed equivalent to personal service.
- 2 In all cases, by sending *twenty-three² days* at least before the day of hearing, a copy of the Order for Hearing *by the general post*, rightly and methodically addressed, and with the proper post town thereon, to every detaining creditor and every creditor for five pounds or more resident in England *elsewhere than as above mentioned*, or in Scotland or Ireland; and to the attorney or agent (resident more than ten miles from London) of every detaining creditor suing by attorney, or by such personal service as is above mentioned made upon any such creditor or attorney.—Letters to the attorneys or agents of detaining creditors, and to detaining creditors suing in person, must be post-paid.—It is not required that notice should in any case be given both to the attorney and agent.
- N.B. Where the sheriff has failed to communicate a detainer to the gaoler before the issuing of the order for hearing, the plaintiff will not be deemed a detaining creditor within the above rule.
- 3 In all cases by advertisement published in the London Gazette *twenty-one¹ days* at least before the day of hearing.
- 4 In cases where the prisoner is described in the schedule as having resided in Scotland or Ireland, and also in cases where four or more of the creditors of the prisoner are resident in Scotland or Ireland, by advertisement published *twenty-one¹ days* at least before the day of hearing in the Edinburgh or Dublin Gazette, as the case may be.
- 5 In all cases where the prisoner is described in the schedule as having resided in some county in England other than London, Middlesex, and Surrey, by advertisement published *eighteen² days* at least before the day of hearing in some newspaper usually circulated in the neighbourhood of the prisoner's last usual place of residence in such county. This rule applies to each such county, if more than one in the description.
- 6 In cases to be heard by a commissioner on circuit, or by justices in Berwick-upon-Tweed, by advertisement published *eighteen² days* at least before the day of hearing in some newspaper most usually circulated in the county or place where the case is ordered to be heard.
- 7 In every case to be heard by a commissioner on circuit or by justices, of a prisoner removed under the act 7 Geo. IV. c. 57, § 65, or the act 1 & 2 Vict. c. 110, § 94, or by the court, of a prisoner whom his creditor, after order obtained, has failed to remove, notice of the hearing shall be given by advertisement published ten days at least before the day of hearing in the London Gazette; and also, where on an original hearing notice in any newspaper in England would be required, by advertisement published in such newspaper seven days at least before the day of hearing; and also by service of the order for hearing seven days at least before the day of hearing upon all detaining creditors, and all creditors (if any) who entered notice of opposition for the former hearing; **UNLESS in any case the court shall otherwise direct by special order concerning the notice in such case.**
- 8 Where at the hearing notices shall appear to have been served on any creditor not in sufficient time, and any other or further hearing of the case shall be appointed

¹ Now *fourteen* days.—Rule of Court, Jan. 1845.

² Now *sixteen* days.—*Ib.*

³ Now *eleven* days.—*Ib.*

for that or any other cause at a subsequent time, notice of such last-mentioned appointment shall be given to the said creditor in such time as will, together with the time of giving the former notice, complete the regular period of twenty-one or twenty-three days, as the case may be; which being done, such creditor shall be deemed to have had due notice. Provided, that such second notice shall in no case be effectual if served less than seven days before the day of hearing in cases requiring personal service, and nine days in cases of service by the post; nor unless the prisoner shall consent to waive notice of opposition to be made at such hearing: and that notice for the original hearing shall likewise be of no effect, if served less than seven and nine days in such cases respectively.

9. Where the service has been defective, and the creditor shall appear against the prisoner at the hearing, he shall be deemed to have had due notice, unless the court, commissioner, or justices shall otherwise direct.—*Rule of Court, 20.*

And by Rule 21 it is ordered, that services shall be made, and proof of notice given, and affidavits made and filed, in manner following:—

1. No proof shall be required, at the hearing, of advertisement in the London Gazette, which is ordered to be inserted always by the officer of the court, and by no other person.
2. Proof of all other advertisements shall be made by production of the Gazette or newspaper in which the same were published.
3. Proof of all services, whether personal or by post, shall be made by affidavit to the satisfaction of the court, commissioner, or justices.
4. All personal services in London and within ten miles thereof shall be made by the Messengers of the court, who shall make affidavit of the same.—The copies of orders for hearing to be served, duly addressed, and numbered according to the number in the schedule, must be delivered to them three clear days at the least (exclusive of Sunday) before the last day of service in cases for original hearing, and one clear day at the least (exclusive of Sunday) before the last day of service in cases for adjourned hearing; and at the same time shall be delivered the original Order for Hearing, together with a list in duplicate of persons to be served, the entries in which lists shall correspond with the directions written on the notices.
5. All services by the post shall be made by the Messengers of the court, who shall make affidavit of the same.—The copies folded, addressed, and numbered according to the number in the schedule, must be delivered to them one day at least before the last day of service, together with a list in duplicate (separate from the lists for personal service) the entries in which shall correspond with the directions on the letters.
6. In cases to be heard by the court, all such affidavits and advertisements as aforesaid (excepting those in the London Gazette) shall be filed at the office eight days at least before the day of hearing in original cases, and two clear days at least (exclusive of Sunday) before the day of hearing in adjourned cases.
7. In cases to be heard on circuit, all such affidavits and advertisements as aforesaid (excepting those in the London Gazette) shall be lodged, between the hours of twelve and four, two days before the day notified in the London Gazette for the attendance of the commissioner, and in cases to be heard by justices at Berwick, between the same hours, two days before the day of hearing, at the office of the clerk of the peace or his approved deputy or other person appointed for that purpose by the court according to the act 1 & 2 Vict. c. 110, § 106, in the town or place at which such attendance or hearing as aforesaid is appointed.

The requisite copies of the order for hearing, to be served on the creditors, having been made by the insolvent's attorney, duly addressed, and numbered, are delivered, with the original and the lists of creditors to be served, at the Messengers' Office in Lyons Inn.

When there is a creditor above the sum of five pounds whose residence cannot upon strict inquiry be discovered, affidavit of such search is made by the messenger, and the court will dispense with the service.

Where, however, without any just reason for the omission, a creditor has not been served, immediate application should be made to such creditor, that he consent to the insolvent's being heard notwithstanding the defect in the notice. This consent should be in writing, and the signature to such consent proved by affidavit: both should be filed with the other documents.

VIII. DISCHARGE OF INSOLVENT ON BAIL.

It has been already seen, that no prisoner can be entitled to the benefit of the act who is not at the time of filing his petition in actual custody within the walls of a prison. But, after an order has been made for his being brought up for hearing, it is provided by sect. 38, that if it shall appear to the satisfaction of the court, by the oath or affidavit of a physician, surgeon, or apothecary, and such other evidence as the court may require, that such prisoner cannot continue to reside within the walls of any such prison without serious injury to the health of such prisoner, or that, for the sake of the health of the prisoners in general, it is necessary that the number thereof within the walls of any such prison should be reduced, it shall be lawful for the court to dispense with such actual custody of any such prisoner within the walls as is hereinbefore mentioned: provided, that if any such prisoner having obtained such dispensation shall go beyond the rules and liberties in which he shall in pursuance thereof be confined, such prisoner shall thereby be deprived of all benefit of this act.

And it is also further provided, (sec. 38) that after any order shall have been made under this act, directing any insolvent to be brought up in order to be dealt with according to the provisions of this act, it shall be lawful for the court, if it shall think fit, and on such notice to the detaining creditor or creditors as the said court shall deem proper, to direct such insolvent to be discharged out of custody on his finding two sufficient sureties to enter into a recognizance to the provisional assignee in such sum as the court shall think fit, with a condition that such insolvent shall duly appear at the time and place fixed for the hearing of such insolvent, and on every adjourned hearing, and abide by the final judgment of the court, or a commissioner thereof on his circuit, or such justices as hereinafter mentioned, and on such other terms (if any) as the court shall think fit to impose, and to issue a warrant, directed to the gaoler, ordering the discharge of such insolvent from custody accordingly. And after such discharge such insolvent shall be free from arrest or imprisonment by any creditor whose debt shall be specified in the schedule filed by such insolvent, until the time appointed for his hearing, and for such further time (if any) as the court shall, by indorsement on such order, from time to time appoint. Provided nevertheless, that in case any insolvent so discharged out of custody shall not duly appear at the time and place fixed for the hearing or any adjourned hearing of such insolvent (not being prevented by illness or other lawful impediment, to be allowed of by the court), the recognizance so entered into shall be forfeited, and the amount secured thereby shall be recoverable in a summary way by distress and sale of the goods and chattels of such sureties as the court shall by their order direct; and the amount so recovered shall be applied for the benefit of the creditors of such insolvent, in like manner as if the same were part of his estate and effects. And the said court may also issue a warrant, authorizing any person or persons therein named to apprehend and arrest such insolvent, and deliver him into the custody of the gaoler or keeper in whose custody such prisoner was at the time when he was so discharged as aforesaid; and such gaoler or keeper is hereby

required to receive such prisoner again into his custody ; and all detainers which were in force against him at the time of such discharge, or which shall have since been duly lodged against him, shall thereupon be deemed to be in force. Provided further, that any insolvent so discharged out of custody as aforesaid shall, on his appearing before the said court or commissioner or justices, be deemed and considered, for all the purposes of this act, in the custody in which he was at the time he was so discharged.

A prisoner desiring to be discharged on sureties till the hearing must apply (which he may do as soon as his schedule is filed) in the office of the court (Town or Country, as the case may be) and deliver the names &c. of necessary parties entered in the proper printed form, exhibiting at the same time the affidavits of the proposed sureties ; he will thereupon receive a form of notice to be served on the detaining creditor and the proposed sureties, containing the appointment for entertaining such application, with instructions by the court. Where the hearing is to be by the court in London, the prisoner must attend the court when such application is entertained, and the gaoler will be ordered to bring him before the court accordingly.—Rule 19.

IX. OF THE ASSIGNEES.

At any time after the making the vesting order, the court is empowered (sec. 45) to appoint a proper person or persons to be assignee or assignees of the estate and effects of the prisoner for the purposes of this act ; and when such assignees shall have signified to the court their acceptance of the appointment, the estate, effects, rights, and powers of the prisoner vested in the provisional assignee as aforesaid shall immediately, *by virtue of such appointment, and without any conveyance or assignment*, vest in the said assignees, in trust for the benefit of the creditors in respect of or in proportion to their respective debts, according to the provisions of this act. And every such appointment shall, after such acceptance thereof, be entered of record of the court ; and such notice thereof shall be published as the court shall direct. And every person so appointed assignee shall be deemed to be an officer of the court, and shall be liable as such to the control thereof. Provided always, that it shall be lawful for the court to direct any fee or remuneration for the performance of duties in getting in and distributing the estate of any insolvent debtor, whether by any assignee, or by the provisional assignee in case of such distribution being effected without the appointment of any other assignee, which shall not exceed the rate of five per centum on the sum received as the produce of such estate.

And by Rule 25 it is declared, that assignees will be appointed, if expedient, by the court or a commissioner, at any time after vesting order made. In a case heard at Berwick, a nomination of the justices will be attended to. Parties applying for an appointment of assignees are at liberty to take into the office such vouchers as they may think fit, shewing the wish of a majority or other portion of the creditors ; and appointments will be made on proof of the desire of such majority, unless some cause to the contrary appear in any case.

A person petitioning to be appointed assignee must state, by affidavit, whether he has been appointed assignee in any other case; and, if so, whether he has filed his account in such case, giving the number of the case.

The necessary papers should be left with the provisional assignee for examination, and for his certificate that no previous assignee has been appointed; and thereupon the confirmation of the nomination will be made or refused.

The appointment when made will be entered of record by the provisional assignee, who will also gazette the same.

The court, in its anxiety to protect the interests of the general body of creditors, will never, except under very special circumstances, or at the particular desire of the other creditors, appoint a near relative of the insolvent to be assignee; nor will the court in general appoint a creditor who has a mortgage or other available security for his debt, or whose interest shall appear to be opposed to or distinct from that of the body of creditors, unless he shall consent to waive the benefit of his security, and place himself upon an equality with the rest of the creditors.

The appointment of assignees being made by the court and accepted by the parties, all the prisoner's property, real and personal, of every species and kind whatever, which by the vesting order was previously vested in the provisional assignee, becomes vested in such assignees as fully and effectually as if it had originally vested in them by such vesting order. But this relation back to the time of the vesting order is not to affect the validity of whatever acts may have been done in the meantime by the provisional assignee.

A copy of the vesting order, or of the appointment of assignees, made upon parchment, with a certificate of the provisional assignee or his deputy indorsed thereon and sealed with the seal of the court, is evidence of the title of such provisional or other assignees respectively in all courts and places. And where by any law now in force any conveyance or assignment of the real or personal property of an insolvent debtor would be required to be registered, enrolled, or recorded in any registry office or place, such a certified copy of the vesting order as above mentioned, and a like certified copy of the appointment of the assignees (if any such appointment shall have been made) shall be so registered &c. And unless such certified copies be registered within two months after the date of such order and appointment respectively as regards the United Kingdom, and within twelve months as regards all other places, the title of any purchaser for a valuable consideration without notice of such order or appointment, who shall have previously registered his purchase deed, shall not be invalidated.—§ 46.

The assignees shall, with all convenient speed after their appointment, use their best endeavours to receive and get in the estate and effects of the prisoner, and shall with all convenient speed make sale of all such estate and effects.—§ 47.

Sale of Real Estate.—If the prisoner be interested in or entitled to any real estate, either in possession, reversion, or expectancy, such real estate, within the space of six months after the appointment of assignees, or within such other time as the court shall direct, shall be

sold by public auction, in such manner and at such place or places as shall, thirty days before the sale, be approved, in writing under their hands by the major part in value of the creditors who shall meet together on notice of such meeting published fourteen days previous thereto in the London Gazette, and also in some daily newspaper printed and published in London or within the bills of mortality, if the prisoner, before going to prison, resided in London or within the bills of mortality, and if such prisoner resided elsewhere within the United Kingdom, then in some printed newspaper which shall be generally circulated in or near the place where he resided at the time aforesaid.

And in case the prisoner shall be entitled to any copyhold or customary estate, a certified copy of such vesting order as aforesaid, and a like certified copy of the appointment of assignees, shall be entered on the court rolls of the manor; and thereupon it shall be lawful for the assignees to surrender or convey such copyhold or customary estate to any purchaser, as the court shall direct; and the rents and profits thereof shall be in the meantime received by such assignees for the benefit of the creditors, without prejudice nevertheless to the lord of the manor.

With respect to the voting of creditors, it is enacted by sect. 52, that in all matters wherein creditors shall vote, or wherein their assent or dissent shall be exercised in pursuance of or in carrying into effect this act, every creditor shall be accounted such in respect of such amount only as upon an account fairly stated between the parties, after allowing the value of mortgaged property and other such available securities and liens, shall appear to be the balance due: and all disputes arising in such matters concerning any such amount shall, upon application duly made, be examined into by the court, or any commissioner on his circuit, who shall have power to determine the same, and, if it seem fit, to refer the examination thereof to an officer of the court, or to an examiner duly appointed in pursuance of this act. Provided always, that the amount in respect of which any such creditor shall vote in any such matter shall not be conclusive of the amount of his debt for any ulterior purposes in pursuance of the provisions of this act.

In some cases the court may direct a conveyance without a meeting of creditors. Sect. 68, reciting that it may often happen that some interest in lands and tenements has or may become vested in the provisional assignee, which appears to be of no value to creditors, but nevertheless it may be expedient that the provisional assignee should make or join in making some conveyance or assignment of the same, and that the same should be done without the expence attending advertisements and meetings of creditors, it is therefore enacted, That it shall be lawful for the court, at any time after the day gazetted for the bringing up of the prisoner, if no person other than the provisional assignee shall have been appointed assignee, and if it shall appear fit, upon such notice given by advertisement or otherwise to the creditors or any of them as the court shall in any case direct, to order the provisional assignee to make or join in making any conveyance or assignment of any such interest as to the court may appear just and reasonable, without observing the provisions of this act as to the sale of real property by the provisional or other assignees.

In some cases the court may restrain the immediate sale of certain property, and raise money by way of mortgage. Sect. 48, after reciting that persons whose estates may by an order under this act have been vested in the provisional assignee may be entitled to annuities for their own lives or other uncertain interests, or to reversionary or contingent interests, or to property under such circumstances that the immediate sale thereof may be very prejudicial to them, and deprive them of the means of subsistence which they might otherwise have after payment of their debts, and it may be proper in some cases to authorize the raising of money by way of mortgage instead of selling the property, enacts, That in all such cases it shall be lawful for the court to take into consideration all the circumstances affecting the property of any such person, and if it appear that it would be reasonable to make any special order touching the same, it shall be lawful for the court so to do, and to direct that such property as it may be expedient not to sell, or not to sell immediately, shall not be sold, and from time to time to order and direct in what manner such property shall be managed for the benefit of the creditors until the same can be properly sold, or until payment of all the creditors shall have been made, and to make such orders touching the sale or disposition of such property as shall seem reasonable, considering the rights of the creditors to payment of their demands, and the future benefit of such person after payment of his debts, and upon such terms and conditions, with respect to the allowance of interest on debts not bearing interest, or other circumstances, as shall seem just; and if it shall appear that the debts can be discharged by means of money raised by way of mortgage on any property, instead of raising the same by sale, it shall be lawful for the court so to order, and to give all necessary directions for such purpose, and generally to direct all things proper for the discharge of the debts of such person in such manner as may be most consistent with the interests of such person in any surplus of his effects after payment of his debts.

Powers.—All powers vested in any prisoner whose estate shall by an order under this act have been vested in the provisional assignee, which he might legally execute for his own benefit (*except the right of nomination to any vacant ecclesiastical benefice*), shall be vested in the assignees by virtue of this act, to be by them executed for the benefit of all the creditors under this act, in such manner as the prisoner might have executed the same.—§ 49.

Leases, or Agreements for Lease.—In all cases in which the prisoner shall be entitled to any lease or agreement for a lease, and his assignees shall accept the same as part of his estate and effects, he shall not be or be deemed liable to pay any subsequent rent to which his discharge, adjudicated according to this act, may not apply, nor be in any manner sued after such acceptance in respect or by reason of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained. Provided, that in all such cases as aforesaid it shall be lawful for the lessor, or person agreeing to make such lease, his heirs, executors or administrators, or assigns, if the assignees shall decline, upon being required so to do, to determine whether they will or will not accept such lease or agreement for a lease, to apply to the court, praying that they may either so accept the

same or deliver up such lease or agreement for a lease, and the possession of the premises demised or intended to be demised; and the court shall thereupon make such order as in all the circumstances of the case shall seem just, which shall be binding on all parties.—§ 50

Assignees may sue in their own Names, &c.—It shall be lawful for the assignees to sue, from time to time as there may be occasion, in their own names, for the recovering, obtaining, and enforcing of any estate, effects, or rights of the prisoner, but in trust for the benefit of the creditors, according to the provisions of this act; and to give such discharges to any persons who shall be indebted to such prisoner as may be requisite; and to make compositions with any debtors or accountants where the same shall appear necessary, and take such reasonable part of any debts as can upon such compositions be gotten in full discharge of such debts and accounts; and to submit to arbitration any difference or dispute between them and any persons on account of any thing relating to the estate and effects of the prisoner.

But it is expressly provided, that no such composition or submission to arbitration shall be made, nor any suit in equity be commenced, by such assignees, without the consent in writing of the major part in value of the creditors who shall meet together pursuant to a notice of such meeting to be published at least fourteen days before such meeting in the London Gazette and also in some newspaper most usually circulated in the neighbourhood of the place where the prisoner had his last usual residence before his imprisonment, nor without the approbation of the court or of one of the commissioners thereof.—§ 51.

And whenever any assignee shall die or be removed, or a new assignee shall be appointed, no action at law or suit in equity shall be thereby abated, but the court in which the action or suit is depending may, upon the suggestion of such death or removal and new appointment, allow the name of the surviving or new assignee to be substituted in the place of the former; and such action or suit shall be prosecuted in the name or names of the surviving or new assignees, in the same manner as if he or they had originally commenced the same.—§ 53.

Stock in the Public Funds &c.—If the prisoner shall, at the time of filing the petition (whether such petition shall have been preferred by himself or by any creditor as aforesaid), or at any time before he shall become entitled to his final discharge according to this act, have any government stocks, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, standing in his own name in his own right, it shall be lawful for the Court for Relief of Insolvent Debtors, whenever it shall deem fit so to do, to order all persons whose act or consent is thereto necessary to transfer the same into the names of such assignees; and all such persons whose act or consent is so necessary as aforesaid are hereby indemnified for all things done or permitted pursuant to such order.—§ 54.

Income of a Beneficed Clergyman.—Nothing in this act shall extend to entitle the assignees of the estate and effects of any prisoner being a beneficed clergyman or curate, to the income of his benefice or curacy for the purposes of this act. Provided always, that it shall be lawful for the assignees to apply for and obtain a sequestration of the profits of any such benefice for the payment of the debts of the prisoner; and

the order appointing assignees in pursuance of this act shall be a sufficient warrant for the granting of such sequestration, without any writ or other proceedings to authorize the same; and such sequestration shall accordingly be issued, as the same might have been issued upon any writ of *levari facias* founded upon a judgment against such prisoner.—§ 55.

Pay or Pension of Military, Naval, and other Officers.—Nothing in this act shall extend to entitle the assignees of the estate and effects of any prisoner being or having been an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the service of her majesty in the customs or excise or any civil office or other department whatsoever, or being or having been in the naval or military service of the East India Company, or an officer or clerk or otherwise employed or engaged in the service of the court of directors of the said company, or being otherwise in the enjoyment of any pension whatever under any department of her majesty's government or from the said court of directors, to the pay, half-pay, salary, emoluments, or pension of any such prisoner for the purposes of this act. Provided always, that it shall be lawful for the court to order such portion of the pay, half-pay, salary, emoluments, or pension of any such prisoner as, on communication from the court to the secretary at war, or the lords commissioners of the admiralty, or the commissioners of the customs or excise, or the chief officer of the department to which such prisoner may belong or have belonged, or under which such pay, half-pay, salary, emoluments, or pension may be enjoyed by such prisoner, or the said court of directors, he or they may respectively, under his or their hands, or under the hand of his or their chief secretary or other chief officer for the time being, consent to in writing, to be paid to such assignees, in order that the same may be applied in payment of the debts of such prisoner. And such order and consent being lodged in the office of her majesty's paymaster-general, or of the secretary of the said court of directors, or of any other officer or person appointed to pay the same, such portion of the said pay, half-pay, salary, emoluments or pension as shall be specified in such order and consent shall be paid to the assignees until the court make order to the contrary.—§ 56.

Goods of which the Insolvent was reputed Owner.—If the prisoner, at the time of his arrest or other commencement of his imprisonment, had, by the consent and permission of the true owner thereof, in his possession, order, or disposition any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the same shall be deemed to be his property, so as to become vested in the provisional assignee. Provided, that no transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt, either by way of mortgage or assignment, duly registered according to the 3 & 4 Wm. IV. c. 55, intituled "An act for the registering of British vessels," shall be invalidated or affected by reason of such possession, order, or disposition thereof.—§ 57.

Landlord's Claim for Rent.—No distress for rent made and levied after the arrest or other commencement of the imprisonment of any person whose estate shall by any such order have been vested in the provisional assignee, upon the goods or effects of any such person, shall be available for more than one year's rent accrued prior to the making

of such order. But the landlord or party to whom the rent shall be due shall and may be a creditor for the overplus of the rent due, and for which the distress shall not be available, and entitled to all the provisions made for creditors by this act.—§ 58.

Fraudulent Conveyances.—If any prisoner shall, before or after his imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over shall be deemed to be fraudulent and void as against the provisional or other assignee. Provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over shall be so deemed fraudulent and void unless made within three months before the commencement of such imprisonment, or with the view or intention, by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the court for his discharge from custody under this act.—§ 59.

Warrants of Attorney, &c.—The act 3 Geo. IV. c. 39, intituled “An act for preventing frauds upon creditors by secret warrants of attorney to confess judgment,” shall extend to the provisional or other assignee of every prisoner whose estate shall, after the expiration of twenty-one days next after his execution of such warrant of attorney or giving such cognovit actionem as therein mentioned be vested in the provisional assignee by virtue of this act, as if the said act had been expressly herein enacted; and every such warrant of attorney and judgment and execution thereon, and every such cognovit actionem and judgment entered up thereon and execution taken out on such judgment, as are declared by the last-mentioned act to be fraudulent and void against the assignees mentioned therein, shall be deemed equally fraudulent and void against the provisional or other assignee appointed under this act, who shall be entitled to recover back and receive for the use of the creditors, all monies levied and effects seized under any such judgment or execution.—§ 60.

And in all cases where any prisoner whose estate shall have been vested in the provisional assignee shall have executed any warrant of attorney to confess judgment, or shall have given any cognovit actionem or bill of sale, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself of any execution issued upon any judgment obtained upon such warrant of attorney or cognovit actionem, or of such bill of sale, either by seizure and sale of the property of the prisoner or any part thereof, or by sale of such property theretofore seized or any part thereof. But any person to whom any sum of money shall be due in respect of any such warrant of attorney, cognovit actionem, or bill of sale, shall and may be a creditor for the same under this act.—§ 61.

Assignees to account, pay Dividends, &c.—The provisional assignee shall keep accounts from day to day (the same to be of record in the court) of all moneys received and paid, and of every thing done by him and under him in the matter of every estate of any prisoner

vested in him, and shall make oath of the truth of every such account as often as he shall be duly required so to do. And every other assignee, at the end of three months at the farthest from the time of his appointment, or sooner if the court shall direct, and so from time to time as occasion shall require or the court direct, shall make up an account of such estate, and make oath in writing, before any person before whom affidavits are by this act directed to be sworn, that such account contains a fair, just, and particular account of the estate and effects of the prisoner got in by or for such assignee, and of all payments necessarily made or deducted therefrom, and of all expences sought to be allowed in respect thereof, up to the time of filing such account, or to some ulterior time if need be. Which account so sworn, together with a minute concerning the probable assets of the estate (if any), shall be filed by the proper officer of the court. And thereupon, and at the time of so filing the same, an appointment shall be made for the examination of such accounts, and for taxation of all costs and charges claimed by such assignee; and an examination shall be had of the proceedings of the provisional assignee or other assignees, as the case may be, and of all the matters of his or their account, by the court or a commissioner thereof, or an examiner duly appointed, before any such assignees shall proceed to a dividend. And if upon such examination there shall appear to be in the hands of such assignees any balance wherewith a dividend may be made, proceedings shall be had forthwith under the direction of the court for making such dividend, and also, when it shall appear necessary, for correcting and ascertaining the list of creditors entitled to receive the same. And notice of any meeting ordered to be held for such ascertaining of debts or for declaring a dividend thereupon, or for both purposes, shall be given for such time and place and in such manner as the court shall at any time or in any case direct.

If such dividend shall be made *before adjudication*, it shall be made amongst the creditors who shall ~~prove~~ their debts in pursuance of an order of the court to be made in that behalf; and in case it shall be made *after adjudication*, the same shall be made amongst the creditors whose debts shall be admitted in the schedule, and amongst such other creditors (if any) who shall prove their debts in manner aforesaid, in proportion to the amount of the debts so proved or so admitted and proved respectively, as the case may be.

If the prisoner, or any creditor or assignee, shall object, in whole or in part, to any debt tendered to be so proved as aforesaid, or to any debt mentioned in the schedule of such prisoner; or if any person whose demand is stated in such schedule, but is not admitted therein to the extent of such demand, shall claim to be admitted as a creditor for the whole of such demand, or for more thereof than is so admitted, the said objections and claims shall, upon application duly made, be examined into by the court or a commissioner thereof on his circuit; and the court or commissioner may, if it seem fit, refer the examination of the same to an officer of the court, or to an examiner duly appointed in pursuance of this act. And the said court or commissioner, and such officer or examiner to whom such reference shall have been made, shall have full power, for the purpose aforesaid, to require and

compel the production of all books, papers, and writings which may be necessary to be produced, as well by the person claiming such debt, as by such prisoner, or his assignee or assignees, creditor or creditors, and to examine all such persons and their witnesses upon oath, as the nature of the case may require, and to take all other measures necessary for the due investigation of such objections and claims; and the decision of the court or commissioner thereupon shall be conclusive with respect to the title of any such creditor or creditors to his or their share of such dividend under the provisions of this act. Provided always, that if in any case it shall appear expedient that the proof of any debt or debts should be required to be made at an earlier or other period than as aforesaid, it shall be lawful at any time for the court, by notice as directed in that behalf, to cause all or any of the creditors to prove their debts in such manner as the court or a commissioner shall require, and to decide upon such debts, and the right to receive dividends thereupon, and to do all things requisite thereto as aforesaid.—§ 62.

In case the prisoner, or any of his creditors, or the court, shall at any time be dissatisfied with the account of the assignees so rendered upon oath as aforesaid, and it shall appear to the court that the matters of such account require a fuller or further examination; or in case any assignee shall neglect to render such account, or to dispose of the property or collect the effects of such prisoner, or shall in any manner waste or mismanage the estate or effects, or neglect to make a due distribution thereof; it shall be lawful for the court to require such assignees to render such account on oath as is directed by this act, if not before rendered; and for the said court, or any commissioner thereof on his circuit, to examine or further examine any account so rendered, and to inquire into any waste, mismanagement, or neglect of the estate and effects, and, if it shall seem fit, to order that it shall be referred to an officer of the court, or to an examiner duly appointed in pursuance of this act, to investigate the accounts of such assignees, together with all matters brought forward in objection thereto, and to examine into the truth thereof, and to report thereon to the court or a commissioner. And it shall be lawful for the court or a commissioner, or such officer or examiner, upon such reference, to require and compel the production of all books, papers, and writings necessary for such purposes, and to summon all parties before him or them, and to examine all parties and their witnesses on oath, as the case may require; and the court or commissioner shall and may take all such measures as shall be necessary for the compelling of the rendering of such account, and for the due investigation thereof, and shall have power to disallow any charge or charges in such account which it shall appear ought not in fairness to be allowed, and to ascertain the produce of the estate and effects of the prisoner to be divided among his creditors, and to direct the distribution thereof, and to take all such measures and make such orders as shall be necessary for compelling the proper disposition and distribution thereof, and to award costs against any of the parties, as justice shall require. And if it shall appear to the court or commissioner, upon examination of the matters of account, that any such assignee or assignees shall have wilfully retained in his or their hands, or otherwise

employed for his or their own benefit, any sum or sums of money, part of or being the produce of such estate or effects, the court or commissioner shall have power and authority to order such assignees to be charged in his or their accounts with such sum or sums of money as shall be equal to the amount of interest, computed at a rate not exceeding twenty pounds per centum per annum on all sums of money appearing to the said court or commissioner to be so retained or employed by him or them, for the time or times during which he or they shall have so retained or employed the same; and the court shall, in pursuance of such order, charge such assignee or assignees in their accounts with such sum or sums of money accordingly; and the decisions of the said court or commissioner upon all such matters shall be final and conclusive.—§ 63.

Unclaimed Dividends.—In all cases where any dividends have remained in the hands of the assignees for the space of twelve months next following the declaration thereof, such dividends shall be paid by such assignees into the court, to the credit of the proper parties in that behalf under such estate. Provided always, that it shall be lawful for the court or a commissioner at any time, although such twelve months may not have expired, if it shall seem fit, to direct that all unpaid and unclaimed dividends, together with the balance remaining in the hands of any assignees, shall be paid forthwith into the court, to the credit of the estate or of the particular creditors, as the case may be.—§ 64.

Although the assignee may not within the three months have received or paid any thing on account of the insolvent's estate, he is nevertheless bound to file an affidavit to that effect.

The court may at any time require assignees to file accounts, either *proprio motu*, or at the suggestion of a creditor or the insolvent. On an application by a creditor or the insolvent, an affidavit must be made, showing that the assignee was appointed at least three months before, and that search had been made on the day of the application or the day before at the office of the provisional assignee, and that no account had then been filed. Upon this motion a rule absolute is granted in the first instance. This rule should be served upon the assignee personally; and if he do not within a reasonable time, generally about three weeks, file a proper account in obedience to the rule of the court, a motion may be made, upon affidavit of the personal service of the former rule, and of search at the office of the provisional assignee, for a rule calling upon the assignee to show cause why he should not be committed to the prison of the Queen's Bench, or to the common gaol of the county wherein he usually resides, for a contempt of the court in not obeying its order. If no sufficient cause be shown, the court will commit the offender, and make such order as to costs as justice may require.

The court has the power to enlarge the debts of all persons whose claims are inserted in the schedule, no matter how small the amount at which they are inserted; but it has no power to admit persons to receive dividends, although they may be actual and *bonâ fide* creditors, if they have been wholly omitted from the schedule.

Assignees may, after adjudication, proceed to make a dividend at any time, upon proper notice, without previously requiring the permis-

sion of the court; but the direction of the court is necessary, if proposed to be done previous to the adjudication.

They are bound to exert themselves personally in collecting and dividing the insolvent's property. Should they think proper to employ an attorney to perform any business which they are themselves competent to perform, the court will not allow the costs of the attorney in passing their accounts. This rule, of course, does not apply to proceedings of a character strictly legal, or to any case in which professional assistance shall appear to the court to have been reasonably necessary.

Removal of Assignees.—In case any assignee shall be unwilling to act, or in case of the death, incapacity, disability, misconduct, or absence from the realm of any assignee, it shall be lawful for any creditor or creditors to apply to the court to appoint a new assignee or assignees, with like powers and authorities; and the court shall have power to remove assignees, and to appoint new assignee or assignees, and to compel any assignee who shall be removed, and the heirs, executors, or administrators of any deceased assignee, to account for and deliver up to the court, or as the court shall order, all such estate and effects, books, papers, writings, deeds, and other evidences relating thereto as shall remain in his or their hands, to be applied for the purposes of this act; and the decision of the court in the matters aforesaid shall be final and conclusive. And from and immediately after such appointment of a new assignee or assignees, and by virtue of the order of the court in that behalf, all the estate, effects, rights, and powers of the prisoner vested in any former assignees shall become vested in such new assignee or assignees, *without any assignment or conveyance executed in that behalf.* And every such removal and appointment shall be entered of record in the court, and such notice thereof shall be published as the court shall at any time direct; and proof of such removal and appointment so entered of record shall be received by such certified copy thereof as is before directed to be received as proof of such order and appointment as aforesaid made in pursuance of this act.—§ 65.

In case any assignee or other person shall disobey any rule or order of the court for enforcing the purposes of this act, or made and entered into by the consent of such assignee or other person for carrying i to effect the purposes and provisions of this act, it shall be lawful for the court to order the person so offending to be arrested and committed as for a contempt of the court to the prison of the Queen's Bench, or to the common gaol of any county, city, or place where he or she shall be, or where he or she shall usually reside, there to remain without bail or mainprize until such person shall have fulfilled the duty required, or until the court shall make order to the contrary. Provided always, that nothing herein contained shall authorize a commissioner acting out of court upon summons to commit any person for disobedience of any order of the court or of any commissioner thereof.—§ 66.

All provisions in this act concerning the appointment and removal of and otherwise concerning assignees, and concerning debts and dividends, and the management and control of the estates of insolvent debtors, shall extend to all cases of record in the said Court for the Relief of Insolvent Debtors at the commencement of this act as well as to cases arising subsequently.—§ 67.

Applications in respect of assignees' accounts, disputed debts, and ascertaining of claims, are generally made by means of summonses and appointments granted by and returnable before a single commissioner or in some cases before an examiner. But proceedings by creditors for removing assignees and appointing new ones, or for compelling the removed assignees to pay over the balance in their hands and deliver up the writings relating to their trust, must be by motion or petition to the court, grounded on sufficient affidavits. The power of committal is exercisable only by the court, and not by a commissioner or examiner.

Matters of such special application to the court against assignees being almost necessarily required to be conducted by attorneys, the applicants for redress are allowed their taxed costs when sufficient cause is shown to have existed for the application. But in general and ordinary cases, such as applications for an assignee to file his accounts, or to inquire into a debt, or to audit accounts of assignees, and other matters which are conducted before a single commissioner or examiner upon summons, creditors are not allowed costs but at the discretion of the court, which will refer the question to the single commissioner, whose discretion is generally very rigid on these occasions.

Upon all matters relating to assigneeships, information is freely given to creditors by the provisional assignee and the clerks in his department.

X. NOTICE OF OPPOSITION, INSPECTION OF BOOKS, &c.

If any creditor intends to oppose the prisoner's discharge, by Rule 22, notice of such opposition must be given in the manner following:—

1. In cases to be heard by the court, by entry made in the proper page and column of the book kept for that purpose at the office of the court, between the hours of ten in the forenoon and four in the afternoon, three clear days before the day of hearing, exclusive of Sunday, and exclusive both of the day of entering such notice and of the day of hearing.—N.B. Entrance to the office in Portugal Street, Lincoln's-Inn-Fields.
2. In cases to be heard by a commissioner or justices, by giving a notice of such intention *in writing to the prisoner*, three clear days before the day of hearing, exclusive of Sunday, and exclusive both of the day of giving such notice, and of the day of hearing.
3. In cases of hearing after removal, or failure of removal, notice of opposition shall be given in manner aforesaid one clear day before the day of hearing; unless where such notice was given for the original hearing, or where the prisoner may waive the same on giving short notice of the hearing. See *supra*, Rule 20, (8).

In country cases, where an insolvent has been bailed out, notice of opposition delivered to the gaoler or turnkey at the gaol from which he was discharged is sufficient.

Inspection of Proceedings, Books, &c.—The proper officer of the court shall, on the reasonable request of any prisoner, or of any creditor, or their respective attorney, produce and show, at such time as the court shall direct, the petition, vesting order, schedule, order of adjudication, and all other orders and proceedings, and all books, papers, and writings, and permit him or them to inspect and examine the same, and shall provide a copy or copies of such part thereof as shall be required, receiving such fee as the court shall appoint.—§ 105. And by the 23d Rule of Court, petitions and schedules, and the books and papers filed therewith, shall be produced by the proper officer for inspection and examination until the last day of entering opposition between the hours of ten and four. Notice to produce books and papers in court must be given to the officer having the custody thereof on any day previous to the day on which they are so produced.

¹ Now two clear days.—Rule of Court, Jan. 1845.

In country cases, the clerk of the peace, town clerk, or other officer in whose custody the duplicate of petition and schedule, and the books, papers, and writings, shall be, shall, on request of the prisoner or any creditor or their respective attorney, produce the same and permit examination on being paid one shilling in each case; and, on request, shall provide and deliver a copy or extract of petition or schedule on receiving fourpence per folio.—§ 106.

XI. HEARING OF THE INSOLVENT, AND ADJUDICATION OF THE COURT.

Upon the prisoner being brought up for hearing, by sect. 72, the court or commissioner or justices shall examine into his schedule upon the oath of such prisoner, and of such parties and other witnesses as the said court or commissioner or justices shall think fit to examine thereupon. And in case such notice as the court shall direct shall have been given by any creditor of his intention to oppose the prisoner's discharge, it shall be lawful both for the said creditor and any other of the creditors, and notwithstanding such creditors may have petitioned for and obtained such vesting order as aforesaid, to oppose such prisoner's discharge, and for that purpose to put such questions to such prisoner, and examine such witnesses, as the court or commissioner or justices shall think fit, touching the matters contained in such schedule and touching such other matters as the court or commissioner or justices shall be of opinion that it may be fit and proper to inquire into, in order to the due execution of this act. But no creditor shall examine or oppose the discharge of such prisoner until he shall make oath or affidavit of his debt, or otherwise give satisfactory proof of his right to oppose such prisoner's discharge, if required so to do by such prisoner. And in case the court or commissioner or justices shall entertain any doubt touching any matter alleged against the prisoner at such hearing to prevent his discharge, or otherwise touching the schedule or the examination of the prisoner, or it shall appear that amendment is necessary to be made of such schedule, or in case the prisoner shall refuse to be sworn, or shall not answer upon oath to the satisfaction of the court or commissioner or justices, it shall be lawful to adjourn the hearing and examination of such prisoner to some future sitting, or to some future circuit, or to some future general, or general quarter, or adjourned sessions, as the case may be; and in every such case such prisoner shall upon such adjournment remain in custody, and shall and may be again brought up, and such hearing and examination be further proceeded in as often as shall seem fit. Provided always, that when any such hearing shall be adjourned by the court generally, or by such commissioner or justices to some future circuit or to some future sessions, the court shall and may, upon the application of the prisoner within such time as the court shall direct, order him to be brought up for hearing accordingly; and such notice thereof shall be given, and to such parties, as the court or commissioner or justices shall direct.

In every case to be heard by a commissioner on circuit, in which there shall have been any property in the possession or under the controul of the prisoner to be given up to the provisional assignee, there shall be obtained and produced at the hearing a *certificate* from

the provisional assignee, or other sufficient voucher, that such property has been duly given up or accounted for. — Rule of Court 28.

Although the discharge of the insolvent be not opposed by any of the creditors, the court is notwithstanding bound to examine into the matters of the petition and schedule of every prisoner brought before it, for the purpose of ascertaining that the insolvent is duly entitled to petition the court, that all the proceedings have been regularly conducted, and that he has not improperly concealed or made away with any of his property; and for this purpose may examine the insolvent upon oath, and all other persons whose evidence it may deem necessary for the investigation of all matters relating to his affairs.

If notice of opposition has been given, any creditor may oppose, either by himself in person or by counsel. If required, however, by the prisoner, he must previously make oath or affidavit of his debt, or otherwise give satisfactory proof of his right to oppose. If the creditor be represented by counsel, and be not himself in court to prove his debt, the court will adjourn the hearing of the case, and grant him a reasonable time to satisfy the court by affidavit or otherwise of his right to oppose the prisoner's discharge.

The insolvent may be examined and required to explain and verify every item contained in his petition, schedule, and balance sheet. He may be questioned respecting all the property at any time in his possession, and the disposition of it, whether the same be mentioned in his schedule or not; respecting his books of account, papers, and writings—the insertion or omission of debts—the charging, mortgaging, or concealing of property. He may also be questioned touching the mode of his contracting the particular debt of the creditor who opposes his discharge, the state of his circumstances at the time of contracting it, and the probable means which he had at that time of discharging it.

There are, however, some restrictions as to the extent to which the right of putting questions to an insolvent may be exercised by an opposing creditor or his counsel. For although the whole of the inquiry is subjected by the act to the discretion of the court, this discretion must be understood to be a *legal* discretion governed by the acknowledged principles of the common law of evidence. The insolvent is, in effect, to be regarded and treated as a witness in a civil procedure, and the court is bound to extend to him the same protection as witnesses usually receive from the other courts of law; and this principle has been uniformly recognized by the court. Thus, he shall not be compelled to answer any question which may criminate himself, or expose him to penalties; as when an insolvent had given a bill to a creditor, purporting to have been accepted by another person, and was asked by the creditor if the name of the acceptor was not written by himself, the court interposed, and cautioned the insolvent not to answer the question if he did not think proper. Neither will the court require an insolvent to answer any questions put by an opposing creditor or his counsel respecting any misconduct towards *another* creditor. Each creditor, in charging an insolvent with misconduct or fraud in contracting a debt or otherwise affecting only an *individual* creditor, and not the *whole body* of creditors, must confine himself to his own particular case. So neither is an insolvent bound to answer any questions not necessarily

connected with a fair elucidation of his case, and which by the answer may tend to degrade his character in public estimation. But an insolvent has been compelled to answer if he was married to the woman with whom he cohabited, because in his schedule he had excepted various articles of female apparel as belonging to himself or family. The court will not interfere to prevent an insolvent from being asked respecting alleged fraudulent misrepresentations to the creditor at the time of contracting his individual debt; and if such questions are pressed, the court will oblige the insolvent to answer them. But it has repeatedly intimated an opinion, that such a course of examination is attended with great inconvenience; and, in practice, the court so far discountenances it, that it will not convict an insolvent of fraud in the contracting of a debt solely upon his own confession, thus extorted, of having made false and fraudulent misrepresentations, but will further require the evidence of the creditor himself to show that these representations had the effect of inducing him to give credit to the insolvent.

The examination of the insolvent being finished, the creditor or his counsel may examine witnesses in support of the opposition. The creditor himself may be a witness against the insolvent, the act of parliament rendering him competent for this purpose, contrary to the general rule of law which, in all courts, disqualifies a party in a cause from being a witness on his own behalf. The wife of the creditor, however, will not be allowed to give evidence in her husband's case; neither will the court receive the evidence of the wife of the insolvent. In bankruptcy the wife of the bankrupt is liable to be examined touching the removal, concealment, or disposition of property, solely because such a proceeding is authorized by statute; but until a similar provision be enacted with regard to the wives of insolvents, the court cannot suffer their evidence to be received either for or against their husbands.

In all cases the best evidence is to be produced which the nature of the proceeding will admit of. Should any deed, will, paper, or writing be in the possession of the insolvent, or under his control, and it be proved to the court by sufficient evidence that it relates to his estate or effects, the court will not proceed to hear the case until it be delivered into the office of the court, so as to enable the creditors to examine it.¹

It is a general rule of the law of evidence, that statements in writing by absent persons are inadmissible as evidence; but a very important exception to this rule, as regards this court, is created by the special provisions of the act. Creditors opposing the discharge of an insolvent have the power, in certain cases, of exhibiting affidavits of absent persons in opposition to the prisoner's discharge. By sect. 73 it is provided, that in all cases heard before the court, when the prisoner's usual place of abode at or lately before his imprisonment was elsewhere than in Middlesex, Surrey, London, or Southwark, the court may receive affidavits of creditors or other persons not residing in Middlesex, Surrey, London, or Southwark, in opposition to the prisoner's discharge, and, if it think fit, may permit interrogatories to be filed for the examination or cross-examination of any person making or joining in such affidavits, and may adjourn the hearing and examination of the prisoner until

¹ *Re Serres*, calling herself Olive Princess of Cumberland.

such interrogatories be fully answered to the satisfaction of the court. And so in cases before a commissioner on circuit, or before justices at Berwick-upon-Tweed, if the usual place of abode of the prisoner at or lately before his imprisonment was in any other county or riding, the commissioner or justices may receive the affidavits of creditors or other persons not resident within the county or riding where such hearing shall be, in opposition to the discharge of such prisoner, and may permit interrogatories to be filed for the examination or cross-examination of any person making or joining in such affidavits, and may adjourn the hearing until such interrogatories be fully answered.

The insolvent is not permitted to contradict these affidavits by the affidavits of other persons; but if he is not prepared, on the day of hearing, to disprove the allegations contained in them, the court will, at his desire, adjourn the case, that he may have the opportunity either of producing witnesses for that purpose on some future day, or of filing, with the permission of the court, interrogatories for the cross-examination of the deponents in such affidavits.

Reference of Accounts, &c.—At the hearing, or at any adjourned hearing, the court, or the commissioner on circuit, or the justices, (sec. 74) may, upon application by a creditor, supported by oath or affidavit, order a reference to an officer of the court, or to an examiner, to investigate the prisoner's accounts and the truth of his schedule, and to report thereon. Upon this reference, the officer or examiner may examine parties and witnesses on oath, and may have the prisoner before him as often as he shall see fit, for which the gaoler shall receive 10s. from the party requiring the reference. But the court &c. may order the expences of the reference to be repaid out of the estate.

By Rule 28, any party desiring an examination and report upon the documentary proofs of debts satisfied, or other such matters, shall deliver his vouchers and request to the clerk of the rules, who will thereupon fill up a rule of reference, and forward the same to the examining officer.

If the insolvent or the creditors except to the report, the schedule may be again referred to the officer or the examiner; or the report may be disallowed altogether, and the court itself may in such case investigate the truth of the schedule. But if no exception be taken to the report, the court will decide according to the terms of it, and no further inquiry will be allowed in open court as to the matters and allegations contained in the schedule. The case, however, remains open for opposition on account of frauds or other injuries to individual creditors.

Adjudication.—We have already seen that the court may adjudicate notwithstanding a fiat of bankruptcy.

After the examination of the prisoner, it shall be lawful, at such hearing or adjourned hearing, for the court or commissioner or justices, upon such prisoner's swearing to the truth of his schedule, and executing the warrant of attorney hereinafter directed, to adjudge that he shall be discharged from custody and entitled to the benefit of this act, at such time as the said court or commissioners or justices shall direct in pursuance of the provisions hereinafter contained, as to the several debts and sums of money due or claimed to be due, at the time of making such vesting order as aforesaid, from such prisoner to the several per-

sons named in his schedule as creditors, or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order as aforesaid and which were not then payable, and as to the claims of all other persons, not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule so sworn to as aforesaid.—§ 75.

And (sect. 76) in all cases where no cause shall appear to the contrary, it shall be lawful for the court or commissioner or justices, according as shall seem fit, to adjudge that such prisoner shall be so discharged and so entitled as aforesaid *forthwith*, or so soon as he shall have been in custody, at the suit of one or more of the persons as to whose debts and claims such discharge is so adjudicated, for such period or periods *not exceeding six months in the whole*, as the said court or commissioner or justices shall direct, to be computed from the making of such vesting order as aforesaid.

But, by sect. 77, in case it shall appear to the court or commissioner or justices that such prisoner has fraudulently, with intent to conceal the state of his affairs or to defeat the objects of this act, destroyed or otherwise wilfully prevented or purposely withheld the production of any books, papers, or writings relating to such of his affairs as are subject to investigation under this act,—or kept or caused to be kept false books, or made false entries in, or withheld entries from, or wilfully altered or falsified, any books, papers, or writings,—or that such prisoner has fraudulently, with intent of diminishing the sum to be divided among his creditors, or of giving an undue preference to any of the said creditors, discharged or concealed any debt due to or from the said prisoner,—or made away with, charged, mortgaged, or concealed any part of his property, of what kind soever, either before or after the commencement of his imprisonment, then it shall be lawful for the said court or commissioner or justices to adjudge that such prisoner shall be so discharged and so entitled as aforesaid so soon as he shall have been in custody, at the suit of some one or more of the persons as to whose debts and claims such discharge is so adjudicated, for such period or periods *not exceeding three years in the whole* as the said court or commissioners or justices shall direct, to be computed as aforesaid.

And, by sect. 78, in case it shall appear to the said court or commissioner or justices, that such prisoner shall have contracted any of his debts fraudulently, or by means of a breach of trust, or by means of false pretences, or without having had any reasonable or probable expectation at the time when contracted of paying the same,—or shall have fraudulently, or by means of false pretences, obtained the forbearance of any of his debts by any of his creditors,—or shall have put any of his creditors to any unnecessary expence by any vexatious or frivolous defence or delay to any suit for recovering any debt or sum of money due from such prisoner,—or shall be indebted for damages recovered in any action for criminal conversation with the wife or for seducing the daughter or servant of the plaintiff, or for breach of promise of marriage made to the plaintiff, or for damages recovered in any action for a malicious prosecution, or for a libel, or for slander, or in any other action for a malicious injury done to the plaintiff therein,

or in any action of tort or trespass to the person or property of the plaintiff therein, where it shall appear to the satisfaction of the said court that the injury complained of was malicious, then it shall be lawful for such court or commissioner or justices to adjudge that such prisoner shall be so discharged and so entitled as aforesaid forthwith, *except as to such debt or debts, sum or sums of money, or damages as above mentioned*; and as to such debt or debts, sum or sums of money or damages, to adjudge that such prisoner shall be so discharged and so entitled as aforesaid so soon as he shall have been in custody, at the suit of the person or persons who shall be creditor or creditors for the same respectively, for a period or periods *not exceeding two years in the whole*, as the said court or commissioner or justices shall direct, to be computed as aforesaid.

And in all cases where it shall be adjudged that any prisoner shall be so discharged and so entitled as aforesaid at some future period, it shall be lawful for the court, if it seem fit, to direct that he shall be confined during any such period *within the walls* of the prison.—§ 81.

Where the adjudication is made by the court or by a commissioner on circuit, an order shall be made accordingly, and the said court or commissioner shall also issue a warrant or warrants to the gaoler, ordering the discharge of such prisoner from custody as to the detainers under which he shall then be confined, or which shall be lodged against him before he shall be out of custody, the same being for debts in respect of which such adjudication shall have been made. And where the adjudication is made by such justices as aforesaid, they shall forthwith certify their adjudication to the court, whereupon the court shall order that such prisoner shall be discharged from custody and entitled to the benefit of this act according to such adjudication at the period or periods expressed therein, and shall order such costs to be paid as shall have been adjudged by the said justices in pursuance of this act, and shall issue a warrant or warrants to the gaoler accordingly.—§ 82.

And every such order of adjudication shall take effect as from the day on which the adjudication shall have been made; and every such adjudication, and certificate thereof, and order thereupon, may be made without specifying therein any such debts, or sums of money, or claims as aforesaid, or naming therein any such creditors, excepting so far as shall be necessary in any case in order to distinguish between the creditors as to whom the prisoner may be adjudged to be so discharged and entitled as aforesaid forthwith, and the creditors as to whom he may be adjudged to be so discharged and entitled at some future period. Provided nevertheless, that in all cases the detainers with respect to which any person shall have been adjudged to be discharged out of custody (he being then in custody thereupon) shall be specified in the warrant to be delivered to the gaoler.—§ 83.

Where it shall appear to the court, on the hearing, that certain things ought to be done by the prisoner before the discharge, but that it is not expedient to adjourn the hearing, the court may pronounce adjudication without issuing the order, subject to the performance of such things as aforesaid, and that on the nonperformance thereof the hearing shall stand adjourned.—§ 84.

In all cases where it shall have been adjudged that the prisoner shall

be so discharged and so entitled at some future period, such prisoner shall be subject and liable to be detained in prison, and to be arrested and charged in custody, at the suit of any one or more of his creditors with respect to whom it shall have been so adjudged, at any time before such period shall have arrived, in the same manner as he would have been subject and liable thereto if this act had not been passed. Provided, that when such period shall have arrived, such prisoner shall be entitled to the benefit and protection of this act, notwithstanding he may have been out of actual custody during all or any part of the time subsequent to such adjudication.—§ 85.

Warrant of Attorney.—Before adjudication, the court or commissioner or justices shall require the prisoner to execute a warrant of attorney to authorize the entering up of a judgment against him in some one of the superior courts at Westminster, in the name of the assignees, or of the provisional assignee if no other assignee shall have been appointed and shall have accepted such office, for the amount of the debts stated in the schedule, or so much thereof as shall appear at the time of executing such warrant of attorney to be due and unsatisfied. And such warrant of attorney is declared not to be within the meaning of the 3 Geo. IV. c. 39; nor shall it be necessary that the same be executed in the presence of an attorney for such prisoner, according to the provisions hereinbefore in that behalf contained. And the order of the court for entering up such judgment shall be a sufficient authority to the proper officer for entering up the same; and such judgment shall have the force of a recognizance.—§ 87.

It is, however, provided by sect. 92, that if at any time it shall appear to the satisfaction of the court, that all the debts in respect of which such adjudication was made have been discharged and satisfied, it shall be lawful for the court, upon application duly made, to direct the warrant of attorney to be cancelled, or, if judgment shall have been entered up thereon, to order satisfaction to be entered on such judgment; and the order of the court for entering up such satisfaction shall be a sufficient authority to the proper officer for entering up the same. And if in any case it shall appear that after the debts of any prisoner shall have been so discharged and satisfied, there shall remain in the possession, or subject to the controul of his assignees, any property of any kind whatsoever which has come to such assignees, or to which they may claim title by virtue of the order made in that behalf, or otherwise by virtue of their office, it shall be lawful for the court, on application duly made, to order that all such property shall be vested in the person whose debts shall have been so discharged and satisfied, or his heirs, executors, administrators, or assigns; and such order shall have the effect of vesting the same accordingly. And any deed or release to be recorded in the said court, by which any such debts shall be released or discharged, shall not be liable to any stamp duty.

XII. THE INSOLVENT'S DISCHARGE.

The discharge of the insolvent, adjudicated as aforesaid, (sect. 75) shall extend to the several debts and sums of money due or claimed to be due, at the time of making the vesting order, from such prisoner to

the several persons named in his schedule as creditors, or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order and which were not then payable, and as to the claims of all other persons, not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule so sworn to as aforesaid.

And (sect. 79) it shall extend to all process issuing from any court for any contempt of any court, ecclesiastical or civil, for nonpayment of money or of costs or expences in any court ecclesiastical or civil; and in such case the said discharge shall be deemed to extend also to all costs which such prisoner would be liable to pay in consequence or by reason of such contempt, or on purging the same. And every discharge so adjudicated as aforesaid as to any debt or damages of any creditor shall be deemed to extend also to all costs incurred by such creditor before the filing of such prisoner's schedule, in any action or suit brought by such creditor against such prisoner for the recovery of the same. And all persons as to whose demands for any such costs, money, or expences as aforesaid any such person shall be so adjudged to be discharged, shall be deemed and taken to be creditors of such prisoner in respect thereof, and entitled to the benefit of all the provisions made for creditors by this act, subject nevertheless to such ascertaining of the amount of the said demands as may be had by taxation or otherwise, and to such examination thereof as is herein provided in respect of all claims to a dividend of such insolvent's estate and effects.

And (sect. 80) the discharge shall extend to any sum and sums of money which shall be payable, by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever. And every person who would be a creditor of such prisoner for such sum or sums of money if the same were presently due, shall be admissible as a creditor for the value of such sums so payable as aforesaid; which value the court shall, upon application, ascertain, regard being had to the original price given for such sum or sums of money, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the time of making such vesting order as aforesaid; and such creditor or creditors shall be entitled in respect of such value to the benefit of all the provisions made for creditors by this act, without prejudice nevertheless to the respective securities of such creditor, excepting as respects such prisoner's discharge under this act.

Though the discharge extends to sums payable by way of annuity, yet the insolvent is liable to his sureties in respect of annuities paid by them subsequent to his adjudication. (2 Maule & Selwyn, 550.)

And rents and covenants due on leases which the assignees have declined to accept are recoverable from the insolvent after his discharge in respect of the payments accruing due subsequent to his adjudication.

Unintentional error in the insolvent's schedule as to the actual amount of any debt will not expose him to any liability for such debt after his discharge; for sect. 93, reciting that it may sometimes happen that a debt of, or claim upon, or balance due from the prisoner may be specified in his schedule at an amount which is not exactly the actual amount thereof,

without any culpable negligence, fraud, or evil intention, enacts, that in such case the prisoner shall be entitled to every benefit and protection of this act, and the creditor shall be entitled to the benefit of all the provisions made for creditors by this act, in respect of the actual amount of such debt, claim, or balance, and neither more nor less than the same. It had formerly been held that the insolvent was only discharged from the amount inserted in the schedule.¹

It has been held that the discharge will extend even to creditors who have authorized the omission of their debts from the schedule.²

The person of the insolvent is protected from imprisonment under the judgment entered up under the act, and for any debt to which his adjudication applies, and for any judgment thereon. And if arrested, he may be discharged upon application to a judge of the court from which the process issued, unless it appear that such adjudication was made without due notice given to the creditor or waived by him. § 90.

And no writ of *fieri facias* or *elegit* shall issue upon any judgment obtained against the prisoner for any debt to which his adjudication applies, nor in any action upon any new contract or security for payment thereof, except upon the judgment entered up under this act; and in any such action the defendant may plead that he was duly discharged, and the plaintiff may reply generally and deny the matters pleaded, or reply any other matter showing the defendant not entitled to the benefit of this act, or not duly discharged under its provisions. § 91.

XIII. ALLOWANCE TO INSOLVENT.

The court is empowered, by sect. 43, to order the provisional or other assignee to pay to the prisoner, out of his estate and effects, such allowance for his support and maintenance during imprisonment and *previous to the adjudication* in the matter of his petition, or for the expense of making out and filing his schedule, as to the court shall seem reasonable and fit.

And, by sect. 118, the court may in its discretion direct that the expences of applying for and obtaining the discharge of any prisoner, or any part thereof, shall be paid out of his estate and effects in the hands of the provisional or other assignee; and if the same be not sufficient, then that such expences or any part thereof may, in cases where the court shall be satisfied that the prisoner has not the means of defraying the same, be paid out of the interest arising from any government securities upon which any unclaimed money produced by the estates and effects of insolvent debtors may be invested; and in every such last-mentioned case the estate and effects of such prisoner, which may then be or may thereafter come to the hands and be vested in the provisional or other assignees, shall be liable in the first place to repay the money so advanced and paid, and the court is authorized to make such orders as shall be necessary for the purpose.

The application to the court for an allowance must be founded upon an affidavit by the insolvent, setting forth the amount of money had in possession at the time of his commitment to custody and received since, —the number of the insolvent's family, how they have been supported,

¹ Taylor v. Buchanan, 4 B. & C. 419.

² Carpenter v. White, 3 Moore, 231;

Howard v. Bartolozzi, 4 B. & Adol. 555; and Tabram v. Freeman, 2 C. & M. 451.

how many are dependent upon the insolvent, and where they are residing,—the amount of excepted articles,—the day appointed for the hearing,—and whether the insolvent has made any previous application to the same purport, and if so, the result. To this affidavit must be annexed a certificate from the provisional assignee, stating the amount of the money actually in his hands. If the prisoner appear from the affidavit to be in want of assistance, the court will allow such sum as under all the circumstances may appear just and reasonable. If an assignee has been appointed previous to the adjudication, and he is possessed of money arising from the insolvent's estate, the court may make an order upon him for the payment of some allowance to the insolvent. If the insolvent has obtained a dispensation to reside within the rules of the prison and has taken advantage of it, no such allowance will be made unless it be shown that the rules were given him gratuitously by the keeper, or were obtained by the charity of others.

The foregoing relates to an allowance before adjudication; but should an insolvent on his hearing be remanded, the court is empowered by § 86, at any time, on the application of the prisoner, to order the creditors at whose suit he shall be so imprisoned to pay to him such sums of money, not exceeding the rate of four shillings by the week in the whole, at such times and in such manner and in such proportions as the court shall direct, and that on failure of payment thereof, the court shall order such prisoner to be forthwith discharged from custody at the suit of the creditors so failing to pay the same.

In order to avail himself of this provision, the insolvent must make an affidavit embodying all the facts of his case, beginning with his commitment to prison, his hearing, adjudication, and remand, with the reasons for such remand, and fully stating his situation in life, number of family, how they are supported, and with whom living, and concluding with a statement whether he has before made a similar application, and if so, the result of it. The affidavit must be clear and positive, so as to enable an indictment for perjury to be supported on it if false. This affidavit must be accompanied by a petition to the court, beginning with the adjudication (an office copy of which must be annexed, setting out the substance of the affidavit, and concluding with the prayer for the allowance.

The various papers must be left at the Town or Country office of the court (as the case may be) for three or four days; and if approved of, a rule *nisi* will be granted. A copy of such rule must be served on the detaining creditor *himself* (not his attorney or agent), in sufficiently reasonable time before the day for shewing cause; and an affidavit of such service made and left at the office two days before such day. When the rule is made absolute, that also must be served on the detaining creditor himself.

If the creditor neglect to pay the allowance, an affidavit of the service of the order absolute may be made, and of the neglect; when a petition may be presented, or a motion made by counsel, for the insolvent's discharge, which will in the first instance be a rule to shew cause, upon which the same proceedings are had as before. If it appear that the allowance was obtained on false representation, the court will rescind the order; but otherwise the insolvent will be discharged in consequence of the nonpayment.

XIV. REHEARING, &c.

By sect. 96, every adjudication and the order thereupon shall be final and conclusive, and shall not be reviewed, unless the court shall thereafter see good and sufficient cause to believe that such adjudication was made on false evidence, or otherwise improperly or fraudulently obtained; in which case the court, upon the application of the prisoner or of any creditor, may order such prisoner (upon due notice to such persons and in such manner as the court shall direct) to attend or be brought up, and the said matter to be re-heard, and shall and may, if just cause shall appear, annul the original adjudication and order; and in case the former adjudication shall not be confirmed, such order, certificate, and warrant shall be made as are required by this act to be made upon such original adjudication; and the court may, if necessary, remand the prisoner to the same custody in which he was at the time of the former hearing, there to be subject to imprisonment as if the former adjudication had not been made. And where in any case such prisoner shall refuse or neglect to appear before the court according to such order for re-hearing, the court may order such prisoner to be apprehended and committed to custody in such prison as it shall direct, and may cause such prisoner to be brought up for examination as often as shall seem fit. Provided, that where upon such re-hearing it shall appear to the court that such prisoner is not entitled to the benefit of this act until some future period, the court may, if it appear reasonable, adjudge the discharge of such prisoner at such future period to be calculated without including the time during which such prisoner was out of custody since the time appointed for his discharge by the former adjudication. And by sect. 97, where the order of discharge has been issued by mistake, the court may revoke or amend the same.

By sect. 98, the assignees may, from time to time, apply to the court, that such person may be further examined as to any matters relating to his or her estate and effects; and any such person refusing to appear or to answer questions, may be committed to prison, there to remain until he submit to be examined.

XV. FUTURE PROPERTY.

We have seen, that the insolvent is required, previous to the adjudication being pronounced, to execute a warrant of attorney to confess judgment in some one of the superior courts at Westminster for the amount of the debts entered in his schedule, in the name of the provisional assignee, or in the name of any other assignee if one shall have been appointed previous to the adjudication. Upon this warrant of attorney a judgment, which shall have the force of a recognizance, may be entered at any time by the order of the court. The motion to this effect is one *of course*, and is made upon affidavit of debt by any creditor of the insolvent.

And by sect. 87, if at any time it appear to the satisfaction of the court, that the prisoner is of ability to pay such debts or any part thereof, or that he is dead leaving assets for that purpose, the court may permit execution to be taken out upon such judgment for such sum as

under all the circumstances of the case it shall order, such sum to be distributed rateably amongst the creditors. And such further proceedings may be had upon such judgment as may seem fit to the discretion of the court from time to time, until the whole of the debts be fully paid and satisfied, together with such costs as the court shall award. And no *scire facias* shall be necessary to revive such judgment on account of any lapse of time, but execution shall at all times issue thereon by virtue of the order of the court. Provided, that in case any such application shall appear to be ill-founded and vexatious, the court may not only refuse to make any order, but may dismiss the same with such costs against the party as shall appear reasonable.

And by sect. 88, in case any person shall, after he has been entitled to the benefit of this act, become entitled to or possessed of, in his own right, any stock in the public funds of this country, or other property (whether in England or elsewhere) which by law cannot be taken in execution under the said judgment, and such prisoner shall refuse to convey or assign or transfer such stock &c., it shall be lawful for the assignees to apply by petition in a summary way to the court, and to pray that the said prisoner may be taken and committed to custody; and thereupon, if upon examination by the court it shall appear that the contents of such petition are true, the court may order such prisoner to be remanded to custody until he transfer such property.

And, by sect. 89, in case any person, or body politic or corporate, shall, after an insolvent shall have been entitled to the benefit of this act, become possessed of, or have under his or their power or control, any stock in the public funds, or any legacy, money due or growing due, bills of exchange, promissory notes, bank notes, securities for money, goods and chattels, or any other property whatsoever belonging to such insolvent, or held in trust for his use and benefit, or to which such insolvent shall be in any way entitled; or in case any such persons &c. shall be at such period in any manner indebted to such insolvent, it shall be lawful for the court, upon the application of any assignee or creditor, to cause notice to be given to such persons &c., directing them to hold the said property till the court shall make further order concerning the same. And the court may order such persons &c. to deliver over such property, and to pay such debts or any part thereof to the provisional or other assignee for the general benefit of the creditors.

XVII. MARRIED WOMEN.

The provisions of this act shall extend to *married women* being prisoners within the intent and meaning of the act. § 101.

And the order of the court vesting the estate and effects of any such married woman in the provisional assignee shall operate upon all property, real and personal, to which she may be entitled for her separate use, or over which she shall have any power of disposition notwithstanding her coverture, or which shall be vested in any trustee or other person for her benefit, and upon all personal estate and effects of which she shall have the actual possession (except her wearing apparel, bedding, and other such necessities, not exceeding in the whole the value of twenty pounds), and upon all other real and personal estate and effects to which she shall be entitled in any manner whatsoever, in possession,

remainder, or reversion, *subject only to such right, title, or interest as her husband may have therein*, and without prejudicing any rights of her husband in such real and personal estate and effects respectively. And all provisions in this act touching the real and personal estate of any prisoner whose estate shall under this act be vested in the provisional assignee shall apply to such real and personal estate and effects respectively in the same manner as they would apply to such real or personal estate and effects if such woman had been sole and unmarried, subject only to the rights of her husband therein.

And such married woman shall also execute a warrant of attorney to confess judgment in one of the superior courts for the amount of the debts remaining unpaid from which she shall be so discharged as aforesaid; and such warrant of attorney so executed shall be sufficient authority for entering up judgment against such woman accordingly, notwithstanding her coverture. But such judgment shall not in any manner prejudice or affect the rights of her husband, except that the same shall be deemed and taken to be her debt in case she shall die in the life-time of such husband, to the end that the same may be discharged out of her personal assets in a due course of administration, or out of her real estate, if any she shall have at the time of her death, but without prejudice to any estate or interest of her husband therein as tenant by the curtesy. And in case such woman shall, during the life-time of her husband, become entitled to any property for her separate use, such judgment may be enforced against such separate property by suit in equity or otherwise, under the order of the said court, for the purpose of obtaining payment of so much of the debts in respect of which such woman shall have been discharged by the said court as shall then remain unpaid. And in case such woman shall survive her husband, such judgment may be, after his death, enforced against such woman or her property, real and personal, in such and the same manner and with the same effect as it might have been if she had been sole and unmarried at the time when she executed such warrant of attorney, and at the time when such judgment shall have been entered up as aforesaid.

But it is provided that the discharge of any married woman under the authority of this act *shall not operate to discharge her husband* from any debts in respect of which his wife shall be so discharged; but such debts, so far as they shall remain unpaid or unsatisfied, shall be chargeable upon and in force against such husband as fully to all intents and purposes as if his wife had not obtained such discharge. § 101.

XVIII. PRISONERS OF UNSOUND MIND.

If any person who shall be a prisoner upon any such process as aforesaid shall be of unsound mind, and therefore incapable of taking the benefit of this act in such manner as he might have done if of sound mind, the gaoler or keeper of the prison shall forthwith require one or more justices of the peace for the county or place wherein such prisoner shall be, to attend at the prison, and inquire into the state of mind of such prisoner; and thereupon, and also in case any such justice shall receive information by other means that such prisoner is of unsound mind, such justice or justices shall go to the prison, and by his or their own view, and by examination on oath of such persons as they shall

think fit, shall inquire into the state of mind of such prisoner; and if it shall appear upon such inquiry that such prisoner is of unsound mind, and therefore incapable of taking the benefit of this act in such manner as a person of sound mind might do, such justice or justices shall forthwith make a record of the fact, and certify the same to the court. And thereupon it shall be lawful for the court, at the instance of any person on behalf of such prisoner, to order notice to be inserted in the London Gazette, and in two or more public newspapers usually circulated in the neighbourhood of the prison, and in the neighbourhood of the usual residence of such prisoner before he was committed to prison, as the court shall see fit, that application will be made to the court for the discharge of such prisoner on a day to be specified in such order or notice (being twenty-one days at least from the day of publication of such one of the said gazettes and newspapers containing such notice as shall be last published); which notice, together with the service of the like notice on the creditor or creditors at whose suit such prisoner shall be detained in custody, or his or their attorney or attorneys, shall be sufficient to authorize the court to proceed to the discharge of such prisoner, if otherwise entitled according to the true intent and meaning of this act. And the court shall proceed accordingly, and shall discharge such prisoner from custody, and do all other acts, in case it shall appear that such prisoner might have obtained his discharge under this act if he had been of sound mind. And thereupon all and every estate, right, title, interest, in law and equity, real and personal, power, benefit, and emolument whatsoever, which, if such prisoner was of sound mind, could or ought to be vested in the provisional assignee pursuant to this act, shall, by force and virtue of the order of the court for the discharge of such prisoner, be vested in the provisional assignee, or in the other assignees appointed by the court and named in the said order or in any other order of the court in that behalf, as fully and effectually as if such prisoner had been of sound mind, and such order had been made vesting the same in such provisional assignee at the time and in the manner in this act provided.

And it shall be lawful for the court to order judgment to be entered up against such prisoner in the same manner as if he had been of sound mind and had executed a warrant of attorney to authorize the entering up of such judgment as is hereinbefore directed, and such order shall be a sufficient authority to the proper officer for entering up the same.

And any dividend to be made by such assignee or assignees shall be made in such manner, and such proceedings shall be thereupon had, as are hereinbefore provided in the case of a dividend of the estate and effects of any prisoner made before adjudication.

And the discharge of every such prisoner of unsound mind, so made as aforesaid, shall extend to all debts and sums of money to which the same might have extended if such prisoner had been of sound mind, and had duly filed his schedule according to the provisions of this act.

And every such order or discharge, and of the appointment of assignees in such case, shall be entered of record in the court, and proof thereof shall be received by such copy thereof as is hereinbefore directed to be received as proof of conveyances and assignments made in pursuance of this act. § 102.

XIX. OF COSTS AND FEES.

The court has no power to award costs except in such cases as are expressly authorized by the act. § 27.

When the opposing creditor proves an act done by the insolvent for which he is liable to be remanded for three years, such opposing creditor has a right to be paid the taxed costs of such opposition out of the estate before a dividend is made. In other cases of effectual opposition, the court or commissioner or justices may order costs if it seem fit; and if the opposition be frivolous and vexatious, the opposing creditor may be ordered to pay the insolvent's costs. § 82.

Fees.—The fees specifically mentioned in the act are the following:—To examiners, for every meeting, 20s. To clerks of the peace, town clerks &c., for every prisoner brought for hearing before a commissioner on circuit, or justices of the peace, 5s.; for inspection of proceedings, 1s.; and for copies thereof, 4d. per folio. To keepers of prisons, for carrying a prisoner before the examiner, 10s.; before the court for hearing, 3s.; before a commissioner on circuit, or justices of the peace, 1s. 6d.; and where the gaol is not in the same town, the actual expence of conveying the prisoner, not exceeding 1s. a mile. For the insertion of any advertisement directed by the act, 3s.

No fee or gratuity is to be taken by the court or its officers, except such as shall be specified in a list signed by the commissioners and exposed to view in the office of the court. § 34.

TABLE of FEES to be received by the Attorneys and Officers of the Court, as settled by the Court on the 1st October, 1838.

ATTORNEYS' FEES.		£.	s.	d.
Attendances in prison and taking instructions for Petition, and attendances for				
Copy of Causes		0	6	8
Notice to Gaoler, and service		0	2	0
Drawing and engrossing Petition, including parchment		0	3	0
Duplicate of ditto, in country cases		0	2	0
Preparing and attesting Estate Paper in duplicate		0	2	0
Ditto, if second page written, additional		0	1	0
Obtaining office copy of Præcipe (not including fee paid)		0	3	4
Attending to lodge or file Petition with accompanying documents		0	3	4
Notice for Appraisement of Excepted Articles, and attendances		0	3	4
Attendances in prison and taking instructions for Schedule		0	6	8
Drawing Schedule, per folio of 72 words		0	0	8
When the number of debtors exceeds 20, then for the excess above 20 only 4d. per folio (<i>vis.</i> , two words to be computed as one.)				
Engrossing Schedule, per folio		0	0	4
Duplicate, in country cases, per folio		0	0	4
Fair copy for prisoner, if required, per folio		0	0	4
For parchment of Schedule, with printed form		0	2	0
Ditto, each additional half-sheet		0	0	6
For paper of Schedule, with printed form		0	0	8
General Balance Sheet, common case		0	5	0
Ditto, per sheet additional		0	2	6
Ditto, Duplicate in country cases		0	2	6
Drawing and engrossing Petition and Affidavit for leave to file Petition or				
Schedule, time having expired, on printed form, common case		0	4	0
Ditto, if another half-sheet is necessary for the Dr. and Cr. account, additional		0	1	6
All attendances relating to such application		0	6	8
N. B. Where the Court directs notice to creditors, subsequent charges will be further allowed.				
Attending at prison, reading over and attesting Schedule		0	6	8
Attending to file Schedule, and for Order for Hearing		0	3	4

	£.	s.	d.
Attending Insolvent for his books &c., indorsing the same, and lodging the same at the office, or with the clerk of the peace	0	3	4
Advertisement in Newspaper, or Dublin or Edinburgh Gazette, including all payments in respect of the same, and for newspaper or gazette, and attendances	0	10	6
Ditto, if more than one such advertisement required, for the second	0	8	0
Copies of Order to serve or annex, and examining, each	0	0	4
Attending Messengers to deliver Order, Copies for service, and Lists, and for their Return (and their Affidavits in country cases)	0	3	4
For all Lists delivered to Messengers, in each town case	0	1	6
Ditto, in each country case	0	1	0
Ditto, in respect of each Notice specified in such lists, additional	0	1	0
Filing Affidavits of service, with advertisements	0	3	4
In country cases, to be charged for all conveyances of documents and books, with expences and attendances, besides as above mentioned	0	7	6
N. B. If by reason of the small number of cases at any place on circuit or sessions, either alone or with any other cause, the above allowance shall appear not to remunerate an Attorney for the parcels connected with the Petitions heard at such place, the Taxing Officer may make further allowance according to such circumstances.			
Searching with the Gaoler for new detainers	0	2	6
Searching for Notice of Opposition, in town cases	0	2	6
Attending Court on days of hearing	0	6	8
Drawing and engrossing Affidavits of service of rules, per folio	0	0	4
Ditto, other Affidavits than above mentioned, per folio	0	0	8
Taking instructions for Special Affidavits	0	3	4
Taking instructions for Brief for Prisoner	0	3	4
Instructing Counsel on motion	0	3	4
Drawing Brief for Prisoner, per sheet of ten folios	0	5	0
Fair copy of ditto, per sheet of ten folios	0	2	6
Attending Counsel, Court on motion, and other necessary attendances not otherwise mentioned	0	3	4
Copy and Service of Rules within the district of the Twopenny Post	0	3	0
Writing and sending letters when absolutely necessary	0	2	6
Drawing Advertisements, other than above mentioned	0	2	6
Fair copy of ditto, for printer	0	1	0
Bills of Costs, with copies, and getting the same taxed, with affidavit and all expences and attendances thereon (but not including the officer's fee), in each case	0	5	0
Ditto, on further taxation after hearing	0	1	6
Letters, Messengers, Stationery, &c. not otherwise charged, in each town case	0	2	0
Ditto in each country case	0	3	0

It is ORDERED, That no account shall be kept as heretofore with the Attorneys for the carriage of Country Schedules &c. from the place of hearing, but that there shall be paid therefor in each case on filing the Schedule *vid.*; and if, after defraying the carriage and portage, any surplus remain at the end of the year, the Chief Clerk shall place the same to the credit of the public account.

OFFICERS' FEES.

For filing Petition of Creditor and evidence in support thereof	0	3	0
For Search, and Certificate (to be annexed to Creditor's Petition) of no prior petition filed from date of custody,—for each year's indexes during the period	0	1	0
For two office copies of Vesting Order, together with Order in duplicate to file Schedule, to be served on Prisoner when Creditor petitions	0	3	6
For preparing Vesting Order, and preparing Notice thereof, and sending same to Gazette, pursuant to 1 & 2 Vict., c. 110, sec. 37, which requires notice to be published	0	5	0
N. B. The sum of 3s. for the publisher of the Gazette is also payable.			
For preparing the Warrant of Attorney	0	2	6
For preparing Advertisement of Hearing, and sending the same to Gazette	0	1	0
N. B. The sum of 3s. for the publisher of the Gazette is also payable.			
For Notice of Sureties to enter into recognizance, with order, instructions, &c.,	0	2	0
For filing and registering Recognizance	0	2	6
For Appointment of Assignee or new Assignee, and entering same of record, and advertizing same in Gazette, pursuant to 1 & 2 Vict., c. 110, sect. 45, which requires notice to be published	0	7	6
N. B. This is payable on filing the Acceptance of Appointment, together with 3s. for the publisher of the Gazette.			

	£.	s.	d.
For Certificate of the sum in court in any case, or of no sum in court	0	0	6
N.B. Copies of the entire account in any case may be required, and will be charged as other office copies.			
For Certificate of Copies made in pursuance of 7 Geo. IV. c. 57, sec. 76, or 1 & 2 Vict., c. 110, sec. 105.	0	2	6
For a Search or a Certificate, other than as above, in answer to inquiry	0	1	0
<i>Exception.</i> —Before adjudication the Prisoner's Attorney, or a Creditor or his Attorney, may search without fee.			
For Office Copies of proceedings, each folio	0	0	4
<i>But Observe.</i> —When an Office Copy is made to which a printed form is applicable, printed words will not be computed by folio; but paper and print will be charged as two folios, 8d., whether the copy be of a Schedule or of any other proceeding. Also, when a series of documents in any case is required, not more than 8d., as above, will be charged for the whole.			
For Copy of Record made on parchment, and certified according to the 7 Geo. IV. c. 57, sect. 19, or 2 Wm. IV. c. 44, sect. 2, or 1 & 2 Vict. c. 110, sect. 46 and 65,	0	10	0
For investigating matters in pursuance of any Order of Reference made by the Court or a Commissioner, and reporting thereon, for each meeting (such meeting to last two hours, if required)	1	0	0
For Ditto, when documents only are referred, and reporting	0	15	0
N.B. This is the total, whatever time and labour be required.			
For every Order of the Court, and for every Summons	0	1	0
Those are <i>Excepted</i> which relate to the proceedings of a prisoner prior to and including Order of Adjudication and Warrant, no fee being payable on such orders.			
Also, Orders which are drawn of course upon certificate.			
For filing Assignees' Account, and giving instruction for proceedings to dividend, registering, &c.	0	3	0
N.B. No further fee is payable by assignees for the clerk's duties in matters of audit, dividend, &c. unless on taxation of law bills.			
For every Subpœna	0	1	0
For taxing Attorney's Bill for proceedings of insolvent, pursuant to Rule of Court	0	2	6
Ditto, on further taxation after hearing	0	1	0
For all other taxation of costs, each side	0	1	0
To the BROKER, for valuing, appraising, and certifying the excepted articles of a prisoner (with further certificates as required by the prescribed form), upon the amount of such valuation, in the pound	0	1	0
N.B. 4s. on account of this fee, and no more, may be received at the time of giving the notice for appraisement; and where the fees shall prove to be less, the difference shall be returned when the appraisement is delivered. Provided, that no such repayment shall be claimed unless the brokers have been permitted duly to complete their valuations.			
To Ditto, on the delivery of each notice for appraisement	0	1	0
N.B. No further payment will be allowed to be received on account of coach hire, for places in or within ten miles of London.			
To the MESSENGERS, for every personal service of Order for Hearing made by them in London and within ten miles thereof	0	0	10
To Ditto, for drawing, engrossing, and swearing affidavit of each such service made by them	0	2	0
To Ditto, for every other personal service, including affidavit	0	1	6
To Ditto, for every service by general post, and drawing, engrossing, and swearing affidavit of the same	0	0	3
To Ditto, for every Consent taken by them in court, including the affidavit	0	1	0
To Ditto for every Consent taken by them elsewhere than in court (or in court, if there has been attendance for same elsewhere) including the affidavit	0	2	6
Fee to COMMISSIONERS appointed by the Court for taking affidavits (excepting those who are likewise officers of the Court, and who do the same without fee) for each affidavit	0	1	0
IT IS ORDERED, That where judgment shall be entered up on the Warrant of Attorney in the Court of Queen's Bench, there shall be charged against the estate, in full of all charges, costs, and expences attending the same, the sum of	1	15	0
N.B. This has recently been increased by reason of the increase of fees payable in the Court of Queen's Bench.			

It is provided by the 45th section of 1 & 2 Vict. c. 110, that it shall be lawful for the Court to direct any fee or remuneration for the performance of duties in getting in and distributing the estate of any insolvent debtor, whether by any Assignee, or by the Provisional Assignee in case of such distribution being effected without the appointment of any other assignee; which shall not exceed the rate of *five per centum* on the sum received as produce of such estate.

This power will be used or not used, as may appear fit in any case.

XX. RULES AND ORDERS.

This court is empowered to make rules and orders, in the same manner as a superior court of common law. When therefore, in the course of the proceedings, it is necessary to obtain a rule or order, there are three modes in which it may be applied for:—by petition and affidavit,—by motion of counsel,—or by summons out of court.

The most usual mode of application to the court on the part of the insolvent, and in all ordinary cases, is by *petition*, accompanied with an affidavit of the facts. The order is then obtained upon the motion of the chief clerk; at whose office the documents must be left one clear day at least before the petition can be answered.

But in matters of importance the proper mode of application is by *motion of counsel*, supported by an affidavit or affidavits. Every motion in court, indeed, must be grounded upon an affidavit of facts; and the affidavit must be produced in court at the time the motion is made. The court then grants the rule, either absolute in the first instance, or a rule *nisi* (to show cause), or refuses it, according to its discretion.

If the rule be granted, whether upon petition or motion, it is drawn up by the clerk of the rules, upon production of the motion paper and the affidavits, together with the fiat of the court or commissioner. Indeed, whether the rule be granted or not, the affidavits must, as soon as used, be filed with the clerk of the rules, in order that they may be given in evidence, if necessary, on an indictment for perjury.

A copy of the rule must then be served on the opposite party, or his agent or attorney; and if it be a rule *nisi*, it must be served a reasonable time before the day appointed for showing cause.

Unless personal service be expressly required, it will be sufficient to deliver a copy to the wife, son, daughter, clerk, or servant of the person to be served, at his usual place of abode or business. Where, however, the object of the application is to bring the party into contempt for disobeying the rule, it will be requisite to serve the rule *personally*; and if service be avoided by the party, application should be made to the court, on an affidavit of the fact, that service of the rule at the residence or last place of abode of the party may be deemed good service.

It is not necessary to show the original rule, unless sight thereof be demanded, or except for the purpose of obtaining an attachment.

If there be any irregularity in the service of the rule *nisi*, it will be waived by the party's appearing and showing cause against it.

Cause must be shown, on the day appointed, by affidavits. Copies of the affidavits filed in opposition to the rule are usually handed over

to the attorney or counsel of the other party in a reasonable time before the day appointed for showing cause.

If no cause be shown on the day appointed, the court will make the rule absolute, on motion of counsel to that effect, and affidavit of the service of the rule *nisi*; which affidavit should accordingly be prepared ready for production in such an event.

Matters of minor importance, however, (that is, all matters except the hearing, re-hearing, or examination of the insolvent) may now be determined out of court upon *summons*, before a commissioner; whose order is as effectual as if made by the court, unless, upon application, it be altered or rescinded by the court at its next sitting. This power is conferred by the 28th section of the act.

To obtain a commissioner's summons, make out a *præcipe* or note of the summons required, and take it to his clerk, who will thereupon make out the summons. A copy of it, carefully examined with the original, must then be served on the opposite party, in the same manner as in the case of rules.

If the party served has no cause to show, and will consent to the order being made, his consent should be indorsed on the original summons; the commissioner will then make the order as a matter of course.

If he will not consent to the order being made, and should not attend at the time and place appointed, then, upon affidavit of the service of the summons, the commissioner will either make the order, or grant a second summons, peremptorily calling on the party to show cause against it. In ordinary cases, the summons is peremptory in the first instance.

If the party served with the summons attends before the commissioner, the party obtaining it is heard in support of the summons; the opposite party then shows cause against it; and the commissioner grants or refuses the order at his discretion.

If granted, the order must be served on the opposite party, in the same manner as a rule of court obtained upon motion; and if not altered or rescinded by the court, will be as imperative in effect as a rule made upon motion by counsel in open court, and may be enforced in like manner.

If the opposite party, however, be dissatisfied with the order, he may make application to the court at its next sitting to have it set aside, by motion of counsel founded on an affidavit of the grounds upon which he asks for a rescinding of the order; by which means the opinion of the court as to its propriety may be obtained, and it will be altered, rescinded, or confirmed accordingly.

BOOK III.

OF PRIVATE INJURIES, AND THEIR REMEDIES.

CHAPTER I.

Of the Prevention of Injuries without the aid of the Law or any Legal Process.

WE observed, at the commencement of our work, that the principal objects of the laws of England, as of those of every other political community, are RIGHTS and WRONGS. In the two preceding books we have considered the rights, first, of persons, and secondly, of things. WRONGS, therefore, and the means or remedies which the law affords for their prevention, compensation, or punishment, will form the subject of the following pages.

Wrongs, it has been already stated, are divided into PUBLIC and PRIVATE. The former, being an infringement of the rights of individuals, for which the law furnishes a remedy by *civil action*, are also termed CIVIL INJURIES; and the latter, being a violation not only of the rights of individuals, but of the community, for which the law has provided for the punishment of the wrong-doer by a *criminal prosecution* at the suit of the crown, are distinguished by the names of CRIMES and MISDEMEANORS.

As wrongs are for the most part merely privations of rights, it is evident that much of the subject has been already anticipated; for in treating of rights we naturally adverted to the wrongs or injuries to which those rights were liable, and at the same time pointed out the specific legal remedies which were open to the parties injured for their redress. But the manner in which those remedies are obtained or made available, still remains to be considered. And as these remedies are principally to be sought by suits or actions of divers kinds in the several courts of law and equity, it is evident that the redress of injuries by suit or action will form the principal subject of the present book. Since, however, there are some cases in which parties themselves may either prevent the commission of an injury, or obtain satisfaction for it, without resorting to a suit or action, it may not be amiss to dispatch the consideration of these before we enter upon the main subject, which will be the redress of injuries by suit or action in the courts.

We shall, therefore, first consider those PREVENTIVE and other remedies, which parties themselves, their relatives or others, may adopt for the prevention or removal of injuries, *first*, without the aid of the law or any legal process, and *secondly*, with the assistance of some legal authority or proceeding.

These preventive remedies will be considered, 1st, As they relate to the prevention or removal of injuries to the *person* of the party himself or his relative; 2dly, As they relate to his personal property; and 3dly, As they respect his real property.

We should premise, that if a party obtain redress by any such summary remedy of his own, he is not in general afterwards allowed to sue for the temporary injury. It seems to be settled, at least in the case of a private nuisance, that a party has only an option, and cannot abate it and also sue for damages; though this doctrine must be received with some qualification. Secondly, the means adopted, either by resistance, defence, or recaption, must always be proportioned to the occasion; and any excess of violence may subject the party to an action, and, in case of unjustifiable or unnecessary or avoidable homicide or mayhem, to punishment. These degrees vary according to the subject-matter: as if a *felonious* attack is made upon the *life* of another, he may justify even homicide in self-defence, and a woman may justify homicide to prevent a rape; whereas, in defence of *goods* or *land* against a mere *misdemeanor*, at most a battery would, in ordinary cases, be justifiable. So in cases of private injury, it is an established rule, that the party should do no more than the necessity of the case requires, when the excess might be in any way injurious to another. Supposing, therefore, the assailant to be too powerful to be resisted by ordinary means, the party wrongfully attacked cannot (unless his own death, or other felony, may reasonably be expected) make up for the deficiency of his strength by resorting to deadly arms, except merely to intimidate.

I. SELF-DEFENCE:—1. *Of the Person*.—The strongest justifiable act of defence is the killing the aggressor.

Homicide committed for the prevention of any forcible and atrocious crime, which if completed would amount to *felony*, is justifiable. A man may repel force by force in defence of his person, property, or habitation, against any one who manifestly intends or endeavours, by violence or surprise, to commit a murder, rape, robbery, arson, burglary, or the like. In these cases he may resist, and even pursue the adversary, until he has secured himself from all danger; and if he even kill him in so doing, it is considered justifiable self-defence. So if in any house, the outer door of which is shut, there be a cry of murder, any person may break open the outer door to prevent it. It is lawful for any private person to do any thing to prevent the perpetration of a felony. But the fear or expectation of any of these offences, however well grounded, as that another is lying in wait to take away the party's life, unaccompanied by any overt act indicative of such an intention, will not warrant him in killing that other by way of prevention, for there must be an *actual danger* at the time.

There must be a felony intended, and not a mere assault. And it must also be of a forcible nature, or of such extraordinary degree of atrocity as not to allow of any delay. Merely attempting to pick a

pocket is insufficient; though if one has actually picked my pocket, and I cannot otherwise take him, it has been supposed that the killing him to prevent his escape would be justifiable; but this may be questioned, as the utmost punishment even of the law would not in such a case be capital. So the killing a person who attempts to break open a house *in the day-time* would not be justifiable, unless it were accompanied with an attempt at robbery also.

Where a sheriff's officer early in the morning pushed abruptly and violently into a man's chamber in order to arrest him, not telling his business, nor using words of arrest, and the person, not knowing that he was an officer, under the first surprise snatched down a sword and instantly stabbed him, this was holden to be only manslaughter. Where a felonious attack has been made upon the life of another, the latter, in self-defence or protection, may justify the pursuit and killing of the aggressor, until he himself is entirely out of danger, which he cannot be said to be so long as the assailant might immediately renew his attack.

If the offence does not amount to felony, and is at most but an indictable *misdemeanor*, a dangerous weapon, either to wound or secure the offender, must not be used. Thus, to assume the appearance of a ghost, and thereby frighten others, and even so to work on their imagination as to occasion death, or to call the feelings into such strong excitement as to produce a fatal malady, is not felonious; and therefore where a person shot at and killed a party who before and at the time had assumed such appearance, it was held murder.

The law justifies a woman killing one who attempts to ravish her. And a husband or father may justify killing a man who attempts a rape upon his wife or daughter, though not if he take them in adultery by consent; for the one is forcible and felonious, but not the other. The forcibly attempting an unnatural offence might, it seems, be equally resisted by the death of the aggressor.

Self-defence, *when no felony is intended or apprehended*, is of two descriptions: 1st, Where the assailant attempts to beat another, and there is no mutual combat; 2dly, Where there is a mutual combat arising from sudden quarrel, without malice prepense.

With respect to the *first*, or self-defence, even if the death of the assailant ensue, without fault of the party attacked, he is wholly dispunishable. But care must be taken that the resistance does not exceed the bounds of mere defence and prevention; for if it do, then the defender himself would become an aggressor. If the first assault be very violent, and continued by means either actually or apparently to the assailed party putting his life in danger, then even a mayhem may become justifiable or be excused. No man is required to remain defenceless and suffer another to beat him as long as he pleases without resistance, although it may be evident that the other does not aim at his life, but he may lawfully exert so much force as is necessary to compel him to desist.

In cases of mere assault and battery, or in cases of attempted illegal arrest, where the life of a party is not in danger, however unjustifiable the conduct of the assailant may have been, no dangerous instrument or means of defence should be even produced (except to intimidate), much less be used.

The extent of the means of self-defence depends on the occasion, and the battery and resistance can no longer be used than whilst necessary to prevent the aggressor from repeating or renewing his attack.

Much less will the natural right of defence imply or permit a right of attacking or retaliating; a person, therefore, cannot legally exercise this right of preventive defence but in sudden and violent cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law.

Secondly, *mutual combat upon sudden quarrel*. With regard to homicide in self-defence where no felony was intended by the party killed, this occurs when death ensues from a combat between parties on a sudden quarrel, and not premeditated. When it is premeditated, as in the case of agreed duels, it is murder; or if on an agreed boxing match, it is at least manslaughter.

With respect to defence against an attack of animals, if a dog, accustomed to bite mankind, attack a party, such party may in self-defence destroy him, but only whilst in impending danger from the attack, and not afterwards.

2. *Defence of Personal Property*.—A man may repel force by force in defence of his personal property, and even justify homicide against one who manifestly intends or endeavours, by violence or surprise, to commit a known *felony*, as a robbery; but it is otherwise where the act would not be a forcible felony. If a party come merely as a *trespasser* without any colour to take the goods of another, it is lawful to exert such force against him (even without previous request to restore the goods) as may be necessary to make him desist. And a party may justify even a battery, by showing that he committed it to restrain the aggressor from taking or destroying his goods, or from rescuing goods in his custody upon a distress, or to retake personal property illegally taken away or detained.

By the 7 & 8 Geo. IV. c. 29, § 63, and 7 & 8 Geo. IV. c. 30, § 28, the owner of personal or real property "about to be stolen, or illegally taken, or wilfully injured, and his servants, or any person authorized by him, may apprehend the offender found committing the offence;" and if the servant of the owner of property find a party actually committing such an offence and apprehend him, and whilst taking the offender to a magistrate such party kill him, this will be murder; but if the servant either did not see him in the actual commission of the offence, or were taking him to any other place than before a magistrate, the resistance would not be a murder.

3. *Defence of Real Property*.—With respect to the defence or protection of the possession of real property, it is justifiable even to kill a person in the act of attempting to commit a *forcible felony*; yet where A with many others had, on pretence of title, forcibly ejected B from his house, and B on the third night returned with several persons to re-enter, and one of B's friends attempted to fire the house, whereupon one of A's party shot one of B's, this was held manslaughter in A.

When the act amounts to a *trespass*, although it is in general lawful to oppose force by force when the former is clearly illegal, yet before

a person turns out or excludes another from entering a particular house or room, he must be well assured that he himself has a better right to the possession than the party to be excluded, and that the latter has no right to be present; and therefore if the exclusion be from a vestry meeting, it must be certain that the meeting is duly holden.

In all these cases, also, much caution must be observed in the mode of resisting the intruder or turning him out; and if there be any excess, the party guilty of it may be liable to an action and to criminal punishment.

It was recently held, that a person set to watch a yard or garden was not justified in shooting one who came into it in the night-time, even though he saw him go into his master's hen-roost, for he was not in the actual commission of felony.

With respect to the prevention of *trespasses* on land. Every person has a right to keep a dog for protection, and may let it loose *at night*; and if a person incautiously go into the yard after the yard has been shut up and he be hurt, he has no remedy. But if the owner know the dog to be ferocious and leave his yard gate open, he must not let the dog loose in the day-time, or let him have a chain so long as to be able to hurt a person entering the yard; and he should give a verbal or written or printed caution against coming too near; though that is not always sufficient, as if the party could not read and was able to justify his being in the particular place where the injury happened.

So an occupier has a right to place a mischievous bull in his own close when properly fenced, if no other person has a right of entry to use a way or otherwise be therein; yet if there had been a right of common or of way, or even if a way there had been previously permitted, though not legally claimable, and the use of it had not been duly countermanded, it would be otherwise. The occupier should at least give notice of such danger, or he will be liable to an action, even admitting he had a right to place such danger there, where he adopts any dangerous means of defence.

The sole owner of a fishery may place hooks in the water to destroy the nets of persons unlawfully fishing.

It is actionable at common law for a person to throw poisoned corn on his own land, and thereby poison his neighbour's fowls. But it has been suggested that a man may corrupt water on his own land, and that if cattle should escape into such land and be injured in consequence of drinking the water, the owner could not sue the former. And, before the present Game Act, a person might with impunity throw poisoned corn on his own land and thereby kill the game of his neighbour, the law not considering game as valuable property when off the land of a person to which they usually resorted; and it is now expressly declared illegal maliciously to put any lime or other noxious material in any water with intent thereby to destroy any of the fish therein; and the placing poison or poisoned ingredients on any land with intent to destroy or injure the game, subjects the party to a conviction in 10*l.* penalty.

At common law, if a person keep glandered horses in his stable so near to that of another as to cause infection, he is liable to an action.

A person may justify killing a dog in a warren whilst pursuing the

rabbits there, or whilst pursuing deer in a park, *but only if he cannot otherwise prevent the destruction of the rabbits or deer.*

No person has any right directly to shoot or seize a dog illegally pursuing a hare when self-hunting. The seizure of a dog, or taking any engine for destroying game, appears now only to be legal when they are used to destroy deer, or in illegal night-poaching. It is yet doubtful whether dog spears may be placed on any land.

It has been admitted that spikes or glass bottles may be placed on the top of a garden wall, to prevent persons from getting over it; and if a trespasser be injured thereby, he has no remedy. And in general, though a person adopting too dangerous a mode of protecting his property may be *criminally* responsible, yet if the party injured were a trespasser, and had notice of the means adopted, he cannot sustain a *civil* action for the injury. Accordingly, before the late act prohibiting the setting of spring guns and man traps (7 & 8 Geo. IV. c. 18) it was holden, that a trespasser, having knowledge that there were spring guns set in a wood, though ignorant of the particular spots where they were placed, could not maintain an action for any injury received thereby. But since the passing of that act, whereby the setting of spring guns or man traps or other engines calculated to destroy human life or inflict grievous bodily harm (except in dwelling-houses, and there only from sunset to sunrise), a person setting a spring gun in a walled garden in the day-time, *without giving notice*, was held liable to an action for an injury to a person who got over the wall to catch an escaped peacock, though a trespasser without licence; and perhaps he would have been held liable even if he had given notice, for, independently of the consideration that it is inhuman to catch a man by means which may maim him or endanger his life, as it is a misdemeanor to set them, it was not to be believed that the guns had been really set as pretended; and, besides, the party injured might not have read or been able to read the notice.

When a spring gun or other dangerous instrument is set in a house under the exception in this statute, the notice thereof should be qualified accordingly; and when any traps are set in woods and grounds to kill vermin, if a dog spear, trap, or instrument likely to injure a dog be placed there (the right to which, it will be recollected, is questionable), the notice should be particularly worded. A small spring trap, in the nature of a rat trap, might be placed so as to spring upon the lower part of the leg of a fox and maim or catch him, and have the same effect upon dogs, without the possibility of injury to man, because too small to receive his foot or ankle.

It was held that any proprietor of land exposed to the inroads of the sea may endeavour to protect himself by erecting a groyne or other reasonable defence, although he may thereby render it necessary for the owner of the adjoining land to do the like. A person may even justify the necessary pulling down a neighbour's house to prevent the progress of a fire which would otherwise consume both.

If a house require repairing or rebuilding, so as to render it necessary to pull down a wall on the owner's land near the house of another, he may pull it down after giving him notice, so as to allow him time to shore up his own house. But with respect to houses within the bills

of mortality, the Building Act contains some regulations to be previously observed in this respect.

A person may legally shoot rooks on his own land, and even so near to a rookery as to disturb the birds in building their nests and breeding there; for the law acknowledges no valuable property in rooks, nor affords any civil or criminal remedy in respect of them. But with respect to pigeons, by 7 & 8 Geo. IV. c. 29, § 33, it is different. So a decoy is protected property. Rabbits, when in a warren or ground lawfully used for the breeding or keeping of rabbits, are protected by the 7 & 8 Geo. IV. c. 29, § 30, which enacts, that if any person shall unlawfully and wilfully in the night-time take or kill any hare or coney in any warren or ground lawfully used for the breeding or keeping of hares or coneys, whether the same be inclosed or not, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully in the day-time take or kill any hare or coney in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or coneys, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money not exceeding five pounds as to the justice shall seem meet. Provided always, that nothing herein contained shall affect any person taking or killing in the day-time any coneys on any sea bank or river bank in the county of Lincoln so far as the tide shall extend, or within one furlong of such bank.

With respect to fox and stag-hunting, although the pursuit is generally tolerated and permitted, yet it is in law illegal, and the hunters may be warned off like any other trespassers; and a master or huntsman stimulating the hunt is liable.

II. DEFENCE BY RELATIVES AND OTHERS.—The principles and rules which allow self-defence of a party's own person are extended to certain relations; as, for instance, husband and wife, parent and child, master and apprentice, and master and servant. When, indeed, a *felonious* attack is made upon an individual or his habitation, then *any other* person, though not a relation, may lawfully interfere to prevent the mischief intended.

But with regard to *mere trespasses*, there is a very material difference between the interference of certain relations and of mere strangers. The former may justify immediate resistance with force when necessary, but a stranger can only interfere moderately to prevent the wrong. But in all cases, as in self-defence, care must be taken that the resistance does not exceed the bounds of mere defence and prevention. However, in the near relationship of parent and child, much indulgence is allowed for the feelings of each relative; and when a man's son was beaten by another boy, and the father went near a mile to find him, and then revenged his son's quarrel by beating the other boy, of which he afterwards died, it was held to be only manslaughter, and not murder; such indulgence does the law show to the frailty of human nature and the workings of parental affection.

With respect to the interference of *friends*, it should seem that there is no legal distinction between them and strangers, and that the nearer or more remote connexion of the parties with each other, as regards

friendship, is more a matter of observation to the *jury* as to the probable force of the provocation and the motive which induced the interference of a third person, than as furnishing any precise rule of law grounded on any such distinction.

A mere stranger cannot justify an interference with force in the first instance, to prevent the battery of a third person or any other trespass or civil injury, where death or any felony is not likely immediately to occur, but must proceed more moderately, and should previously declare or signify that he interferes merely to preserve the peace, and not as a partizan; and he can only justify the gentle laying on of his hands to prevent a breach of the peace; though afterwards, if he be himself attacked by either party, he may defend himself with the same degree of force as if he had been originally illegally assailed.

With respect to the interference of *strangers* where the process turns out to be illegal, it seems to be considered that the illegal restraint of any one's liberty is a sufficient provocation to by-standers.

In case of a libellous caricature causing a person to become an object of ridicule, it has been considered justifiable in the party libelled even to destroy the picture, and even excusable in a near relation to do so; but the safer course is to take the libel to a magistrate.

III. APPREHENSION OF WRONG-DOERS. — One of the most immediate and effectual means of preventing an injury, or securing punishment for its commission, is the apprehension and detainer of the wrong-doer "*found committing*," or *whilst committing* the offence, or, in the case of felony, when he is escaping; and also of seizing his engines then in use or about to be used for the wrongful purpose.

Both the common law and divers modern statutes authorize parties themselves who have been or are likely to be injured, and others on their behalf, or for the security of the public, to interfere on their own accord, and apprehend the offender whilst found committing an offence, or very shortly after the offence has been committed, and then to deliver him to a peace officer, or convey him before a justice of the peace.

Indeed, private individuals are not only permitted but *enjoined* by law to arrest an offender, if present when a *felony* is committed or dangerous wound given, on pain of fine and imprisonment if the wrong-doer should escape through their negligence. And although the offender run away, and give over his intention of committing the felony, still it seems on fresh pursuit he may be apprehended by any one. And when it is certain that a felony has been committed *by some one*, any private individual is excused in imprisoning a person, though he should turn out to have been wholly innocent, if he can prove that he had reasonable or probable cause for suspecting that he was the felon. But if it should turn out that no felony had been committed by any one, then (except in the case of arrest upon a hue and cry) he would have no power to do so, although he had probable cause for suspecting the guilt.

In the case of a *misdemeanor*, suspicion that a party has on a former occasion committed a misdemeanor, though accompanied with proof of the offence having been committed by *some one*, is no justification for giving the former in charge to a constable without a justice's war-

rant. Nor can a private person, at common law, apprehend or imprison another for a misdemeanor or breach of the peace after it is over, without a warrant; nor can a constable do so at common law, unless he had a view of such misdemeanor or breach. It is safer, therefore, in all cases of the least doubt, for private individuals, especially when time will allow, rather than thus act for themselves, to apply to a magistrate for a warrant.

It would be beyond the limits of this work to attempt to enumerate all the instances in which, by the common law or by general or local statutes, private persons and officers are authorized, either with or without warrant, to apprehend supposed offenders. The general rule is, that a private person, in order to justify or excuse his giving charge to a peace officer who has not had actual view of a breach of the peace, must be prepared to prove that a felony had been committed by some one, and that he had reasonable grounds upon facts to suspect that the party apprehended was the guilty person. But a constable or other proper officer is justified in acting upon the charge of felony made by another, if he have reasonable grounds for suspecting that the party charged was guilty of the felony, though he turn out innocent, and that no felony whatever had actually been committed. But he must not handcuff a person unless he has reason to fear an escape.

The Vagrant Act, 5 Geo. IV. c. 13, authorizes any person whatsoever to apprehend persons found offending against that act, and to take them before a justice of the peace.

So the 7 & 8 Geo. IV. c. 29, *against larcenies and petty stealings*, and the 7 & 8 Geo. IV. c. 30, *against malicious injuries to property*, contain special provisions for the apprehension without warrant of persons "found committing" offences against those acts, by a peace officer, or by the owner, or his servant, or any person authorized by the owner. The offender must, in general, be found in the actual commission of the offence; and he must at least be acting wilfully. But if he be taken upon fresh pursuit, his apprehension would be legal.

The 9 Geo. IV. c. 69, § 2, *against night poaching*, provides, "that where any person shall be found upon any land committing any such offence as is thereinbefore mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor wherein such land may be situate, and also for the game-keeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or, in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his being conveyed before two justices of the peace." The act provides against assaults and resistance of such apprehension by enacting, "that in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorized to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor," and on conviction be transported for seven years, or imprisoned with hard labour for not exceeding two years

But a stick or bludgeon, not taken out by the offender for the purpose of attack, is not an offensive weapon within the meaning of this act.

If one of the keepers be shot by one of the poachers, this will be murder in all, unless either of the poachers separated himself from the rest, so as to show that he did not join in the act; and it will be murder though the keeper had previously struck the offender or any of his party, if he struck in self-defence only.

It will be found that the principle of these modern acts authorizing private persons to apprehend offenders is not new, but will be found in the ancient acts respecting offences in forests and parks, and in the General Highway Act, Turnpike Act, and in most of the local Paving and Police Acts, in order to secure transient offenders.

So general protection to persons apprehending offenders is afforded by the 9 Geo. IV. c. 31, § 12, against criminal resistance.

In general, not only officers but private persons who apprehend supposed offenders without warrant have adequate protection against, or means of getting rid of civil actions for any irregularity when they have acted *bonâ fide* and without malice, but have either mistaken the offence or the person, or the regularity of their proceeding.

Whenever an officer or a private individual acts with or without a warrant, he should in all cases take care to notify in the first instance his authority to the party about to be apprehended; for otherwise his resistance might be excused, excepting in the case of a *known* constable or peace officer, or where the ground of the arrest is already sufficiently known to the offender, as where he is found in an inclosed area or yard for an unlawful purpose.

When a private person has apprehended an offender at common law for a supposed felony, he should immediately, or as soon as practicable, deliver over the prisoner to a constable, or convey him before a magistrate or to any gaol in the county. But the preferable course is to see that he be taken as soon as practicable before a magistrate. But if the apprehension be at night and during the hours of rest, then the prisoner may be taken out of his home and placed during the night in a secure prison until the earliest hour of business the next morning. But the party must not be handcuffed, much less beaten, unless there be resistance or real danger of rescue.

IV. RESISTANCE OF ILLEGAL PROCESS.—If an officer or person endeavouring to make an arrest or enter a house have no legal authority for that purpose, or if in certain cases he abuse such authority and do more than he is authorized to do, or if he have no right to enter, then the party about to be imprisoned, or whose house is about to be illegally entered, may resist the illegal imprisonment or entry by self-defence, not using any deadly or dangerous weapon, and may escape or be rescued or even break prison, and others may assist him in so doing. And although he would not be justified in killing the officer, unless he threatened him with immediate loss of life or forcible felony, yet the homicide in resisting the unlawful imprisonment or forcible trespass in the house would only be manslaughter.

But in all cases, whether of arrest for a supposed debt or apprehension for a supposed crime, it is a general rule, that the falsity of the charge, that is, the real injustice of the demand in the one case, or the

party's innocence in the other, will afford no excuse for resisting the process, or the officer employed in enforcing it, when specific and express, to take a particular party; and resistance, escape, or rescue, is only justified or excused where the process itself or the conduct of the officer is illegal, admitting the existence of the debt or the guilt of the crime; for every man is bound to submit himself to the regular course of justice, and should wait the ultimate decision on the claim or the imputed crime. And, upon the whole, it appears to be very hazardous to resist the execution of any process or arrest having the least semblance of a legal proceeding, as the powers of arrest in civil cases, and to apprehend in criminal, are most extensive; and the wisest course is not only to protest against, but to submit for the time to the illegal imprisonment, rather than by hazarding a resistance be subjected to the serious consequences that may sometimes ensue.

V. RECAPTION.—The right of recaption occurs when a husband, parent, or master, has been illegally deprived of the custody of his wife, child, or apprentice or servant, or the owner has been deprived of his property. In such cases the law, under certain circumstances, allows the recaption of the person of the relative, or of the property, wheresoever either may happen to be; and if he can contrive to regain possession without undue force, the law favours and will justify his proceeding.

When a wife, a child, or an apprentice, or, according to Blackstone, a servant (but that must be limited to a servant who assents to the recaption), has been taken away wrongfully by the party withholding either, the person entitled to the custody may at once, and without any formal request or demand, peaceably enter the house of the wrong-doer, the outer door being open, and carry away the party wrongfully detained. If the recaption be resisted with force, then recourse must be had to a court or judge for a *habeas corpus* on behalf of the husband, parent, or guardian, or on behalf of the apprentice, or for the chief justice's warrant; or recourse may be had to a court of equity to compel the return of a child or ward to his studies, or to an appointed place. And if a wife elope with an adulterer or other, the husband may legally with force retake her; and if they escape to France, their separation may be enforced by the law of that country, and the adulterer imprisoned for a year.

The same principles extend to the recaption of *personal property*; and it has been observed, that there may be many cases where recaption may be the only or the best remedy; as if one joint tenant or tenant in common take a chattel real or personal, and assume the exclusive possession, in which case his co-tenant cannot support an action against him (although sometimes a court of equity would regulate the enjoyment), and therefore the only remedy would be for the other co-owner to retake the possession.

If a party be wrongfully dispossessed of his personal property, he may in general justify the retaking it from the house and custody of the wrong-doer, even without a previous request to re-deliver it. But, in this recaption, care must be observed to avoid any personal injury, or any forcible entry or breach of the peace.

If the possession of the property was originally justifiable, but it is

afterwards wrongfully detained, the owner must first request the redelivery, and he cannot justify more than gently laying his hands on the wrong-doer in order to recover it; and even then, and after it, a party cannot in all cases legally enter the house or land of another to retake his property, but must frequently proceed by action of detinue, replevin, or trover; and in no case may the owner commit a riot, or a forcible entry, or breach of the peace, to regain his property, and if he do, he may be indicted for a breach of the peace.

If a party take my personal property and alter its form, or improve it without altering it into a different species, I may retake the whole.

But if a tenant neglect to remove his fixtures or crops, during his tenancy, he loses his property therein, unless in cases where he is entitled to emblements or a way-going crop, and he cannot afterwards enter to retake them, or support an action of trover for withholding them. But where an occupier has been strictly a tenant at will, or at sufferance, and another person has determined his right to continue in possession, it should seem that he would not be a trespasser if he enter afterwards to remove his goods, and continue only a reasonable time for that purpose.

If trees are blown down, it is not trespass for the owner to enter the land into which they fall to take them. So if a man have to lop his tree, and he cannot do it unless it fall, without his fault, upon the land of another, he may justify the felling of it upon such last-mentioned land. So if a fruit tree grow in a hedge, and the fruit fall into the land of another, the owner may go upon the land and fetch it. But in these cases the occupier should be previously requested to deliver the property to the owner, or to allow him to enter.

With respect to goods wrongfully obtained *under colour of a contract*, if the pretended purchaser's conduct was so fraudulent as to avoid the contract, the vendor may retake or even rescue them by any stratagem, even when in the hands of the sheriff under an execution at the suit of a creditor against the fraudulent purchaser.

So where goods have been *purchased* without such fraud, and it be discovered, before they have reached their destination or the hands of the purchaser, that he is insolvent, they may be stopped *in transitu*, by any means short of force; though a part delivery will in general defeat the right to stop the residue. So the taking a bill or note, which is still outstanding in the hands of a third person, will preclude the vendor from insisting on his lien.

The purchaser of a specific chattel who has paid for the same, or who tenders the price, may in general take it with force, in case the vendor or a third person refuse to deliver it.

It is laid down at the common law, that if a man be disseised of any lands or tenements, he may, if he cannot prevail by fair means, legally regain the possession thereof by force, unless he were put to the necessity of bringing his action by having neglected to re-enter in due time, that is, within twenty years. The better way in these cases, when the claimant has the legal as well as the beneficial right, is to avoid personal violence or the breaking an outer door, and to obtain possession through the intervention of a tax-gatherer (who may be authorized by a warrant to break open doors) or by other stratagem.

VI. REMOVAL OF INJURIES BY ABATEMENT.—Cases of abatement, or removal of injuries by the mere act of the party himself, and without the assistance of the law, generally occur in private or public *nuisances*, as they are usually termed. But the same principles will, in general, apply to other cases.

In the case of a private nuisance, the building or act, however likely to become a nuisance, cannot be legally abated until it has actually become so in some sensible degree, and not prospectively, or *quia timet*. And before an actual injury has arisen, the party apprehending prospective injury should file a bill in equity for an injunction.

If a wrong-doer illegally erect upon his own soil any thing which occasions a nuisance or injury to another, as by stopping a rivulet, and so diminishing the water used by him for his cattle, the party injured may enter on the soil of the other and abate the nuisance, and justify the trespass; and this right of abatement is not confined merely to nuisances to a house, to a mill, or to land. So if a person on his own land erect a building which obstructs the light or air passing through an ancient window, the occupier of the latter may legally abate or remove it, and, if necessary, may enter the premises of the wrong-doer for that purpose. On the other hand, although a person may have a right for light and air to pass through his ancient window into his building, yet the occupier of the adjoining land may prevent such party from overlooking his premises by placing boards and other obstructions under the window, taking care not to commit any trespass upon or to the building in which the window is placed.

When the nuisance is occasioned by the *tortious misfeasance* or *malfeasance*, of another, the party thereby injured may in general abate the nuisance immediately, and without any previous notice or request; but if the nuisance be merely continued by a party who did not erect it, or when it consists of *omission*, the party should be requested to remove it before the party injured can himself remove the injury. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it, and then no previous notice is requisite; but, in all other cases of such nuisances, a person should appeal to a court of justice.

In abating a *private* nuisance, care must be observed to abate no more than is necessary to restore the party injured to the enjoyment of his right as before the nuisance.

If a common be improperly surrounded by a fence, a person having a right of common therein may justify the prostration of it; but he cannot justify the prostration of trees, nor killing rabbits.

With respect to the boughs of trees overhanging the land of another, much contention has arisen. The right to cut such overhanging boughs is restricted to so much only as actually overhangs the party's land; and as such cutting of a tree that has been suffered to grow to a considerable size is in general considered an unneighbourly act, great care should be observed that there be no excess, and that the cutting be as little injurious to the tree as possible; for if there be any excess, a jury will frequently give very considerable damages, especially if the trees were ornamental.

A legal remedy is now applied in all cases of nuisance arising from contagious and epidemic diseases, by the 9 & 10 Vic. c. 96, by which the filthy and unwholesome condition of any dwelling-house or other building, or the accumulation of any offensive or noxious matter, refuse, dung, or offal, or the existence of any offensive or noxious drain, privy, or cesspool may be removed, and the nuisance abated.

With respect to the abatement of *public* nuisances, private individuals are in many cases allowed to remove them, without the interposition of any legal authority; and in others certain inferior officers, or persons authorized by custom or particular statutes, may summarily do the like, as a leet jury in destroying fraudulent or defective weights and measures, or bad meat.

An entry to abate a nuisance immediately dangerous to the public safety, and which requires immediate abatement, may be made without any previous request; for necessity will then justify such an immediate entry. But only a magistrate can remove a gate on a highway road put there by trustees.

No person can justify placarding a supposed house of ill-fame, or placing and keeping a lighted lamp opposite to it; for this tends to a breach of the peace, and the nuisance should be put down by legal means.

VI. *DISTRESSES AND SEIZURES*.—Distresses of cattle or chattels, whether damage feasant or for rent, or for other claims, may also be properly considered in the nature of remedies by acts of the parties without the intervention of legal authority, although they frequently give rise to actions of replevin and other litigation.

1. With respect to *distresses damage feasant*, it had been considered that no person should distrain cattle damage feasant, unless it be certain that he has the legal title to the land, and not a bare possession; and that if his title be questionable, he should be content to drive off the cattle, and to bring an action of trespass to recover compensation for the damages; which action is always sustainable against a wrong-doer.

In all cases, before making a distress, the party should well consider, whether the trespass was not justifiable, either in respect of the state of the fences which he ought to have repaired, or otherwise; and even then, as the making a distress damage feasant is usually considered an unneighbourly act, it would be better, if the owner of the cattle be known and solvent, to forbear distraining, and to bring an action, if the damages clearly exceed 40s. But if the owner of the cattle be unknown, a distress is advisable.

The cattle must be taken whilst actually upon the owner's land and in the very act of doing damage. A horse with its rider upon him, or goods in the actual use of the party, cannot be taken, because such a distress might lead to a breach of the peace; but by recent acts the tackle of persons illegally fishing, and the snares and dogs of persons illegally in pursuit of deer (7 & 8 Geo. IV. c. 29), and game recently killed (1 & 2 Wm. IV. c. 32), may be seized for the use of the owner.

The cattle &c. taken cannot be legally impounded after a tender of sufficient amends before impounding.

Cattle distrained must not be beaten or wounded, or worked or used. But if they die in the pound without any fault of the distrainor, the

loss will fall upon the party distrained upon. The property distrained cannot be sold, but can only be impounded and kept as a pledge until compensation for the damage has been made; and if they should be illegally sold, the party distraining would become a trespasser *ab initio*. Therefore, if the owner of the cattle be obstinate, and refuse to replevy or pay damages, the party distraining would derive no advantage from his distress.

If a distress *damage feasant* be made and impounded in a *common* pound overt, the owner of the cattle is, in point of law, bound to take notice of it at his peril; but if in any *special* pound, whether overt or covert, the distrainor must give notice to the owner. In all cases of pound overt, the owner of the cattle, and not the distrainor, is bound to provide the beasts with food and necessities; but if they are put in a pound covert, as in a stable, the distrainor must feed and sustain them. It is better, however, if possible, to give the owner notice in writing of the impounding.

2. *Distresses for rent* have been already treated of under the head of LANDLORD AND TENANT. Although a proceeding by distress seems in some respects in the nature of process, yet it is not legally considered as a proceeding *at law*; and therefore a common injunction in a court of equity restraining proceedings at law, means in a court, and does not extend to prohibit a distress for rent; and in many cases it may be advisable, notwithstanding a general injunction, for a landlord to distrain in order to secure the ultimate payment of an arrear of rent, to prevent which a special injunction, expressly prohibiting that proceeding, must be obtained.

3. To the proceeding by distress for rent may be added distresses specially authorized, as for *rent-charges*, *sewers' rate*, *poor rate*, or *highway rate*, or under various particular acts of parliament, authorizing the levying of *finer* or *penalties* by distress and sale. When, as in the case of a highway rate or poor rate, a statute gives a distress for an arrear, that remedy only must be pursued, and no action can be maintained. But as the power to distrain on standing crops, or of cattle upon a common, is only given in rent service, such crops or cattle cannot be taken under distress for arrears of an annuity or rent-charge.

Seizures and distresses for *heriots* are also remedies by the act of the party entitled to them, which may be properly classed under this head. For *heriot service*, which is a species of rent, the lord may distrain or seize; but for *heriot custom* he can only seize the identical heriot, and cannot distrain any other chattel. The like speedy and effectual remedy of seizure is also given by law with regard to many things that are said to lie in franchise, as waifs, wrecks, estrays and deodands, which may be taken without the formal process of a suit or action.

The SETTING-OFF one debt against another, RETAINERS by executors and assignees in bankruptcy, and LIENS, may also be treated as modes of preventing a loss by the act of a party himself. These subjects, however, have been already considered.¹

¹ As to SETTING-OFF, see *ante*, 385; as to *rupts' Assignees*; and as to LIENS, *ante*, 282, RETAINERS, see *tit. Executors*, and *Bank-* 288, 392.

CHAPTER II.

Of the Prevention of Injuries by Legal Authority.

WE have now to consider the preventive remedies which may be had by the intervention of some competent legal authority or proceeding, whether summary or formal, as distinguished from prevention by the mere act of parties, as considered in the last chapter.

I. IMPRISONMENT OF A LUNATIC.—At common law, any person might justify confining and restraining his friend in a manner essential under such circumstances; and a private individual may arrest a lunatic who seems disposed to do mischief. When there is danger of a lunatic committing any crime or offence or serious mischief, for which if sane he would be criminally punishable, the proper course is to proceed under the 39 & 40 Geo. III. c. 94, s. 3, which enacts, "That, for the better prevention of crimes being committed by persons insane, if any person shall be discovered and apprehended under circumstances that denote a derangement of mind, and a purpose of committing some crime, for which, if committed, he would be liable to be indicted, and any justice before whom such person may be brought shall think fit to issue a warrant for committing such person as a dangerous person suspected to be insane, such cause of commitment being plainly expressed in the warrant, the person so committed shall not be bailed except by two justices, one whereof shall be the justice who issued such warrant, or by the quarter sessions, or by one of the judges, or the lord chancellor, lord keeper, or commissioners of the great seal."

There is no power to interfere with the person of a lunatic when he has been arrested, so as to take him out of the custody of the sheriff or his officer, either before or after a commission of lunacy has been found. But it should seem that the lord chancellor has jurisdiction in any case, even before a commission, upon proper application, to order in whose custody a dangerous lunatic shall be placed; and after a commission has been established by the verdict of a jury, it is clear that the chancellor may order that the lunatic shall be delivered to the committee, and for that purpose a habeas corpus is unnecessary.

II. PREVENTION OF INJURIES BY APPLICATION TO A MAGISTRATE OR PEACE OFFICER.—In case a felony, or a serious breach of the peace, or disturbance, or other illegal act constituting a misdemeanor be expected, then it is advisable, either by application to a magistrate or to a constable or other peace officer, to cause him to attend, so that if he have information of any felony, or view of any actual breach of the peace, he may immediately interfere, and apprehend the wrong-doer; and on any information that a breach of the peace is about or likely to ensue, it is the duty of every justice of the peace and constable within his district to attend and prevent it.

A justice called upon to suppress a riot is required by law to do all he knows to be in his power that can be reasonably expected from a

man of ordinary prudence, firmness, and activity under the circumstances. In suppressing a riot a justice is not bound to head the special constables, or to arrange and marshal them, for that is the duty of the chief constable. Nor is a magistrate chargeable for not having called out the *posse comitatús* in case of riot, if he has given the queen's subjects reasonable and timely warning to come to his assistance; and he is not bound to go with soldiers in person, it being enough if he give them authority.

On the reasonable expectation of any tumult, riot, or felony, (but of which it is necessary that some person should make oath before a magistrate), and for prevention thereof, before the same has actually occurred, or whilst it is in progress or likely to be repeated, any two justices may appoint special constables, who are to perform the same duties as common law constables, and are subject, in case of neglect, to a forfeiture of 5*l.* each, and to other liabilities. And it would be an indictable misdemeanor if magistrates should perversely, and after tender of such oath, neglect to appoint them when requisite.

It is the duty of justices of the peace, when they are informed that a breach of the peace is likely to take place, to attend *in person*, or at least to send peace officers to prevent it.

If a magistrate have jurisdiction, his error in issuing a warrant to apprehend, or in committing a person to take his trial for a supposed offence, will not subject him to an action of trespass, even though the depositions were improperly taken in the words of the act, and not in those of the witness. But if he had no jurisdiction at all, or if it had ceased, it would be otherwise.

Although in ordinary cases, on the apprehension of a duel or breach of the peace, application to prevent it should be immediately made to justices of the peace, yet when a duel is expected between persons of rank and consideration it may be expedient to apply to the lord chancellor or to the chief or other judge of the Court of Queen's Bench, who will sometimes send for the parties and require their pledge of honour not to proceed to any violent measures, or will, as the most certain course, issue his warrant in the first instance, and require them with sureties to enter into a formal recognizance to keep the peace towards each other; which will preclude them, not only in honour, but legally, from even leaving the country to fight on the continent, as a duel out of the kingdom between parties, one of whom is a British subject, would be as penal and punishable as a duel within the queen's dominions, and equally constitute a breach of the recognizance.

III. SURETIES TO KEEP THE PEACE. — Whenever an injury to the person has been threatened, or the burning of a house, one of the most effectual modes of preventing it is to obtain *sureties to keep the peace*, or to be of *good behaviour*.

It should seem that when a person is so bound for *good behaviour*, he is not only to avoid actual breaches of the peace, but must well demean himself in his carriage and company, not doing any thing which may be a cause of a breach of the peace, or put the people in fear or dread; but this does not extend to misdoings of other things which touch not the peace. A recognizance to *keep the peace* is only forfeited by an actual attack or threat of bodily harm or burning a

house; therefore it is not forfeited by bare words of heat and choler, as calling a man a knave, liar, rascal, or drunkard. And it has been said, that even a recognizance *for good behaviour* will not be forfeited by such words; but a challenge to fight would undoubtedly constitute a breach of such recognizance. However, a mere entry with force on lands, without offer of violence to any man's person, and without public terror, or a trespass to corn and the like, so that it be not a taking from the person, though nominally breaches of the peace, are not sufficient to forfeit a recognizance *to keep the peace*; for the breach must be done or intended to the person or in terror of the people. But a recognizance of *good behaviour* will be forfeited by going armed with great numbers to the terror of the people, or speaking words tending to sedition, and also, as is said, for such actual misbehaviours as are *intended* to be prevented by such a recognizance, but not for barely giving cause of suspicion for what perhaps may never actually happen.

It appears, however, to be agreed, that no assault or other act will constitute a breach of either recognizance, if it were justifiable, as in defence of one's self, or of a wife, child, apprentice, or servant.

To obtain sureties to keep the peace, the party requiring it must swear to a fear of present or future danger, and not merely to a battery or trespass or any breach of the peace that is *past*, excepting as a legitimate ground for fearing *future* injury, which fear must always be stated. And a husband or parent may require such sureties against a threatened injury to his wife or child; but not a master in respect of threats to his servant; nor any one, by virtue of the general act, for threats of injury to cattle, goods, or land. Threats by letter or writing to burn or destroy houses, outhouses, barns, stacks of corn, or grain, hay, or straw, and other threats, are provided for by the statutes 4 Geo. IV. c. 54, § 3, and 7 & 8 Geo. IV. c. 29.

In general, the application should be made to a neighbouring magistrate, or in case the sessions of peace are then holden, directly to the court of sessions, unless in the case of a peer.

The articles before magistrates at sessions should be upon oath, or the affirmation of a Quaker, stating fully all the facts. The justices or court of sessions are then to issue a warrant to bring the party charged before them. The recognizance may be for a certain time, as for two years, or generally, for any indefinite time. If the party refuse to find the sureties, he is, by the terms of the justice's commission and the statute, to be committed. If so committed, the warrant must express the cause, and show on the face of it that it is a good one.

If the party required to find sureties be a peer, or the magistrates refuse to interfere, or if the case be of sufficient importance, application may be made to the Court of Chancery or to the Court of Queen's Bench; but the statute 21 Jac. I. c. 8 enacts, that process of the peace or for good behaviour shall not be granted but upon motion in open court, and declaration in writing and upon oath, to be exhibited by the party desiring such process, of the causes for which such process shall be granted; the motion and declaration to be indorsed on the back of the writ; and if it afterwards appear that the causes are untrue, the court may order costs to the party grieved, and commit the applicant till they be paid.

The Court of Queen's Bench may require a recognizance with sureties to keep the peace for any term of years (which they may afterwards reduce), or generally, in which case it continues during life; and where the party required to give the security is aged or ill, or at a distance, the court will authorize, and by mandamus command, local justices to take the recognizance, specifying the form.

The chancellor may award precepts and take recognizances of the peace; and upon oath and proceedings regulated by the before-mentioned statute and supplicavit, he is expressly authorized to require sureties of the peace. But sureties in that court are not so frequent, unless when connected with some pending proceeding; many instances of that proceeding are, however, to be found.

It is principally on the part of a wife against cruelty and personal injury from a husband that *articles of the peace* are exhibited. Where such an application is founded on good ground, it is considered so necessary, that an attorney employed by the wife may even sue the husband for his fees. Generally speaking, when by a long course of cruelty on the part of the husband reconciliation becomes hopeless, a suit in the spiritual court for a divorce and alimony seems the more permanent and preferable remedy.

IV. RELIEF FROM IMPRISONMENT BY HABEAS CORPUS.—When a party continues imprisoned, whether legally or illegally, he may (except in certain cases of the highest crimes, as treason or capital felony, which are not bailable) obtain an investigation of the cause of imprisonment by issuing a writ of habeas corpus, returnable immediately before the chancellor at any time, or one of the superior courts (usually, in criminal cases, the Court of Queen's Bench) in term time, or now before one of the judges or barons in vacation, who will thereupon, if the imprisonment be illegal, immediately discharge him, or, when legal (unless in the excepted cases), bail him on his finding adequate sureties to be forthcoming at a future time to receive his trial.

The 31 Car. II. c. 2 requires that the writ shall be obeyed immediately. It enacts, that any person committed or detained for any crime (unless for felony or treason, plainly expressed in the warrant of commitment), or any one on his behalf, may, in vacation time, complain to the chancellor or lord keeper, or any one of her majesty's justices of Queen's Bench or Common Pleas, or barons of the Exchequer, who, upon view of the copy of the warrant of commitment, or upon oath that it has been denied, is authorized and required, upon request made in writing by such person or any one on his behalf, attested and subscribed by two witnesses who were present at the delivery of the same, to award and grant a habeas corpus to the delivering officer returnable immediately, and who is to return the same within the time prescribed; and the judge, within two days after the party has been brought before him, is to discharge the prisoner, taking his recognizance with sureties for his appearance in the proper court, unless it shall appear that the prisoner has been imprisoned on legal process, order, or warrant, for a matter or offence not bailable.

And the 56 Geo. III. c. 100, reciting that the above-mentioned act is confined to imprisonments for supposed *crime*, extends the power of issuing a writ of habeas corpus in vacation, and enacts, that where any

person shall be confined or restrained of his liberty *otherwise* than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process (*i. e.* legal process) in any civil suit, any judge or baron shall, "upon complaint made to him by the party so confined or restrained, or on his behalf, if it shall appear by affidavit or affirmation that there is probable and reasonable ground for such complaint, award in vacation time a writ of *habeas corpus ad subji-ciendum*, returnable immediately;" and that, although the return to the writ should be sufficient, it shall be lawful for the judge or baron to examine into the truth of the facts set forth in such return by affidavit or affirmation, and to do therein as to justice shall appertain; and if the propriety of the imprisonment shall appear doubtful, he may in vacation refer the matter to the court in the next term, and take bail in the mean time. But the court in term time, or a judge in vacation, should, in case the imprisonment be manifestly illegal, discharge the party, or bail him. If the party have omitted to apply for two whole terms, then he is not entitled to a *habeas corpus* returnable in vacation. The act also contains regulations for compelling expeditious proceeding to trial in cases where the party is legally imprisoned.

The application must be grounded on affidavit of a probable reasonable ground for the complaint, and that it is made by or on the behalf of the person imprisoned; and upon such affidavit the court will exercise their discretion whether the writ shall or shall not issue.

If it appear, as well from the return as from the accompanying depositions and proceedings, that no offence whatever has been committed, and that there is no ground for the imprisonment, it should seem that the court would at once discharge the party without requiring any bail. So if there has been delay of prosecution of a criminal case beyond the time mentioned in the act, the court will, in general, immediately discharge the prisoner on bail; but not if the trial has been delayed on account of the absence of the prisoner's witnesses.

The application for a *habeas corpus* must be made by or on the behalf of the person committed or detained, confined, or restrained, and upon his written request attested by two witnesses.

An *alien enemy* cannot have this writ, the relief being in that case by application to the secretary at war; but, in general, any other alien may have this writ, if restrained of his liberty.

A person committed for contempt by the house of lords or commons is not within the act; nor, as has been said, a person committed by a rule of court. But, in general, any person illegally imprisoned, even in a mad-house, may by this writ obtain his release.

A married woman may, when there are articles of separation between her and her husband, and she is afterwards confined by him, recover her liberty by this writ, upon her own application; but the affidavit must show that the application is at her instance, and unless that expressly appears the courts will not interfere. And it has even been held that if a husband apply for a *habeas corpus* to bring up his wife, his affidavit must state that she is detained against her will.

If a married woman is so closely confined and ill-treated by her husband as to preclude all access to her, or she is too weak in body and mind to obtain an affidavit from her, and she is suffering in

health and in danger of her life, it is probable the court, on the application of a third person, would order that a physician or apothecary and other proper persons should have access to her.

In the case of an infant child, the father may have this writ in the first instance, upon his own affidavit that his child has absconded without his consent. A child may, on his own application, have this writ, as any other individual. And he may have this writ in case of cruel or personal ill-usage from his parent; though in general, if he have property, it is better to make him a ward in chancery, where his interests can be better protected than at law. A guardian may recover his ward by petition to the court of chancery, without a habeas corpus.

In the case of an infant apprentice, there must be an affidavit that he is detained against his will, and the court will not issue the writ on the mere application of the master. If an apprentice has enlisted in her majesty's service, whether in the army or navy, or in the East India service, the Mutiny and the Marine Mutiny Acts prescribe the punishment and the course of proceeding to be observed by the master.

The course formerly was to bring up the party into court in all cases, however great the distance; but of late, where the court thinks fit, upon hearing affidavits of poverty or inability to travel, they will grant a rule to show cause, and decide upon motion whether the party shall be discharged or bailed, and if the latter, will direct the bail to be taken before a magistrate in the neighbourhood.

In modern practice, an application to the chancellor is seldom made under the statute of the 31 Car. II., or at common law, except in cases depending in his own court, for the ordinary purpose of commitment, or of changing the custody.

In some cases, where a bankrupt contests the legality of his commitment, he may, it seems, petition the Court of Review for his discharge or re-examination, or he may be brought up by habeas corpus before the lord chancellor.¹

But, besides the mode of relief from illegal imprisonment by writ of *habeas corpus*, there are numerous cases where by particular acts of parliament, or by the practice of each court, a party may be discharged on motion, and sometimes by mere application to a judge; as in the case of an arrest of an ambassador or his servant, or a certificated bankrupt, or a discharged insolvent, or where a person is arrested whilst attending a court of justice either as a counsel, party, or witness. In these cases, in general, the writ is not necessary, and the party may be discharged on affidavit and motion, or sometimes by summary application even without affidavit, upon the mere undisputed statement to the court or the judge sitting at *nisi prius* at the time the illegal arrest was made.

V. PREVENTIVE REMEDIES BY APPLICATION TO THE SUPERIOR COURTS.—These are, *first*, to courts of law, and *secondly*, to courts of equity. The former are few, compared with the latter, which are of great variety. Indeed, in modern times the preventive proceeding in equity by bill and injunction has been found so summary and salutary, that at present recourse is scarcely ever had to any of the ancient specific common law remedies.

¹ Exp. Jones, 4 Dea. & Ch.

WRIT OF INJUNCTION.—Courts of equity have a very extensive, expeditious, and summary jurisdiction by writ of *injunction*, founded on a bill, to prevent, and sometimes virtually to remove, most private injuries and public nuisances. An injunction is a writ of two kinds; the one remedial, the other judicial; the former to prevent injuries, the latter to enforce a decree for specific performance.

The former may relate to proceedings in other courts, or, as unconnected with legal proceedings, may be to restrain the indorsement or negotiation of bills of exchange and promissory notes, or the sale of land, or the sailing of a ship, or the transfer of stock, or the alienation of a specific chattel; to prevent the wasting of assets or other property pending a litigation; to restrain a trustee from assigning the legal estate, or any party from setting up a term of years and thereby precluding the trial of the real right; to restrain assignees from making a dividend; to prevent a party from removing out of the jurisdiction, or from marrying or having any intercourse with a ward, or even parent, which the court disapproves of; to restrain the commission of every species of waste to houses, mines, or timber, or any other part of the inheritance; to prevent the infringement of patents and the violation of copyrights, either by publication or theatrical representation; to suppress the continuance of public or private nuisances; and, by the various modes of interpleader, to restrain vexatious and multifarious suits, or to quiet possession before or pending suit or after decree, or to stop the progress of other vexatious litigation. These are the principal instances of the interference of courts of equity to prevent injustice. And, in fact, their powers are so extensive, that almost any thing, upon a proper statement, may be done by injunction.

The principle upon which the courts interfere is, that if the party were allowed to proceed in his wrongful act, an action might afford but an imperfect remedy for the injury, the damages might be incapable of complete proof, the injury might be to an incalculable extent, or the wrong-doer insolvent and unable to make compensation. The proceedings, in many of these cases, as in those of waste and piracy of copyrights, besides preventing the wrong-doer from future waste or injury, compel him to keep and render an account, and make compensation for the past. And although the court will sometimes refuse to grant an injunction in the first instance, on the ground that the right is doubtful, directing that to be tried at law, yet they will frequently compel the defendant in the mean time to keep an account of his sale and profits if the subject requires it, and, in case the decision should be finally against him, to render the same, and pay what is just.

Courts of equity will not, however, interfere to prevent the commission of a crime, excepting to restrain a libel upon an infant (who is under the peculiar protection of courts of equity), and excepting such cases of public nuisance as are more particularly injurious and dangerous to particular individuals in the neighbourhood, and also constitute private injuries.

In some very few and urgent cases an injunction will be granted upon petition and affidavit. But, in general, the proceeding to obtain an injunction must be by first filing a bill (except to stay waste or proceedings at law), stating the cause of complaint and praying the

interposition of the court, and an injunction should be specially prayed. But immediately after the bill has been filed, upon proper affidavits and a motion *ex parte*, even before the defendant has been served with process on the bill or knows of any proceeding, an injunction (technically called a *special* injunction) may, in cases requiring immediate interposition, be obtained immediately. The cases in which the court usually interferes thus summarily are those of irreparable waste, plain nuisance, infringement of a clear copyright, forcible entry, wasteful trespass, executors wasting assets, and danger of a bill being unjustly negotiated.

In cases where an injunction will not be granted *ex parte*, or without hearing the other party, the practice is to file the bill, and then serve a subpoena to appear; and after the appearance and notice thereof, the complainant files his affidavit of facts, and then serves notice of motion for an injunction, upon which the affidavits in opposition must be filed before the sitting of the court on the day named in the notice of motion. Briefs are delivered to the counsel for the complainant and the defendant, stating the affidavits of each party. The proceeding then frequently stands over for some days before the threatened motion is made; and if so, then, pending the delay, each party may file further affidavits, giving notice thereof. At length the motion is made, and whether an injunction be granted or refused, the defendant may afterwards be required to file his answer, and the case may be finally decided on the bill at the instance of either party.

When a bill prays an injunction, if the defendant does not put in his answer to it within eight days after the filing of the bill, the plaintiff is entitled as of course to his injunction *nisi*, which, on putting in his answer, the defendant may move to dissolve; and if he then succeed, and the main object of the bill is thereby frustrated, the suit very seldom proceeds any further, except in regard to dismissing the bill, unless the truth of the answer can be disproved by the plaintiff's evidence. So the plaintiff may ground his motion for an injunction upon the merits confessed in the defendant's answer.

An injunction in general only operates *in personam*, that is, to attach and punish the party if disobedient in violating the injunction. Where the party is in contempt for breach of the injunction, the practice is, to give notice of a motion that the defendant may stand committed for breach of the injunction, which is moved upon affidavit of the service of the injunction and of the contempt. But where the injunction is in the affirmative, as to yield up, quiet, or continue possession of houses or land, there it has been long established that the court will not only commit the party for his contempt, but will issue a *writ of assistance* to the sheriff to put the complainant into possession. After recovering at law upon a writ of dower or in ejectment, if the possession be withheld, or disturbed after it has been delivered, proceedings may in some cases be advantageously had in a court of equity.

There yet remain to be considered some other preventive remedies in courts of justice connected with suits, and of great practical importance. These are principally, 1. Bills and writs of *ne exeat*, to prevent persons from leaving the kingdom to avoid payment of an

equitable debt; 2. Bills to perpetuate testimony; 3. Bills to restrain or qualify actions in courts of law and other courts; and 4. Bills of interpleader.

WRIT OF *NE EXEAT REGNO*.—When there is a *legal* debt of 20*l.* or upwards, and the creditor can show, upon affidavit, to the satisfaction of a judge of one of the superior courts of common law, that there is probable cause for believing that the debtor is about to quit the country, he may cause him to be arrested and give bail. But there are many *equitable* and *ecclesiastical* claims, in respect of which either no proceedings can be had at law, or at least no arrest. The court of chancery or the master of the rolls, therefore, will, in cases where bail cannot be required at law, issue a writ of *ne exeat regno*, which requires the party to find sureties in the nature of equitable bail, that he will not quit the kingdom, or go into Scotland or Ireland; and this is extended also to common law debts, when they constitute matters of account.

The demand for which a *ne exeat* may be issued must in general be equitable, and not legal, excepting in the case of an account. It must be completely due, and must be such a debt that the sum to be marked on the writ may be ascertained.

The affidavit of a threat or intention to go abroad must be positive, not upon information and belief; but the court acts on evidence of intention to go, without regard to denial. No notice of motion for the writ need be given, for that might defeat its object; but a bill must be first filed.

BILLS TO PERPETUATE TESTIMONY are also in the nature of a preventive remedy to prevent loss of evidence in case of any vested interest, but which cannot be immediately litigated, because it is in remainder or reversion pending an estate for life or years, or where the evidence will be important to resist a claim which may afterwards be litigated; but it has been doubted whether chancery has jurisdiction to entertain a bill to perpetuate testimony in case of a claim to a dignity.¹ A bill of this description is proper whenever a person has a vested claim or defence, which by the death of a then living witness he might hereafter be unable to establish. But the bill must always show that the party filing it cannot immediately bring his action, or compel his opponent to bring his action to try the right, or it will be demurrable.

The witness expected to die must be old and infirm, and usually of the age of seventy years; and it has been proceeded upon in other cases where there has been only one witness living. But the defendant's costs of such a bill must be paid by the application. It should seem, on principle, that when a claimant has no immediate power to commence a suit, or where a party would properly be defendant in any proceeding, and has no power to compel the creditor or claimant to sue immediately, it should be allowed immediately to examine witnesses conditionally, even when much younger than seventy years old. But this proceeding, it is said, is not in general favoured, and is considered as open to great objection. The recent act 1 Wm. IV. c. 22, enabling the courts to examine witnesses on interrogatories, only applies when an action is actually pending; nor can a commission to examine a witness be obtained in a court of equity until a suit in which he is to be examined has been actually commenced.

¹ The 5 & 6 Vic. c. 69 has been passed for enabling such bills to be filed; and the attorney general may be made defendant therein when the crown is concerned.

CHAPTER III.

Remedies to compel Specific Relief or Performance.

WE will now suppose that an injury or breach of contract is complete, and that the party injured would prefer *specific relief* or performance in preference to mere compensation in damages or punishment.

1. WRIT OF MANDAMUS.—We have seen that the specific remedy for false imprisonment is a writ of habeas corpus, or summary application for release from imprisonment. But there are some few private rights, principally of the person, the violation of which may be remedied or their specific enforcement secured by the writ of mandamus, which commands the completion or restitution of the right. The power of issuing a writ of mandamus belongs exclusively to the Court of Queen's Bench, and it may be compared to a bill in equity for a specific performance. It is used, however, by that court principally for *public* purposes, and to enforce the performance of public rights or duties. If there be a public duty to enforce, then the writ may be directed to the inhabitants of a parish, in case there be no standing officer. It, however, operates in affording specific relief and enforcing some *private* rights when they are withheld by a public officer.

This writ is only issued where the party has no other specific remedy; and for that reason the court refused a mandamus to a bishop to license a curate, because the latter had another specific remedy by *quare impedit*. And although in the case of a clear public right, if it be important, to prevent great and immediate public damage or inconvenience to many persons, that the court should immediately interfere, yet if the right or obligation be doubtful, the court will refuse the writ and leave the prosecutor to proceed by such other remedy as he may have. It is entirely in the discretion of the court to grant it, and it is never done but with great caution.

The court will not interfere by mandamus after considerable delay, where the party applying for it has slept on his right, and allowed perhaps other rights to grow up.

As respects the rights to offices of a public nature, and the duties of certain officers and personages standing in certain situations, the possession of the right on the one hand, and the observance of the duty on the other, may be enforced by this writ of mandamus.

1. As regards the *person*: Where the attorney of a party imprisoned upon a capital charge had been refused by the visiting magistrates, in the exercise of their control over prisons under the 4 Geo. IV. c. 64, admission to the prison, so as to enable him to prepare his defence, the Court of Queen's Bench issued a mandamus directing the magistrates to permit access. And where a bankrupt had been finally committed by the commissioners for not satisfactorily answering, a mandamus was granted conditionally to the commissioners to issue their warrant for a

further examination, on a suggestion that the bankrupt was desirous of disclosing his estate and effects.

A mandamus may be obtained to compel the burial of a parishioner, though not to direct the precise place or mode of burial.

So to compel the ecclesiastical judge to grant probate to the executor named in a will, or letters of administration to the husband of his wife's estate, unless the husband has done something to part with his right; and a mandamus for administration to the next of kin may be granted, notwithstanding a suit depending, if his consanguinity be not denied.

The *preliminary conduct* of the party in obtaining the writ is particularly important, as under the recent act 1 Wm. IV. c. 21, the costs of the application are in general in the discretion of the court, and if the party applying has acted courteously and properly, he may frequently avoid the payment of costs, though he fail in other respects.

In the first place, the party claiming admission to an office or other right, and intending afterwards to endeavour to enforce his claim by motion for a mandamus, should frame a written and explicit notice of his claim, succinctly stating the grounds and reasons; which may be somewhat in the form of a notice of appeal against a poor rate or other objectionable proceeding. He should then, in the same notice, in a courteous manner require admission to the office or performance of the act within a reasonable time, naming a proper day and place, and requesting that if such be inconvenient to the party that he would appoint another time and place. In the same notice it may be intimated, that in case of refusal to comply with the request, the party will be under the necessity of applying to the court as the only means of obtaining the right. At the same time, if a clear and positive opinion of counsel has been obtained in favour of the claimant, it will be a proper and candid measure to accompany the notice with a copy of such case and opinion, and request the party himself to take advice. If, after such a precautionary measure, the party should persist in his refusal, and the court shall afterwards think that he did so improperly, then, under their discretionary power, the court would probably make him pay, or not allow him costs, according to the circumstances of the case.

At the appointed time there should be a second application in person to the proper officer, requesting admission &c.; and this should be in the presence of one or more persons proper to join in an affidavit. And at all events, in case a personal interview or peremptory refusal to admit has not been obtained, it may be expedient to serve another notice referring to the former and the refusal or silence, and again requiring admission, and pointing out the loss or inconvenience that will result from continued refusal, and the necessity that will ensue for the expence of proceedings in the Court of Queen's Bench, and the power of that court over the costs.

In the event of continued refusal, then one or more affidavits should be made on the part of the claimant, fully and explicitly stating the nature of the office, and showing its duties and other facts essential to establish that it is of a public nature, and that the party has the right he claims. Where it is a corporation by charter, the substance as applicable should be stated, and an authenticated copy must be produced

at the time of making the motion. The affidavit should also anticipate and answer every possible objection or argument in fact which it may be expected will be urged against the claim. A copy of the notice or notices previously served on the mayor &c. should be annexed and verified, and the service of each, and the non-compliance with the notice, also sworn to; and when any strong resistance is expected, any disputable or material facts should be corroborated by one or more respectable and experienced individuals.

The proper affidavits having been obtained, the course in general is, upon production of such affidavits, to move for a rule *nisi*, to show cause why a mandamus should not issue, though in some cases the rule would be absolute in the first instance, and the writ will immediately be issued. When a rule *nisi* has been obtained, then if no sufficient cause be shown, the party must submit, or a mandamus will issue, which will require either a return that the required act has been performed, or a formal and true return of an adequate excuse, which is traversable; and if ultimately no sufficient cause be shown, or the return be insufficient, a peremptory mandamus will be issued.

With respect to *costs*: At common law, in general, after issuing the writ, no costs were to be paid or received, the king being considered the prosecutor, though, upon discharging a rule *nisi* for a writ of mandamus, the costs of the motion were in the discretion of the court. But by 1 Wm. IV. c. 21, § 26, in all cases of application for any writ of mandamus whatsoever, the costs, whether the writ shall be granted or refused, and also the costs of the writ if the same shall be issued and obeyed, shall be in the discretion of the court, and the court is authorized to order and direct by whom and to whom the same shall be paid. This act it is which renders it expedient to be particularly cautious and courteous in the proceedings antecedent to the application.

Some rights of persons may be particularly enforced by bill in equity, the extent and application of which will be presently fully noticed; and sometimes even more summarily, on *petition* and *affidavit*, although no cause be depending. Thus in some cases where the property is small, a guardian may be appointed to an infant, and maintenance allowed, upon petition merely; but in other cases a bill must be filed.

2. As respects *moveable personal property*. At law, the only specific legal remedies are to replevy, or to proceed by action of *detinue*. There are very numerous cases of the inspection of documents rather of a public or general nature being enforced by mandamus, where the party applying does not claim any right to the possession, but merely requires an inspection, such as court rolls of a manor of which he is a copyholder. But a mandamus will not be issued, even at the instance of a tenant of the manor, to inspect the rolls for the purpose of supporting an indictment against the lord, even for not repairing a road within the manor; because in a criminal proceeding it is a rule at law, as well as in equity, not to compel a party to furnish preliminary evidence against himself.

Replevin is not (as until recently had been generally, but erroneously, supposed) confined to cases of wrongful distress, but is an immediate summary remedy in all cases where there has been a wrongful taking,

even by force, or in any manner otherwise than by process in execution; and it should seem that even goods illegally detained may be replevied. And even in cases of distress for a poor-rate, it has been recently decided, that the sheriff is legally bound to grant a replevy. This is unquestionably the best specific remedy at law for the immediate return and securing of any moveable chattel.

A court of equity will, upon bill filed, decree the specific delivery of certain chattels, which it is considered may be of peculiar value to the owner, perhaps much beyond their intrinsic value, such as heir-looms or title deeds; and where, in case of a specific bequest of a chattel, the executor has refused his assent, a bill in equity to compel assent and the delivery of the specific article may be the only remedy.

It should seem, that immediately after a bill has been filed, and upon affidavit showing the specific right, and the danger of the chattel being damaged or lost, an injunction or order to stay the disposal thereof will be granted.

In other cases of pecuniary and other property, where there are joint-tenants, tenants in common, or partners, and there is fraud or danger of loss to any of the co-owners by the misconduct of the others, upon a bill filed, the fund will be ordered into court, or otherwise secured. But the mere existence of a strong temptation to abuse partnership effects is not alone sufficient; some actual or threatened abuse must be established.

If a party is in possession of a void deed or instrument, which might thereafter be attempted to be enforced, a court of equity will by injunction restrain proceedings, and order the instrument to be delivered up. So although a deed or instrument be valid at law, yet if in equity it ought to be delivered up, the court will decree accordingly, unless each party has been guilty of fraud, and neither entitled to assistance. So a court of equity will enforce the delivery of a proper deed or other instrument in pursuance of a party's contract. Under particular statutes, to prevent the expence of a formal suit, certain persons standing in the situation of trustees may, upon petition, and without bill, be compelled to execute conveyances, or the conveyance may be dispensed with.

II. BILLS FOR SPECIFIC PERFORMANCE.—The jurisdiction in equity by bill to enforce specific performance of contracts, and the delivery of accounts, and of other rights, may in some degree be assimilated to the jurisdiction at law of the Court of Queen's Bench to compel specific performance of certain acts by writs of *mandamus*, but with this general distinction, that the latter remedy is usually confined to the enforcement of public rights or duties; whereas the remedy in equity principally relates to the enforcement of private rights or duties.

1. General Rules.—It is to be observed, that specific performance will not in general be decreed of contracts for the sale or purchase of mere personal property, such as timber, hops, and the like, where damages at law would afford sufficient compensation for the breach. Thus, if a party contract to deliver a certain quantity of corn or hops, or to transfer stock, and refuse to do either, the vendor may readily purchase the like articles elsewhere, and the recovery at law of damages for the breach of the contract, sufficient to cover any tem-

porary damage or advance of price, is considered an adequate compensation. To this rule, however, there are exceptions; and where a contract relating to personalty has been in part performed, and the purchaser has parted with his money, and then the vendor attempts to deprive him of the moveable chattels, or otherwise of the benefit of the contract, to a ruinous extent, we have seen that a court of equity will in effect decree a specific and complete performance, by injunction against the wrongful act of the vendor; and we have seen many instances where a court of equity will compel the delivery of a proper security or document in pursuance of a contract.

Where also the subject matter of the suit is too small to be worth the dignity of the court, the court will not interfere,¹ except in the case of heir-looms or the like, as already noticed.

And a party cannot at the same time proceed at law for damages, and in equity for specific performance.

As regards contracts in general, a court of equity will not decree specific performance, unless the obligation to perform the contract was, at the time it was made, mutual and reciprocally binding, as in the case of an infant or a married woman. Yet although a party filing a bill for specific performance had not himself signed the contract, yet he might sustain the bill against the party who had. But perhaps if an infant purchaser, after he has attained twenty-one, and whilst the contract is open, and before the vendor has expressed any dissent, should affirm the contract, or even file his bill (which might of itself be deemed such affirmation), then his bill might be sustained.

As to married women, it is clear, that if a husband should contract for the sale of his wife's real estate, a court of equity will not decree him to procure her to join in a conveyance; and it should seem, on the other hand, that unless the vendor-husband has, whilst the contract is open, and before filing his bill for specific performance, procured his wife to concur and execute the conveyance, and levy a fine when necessary, he could not sustain his bill against the purchaser. But when an estate has been settled upon a married woman for her separate use, or when the legal estate is in trustees, specific performance might probably be enforced.

So lunacy, weakness of intellect, and intoxication, when procured by the opposite party, are objections to specific performance.

With respect to the contract itself and its requisites, we must refer the reader to what has already been said on the subject.

Courts of equity cannot, on behalf of a vendor, decree the performance of one part of an agreement, leaving the other part unperformed. But a purchaser may sometimes have a specific performance in part, waiving the rest, and the defendant cannot object; but there are exceptions to this rule.

We have seen the necessity for contracts to grant leases, or to sell any interest in land, to be in writing, and signed by the parties to be charged. But in many cases where a contract has been imperfect in these respects, yet a substantial part performance, effected as such, will in equity entitle either party (whether he be the intended lessor or lessee,

¹ See instances in Chit. Eq. Index, tit. *Jurisdiction*.

or vendor or purchaser), by bill in equity, to compel the specific performance of the whole. It seems, that although an agreement for a lease has been uncertain in some part of its terms, as that the rent shall be fixed by arbitration or by a third person, which has not been done, yet if the tenant has substantially occupied under the agreement, and in part performed it, the court will refer it to the master to fix the rent, rather than suffer it to be rescinded *in toto*.

If it be established that any fraud is imputable to the vendor, or if there has been any mistake or surprise that operates in conscience against his demand to have the contract performed, it is an answer to an application for specific performance.

Fraudulent representations, or even wilful concealment or suppression of any material fact in the knowledge of a vendor or purchaser, although only to a small extent, will in general induce a court of equity to refuse specific performance at his instance, though it might be enforced against him. Material misrepresentations of by-gone or supposed existing facts in obtaining any agreement will have this effect.

Where a misrepresentation has not been fraudulent, then, in some cases, in order to deter a court of equity from granting specific relief, it must have been material, and of such an extent as substantially to vary the spirit of the contract; for if not so-material nor wilful, the court will compel the purchaser to complete the contract, accepting only a compensation for the deficiency in quantity or value in the estate. But if a wilfully fraudulent misrepresentation be established even as to a small part of a contract, the party guilty of it is entirely precluded from asking for a decree of specific performance, even of a part of the contract, or even upon his waiving the part affected by the misrepresentation.

But if the thing concealed or omitted to be stated was too trifling to affect the ground of the contract, or work any injustice, or affect the interest of the party, the court would, notwithstanding such concealment or omission, decree specific performance of the agreement. Where the agreement is of doubtful and suspicious character with respect to the fairness of the terms or mode of obtaining it, the court will not decree specific performance; and though a length of time has elapsed, that, under circumstances, will not imply acquiescence.

Supposing the party deceived has, before he discovered the fraud, taken possession and had a partial benefit from the contract, still, unless there has been perfect *bona fides* on the part of the other party, he cannot, on account of such partial benefit, compel specific performance, but must seek his remedy, if any, for the temporary use of the property or other benefit, by another and different proceeding.

Where the particulars of a sale by auction stated that the sale would be without reserve, and yet puffers were employed, specific performance was refused. Indeed the contract of sale would in that case be void at law as well as in equity. The statute imposing the auction duty allows a bidding by one person on the part of the vendor, though not by several.

With respect to concealments, if a material fact within the knowledge of the vendor or purchaser, and which, if communicated, would have probably changed or altered the terms on the part of one of the

parties, be concealed, that fact will avoid the contract, and preclude the party guilty of it from sustaining a suit for specific performance.

In these cases, especially of contracts of sales improvidently entered into by a trustee or assignee, though a court of equity may not go so far as to cancel the agreement, yet specific performance will be refused, and the party who unjustly seeks it, will be left to his remedy at law.

If an agreement be in part performed by a party after knowledge of the supposed fraud, surprise, or mistake, then equity will compel specific performance of so much as can be executed, and it will be considered that he has waived the objection.

The party against whom a contract is required to be enforced must not only have had legal competency and capacity to contract, but must also have duly exercised his faculties. Deeds improvidently entered into by persons uninformed of their rights will be sometimes set aside, though obtained without any actual fraud or imposition.

In general, mere *inadequacy of price* is not sufficient to induce the court to refuse specific performance, but there may and have been cases of such inadequacy, when so great as to form a ground even for cancelling a contract.

The *inability* of a vendor to *make a perfect title* to the entire thing as agreed to be sold, may be principally of five descriptions.

1. He may not be able to convey the entire interest in the estate sold.
2. He may not be able to convey so large an estate in the property as proposed.
3. The objection may be to the quality of the estate as described.
4. He may not be able to make out a title to so much in quality.
5. The title itself may be imperfect.

In the first, second, and fifth cases, it should seem that specific performance will not in general be decreed. In the third and fourth cases it may or may not with an abatement in price, but depending on other circumstances, as whether the deficient quantity was so material as to have influenced the intention of the purchaser in buying.

We have seen that fraud in a very small respect will preclude a party from compelling the party deceived to perform the contract; but mistakes, if they do not affect the essence of the bargain, will not, at least in a court of equity, have that effect; and upon making compensation for the difference in value, the rest of the contract may be specifically enforced.

There are other circumstances that may have arisen since the contract was made which may induce a court of equity to refuse a decree of specific performance. Thus, if it be discovered that an intended lessee has committed a felony, the court would not compel the intended lessor to execute a lease to him.

As respects *solvency*, it has been decided that if a vendor become a bankrupt before the conveyance has been executed, the purchaser cannot be compelled to complete the purchase although no commission or fiat has been issued. But, in general, if a purchaser has become insolvent, and he or his assignees or representatives should tender the purchase money at the appointed time, and the vendor could return it, the general insolvency of such purchaser is wholly immaterial. But in an agreement for a lease, the covenants and stipulations to be observed by the intended lessee being matter of future performance during

the whole currency of the lease, his failure before a lease has been granted raises a substantial and reasonable continuing objection to the completion of the contract; and therefore his insolvency is a decided objection and bar to a bill for a specific performance; and the bankruptcy of a lessee constitutes ground for refusing the renewal of a lease. But as there may be exceptions to these cases, as where the assignees of the intended lessee offer adequate security, it seems improper to demur to a bill on the ground that the objection is absolutely a bar.

The court will not refuse a decree for a specific performance of a contract to grant a building lease, on account of the plaintiff (the intended lessee) having erected a brewhouse on land injurious to the lessor's property, or having contracted to underlet contrary to the agreement for the lease. But it would be otherwise if the breaches were wilful and obstinate, or by the terms of the agreement would have exhibited grounds of forfeiture.

When there has been a change in any material circumstances, or alteration of the property referred to in the previous agreement, so that it could not be enjoyed according to the stipulations, the court will, in some cases, refuse to decree specific performance of any part of the stipulations.

With respect to tenants and agreements for a lease, a different rule prevails; and although a lease has been executed, and afterwards the premises are consumed by fire, unless it be provided otherwise, the tenant continues liable to pay rent and perform the covenants, and could not obtain relief in equity; nor could he even compel the landlord to expend the money insured in rebuilding; yet if the tenancy be only in *feri*, and the premises be materially injured by fire, or otherwise deteriorated, without fault of the intended lessee, a court of equity will not compel him to accept a lease, or execute a counterpart.

In general, gross delay in applying for a specific performance would induce the court to refuse its interference. But when time is not of the essence of the contract, delay in applying for performance will not necessarily constitute an objection to a specific performance. Cases on this subject are very numerous.

Particular Contracts which will or will not be specifically enforced.
—Suits to compel the specific performance of a contract to marry have been expressly prohibited; but specific performance of marriage articles, and all contracts of that nature, although relating only to the payment of money, will be specifically enforced in courts of equity, where the most adequate justice in those cases can be best secured.

A clear and distinct contract to enter into a *partnership* in a trade or other concern for a certain term of years will be specifically enforced, though in truth it is a mere chattel interest. But if by the terms of the agreement the partnership, were it actually commenced, would have no fixed duration or benefit, as if it be stipulated or understood that either party might put an end to it upon giving notice, there the court would not interfere. On the other hand, when, in consequence of the fraud or misconduct of one of several partners, the joint trade cannot be any longer carried on without hazard, the court will enforce dissolution by injunction and decree. And although in general a bill for an account against a partner should pray a dissolution, yet the

Court of Chancery will entertain a bill to compel specific and continued performance by partners, and compel them to continue to act according to the provisions of instruments into which they have entered, when it is essential for the interests of the parties concerned that such partnership should continue.

Equity will not decree specific performance of the most express agreement to *refer to arbitration*, or to abide by the decision of a third person, unless before revocation a perfect award or decision has been made. But a bill will lie to compel specific performance of an award when the act to be performed is collateral to the payment of money, or where the party has received the money in consideration whereof he was awarded to convey. Although if the award direct any thing to be done respecting lands, the court will decree a specific performance, yet it will not execute an award for the mere payment of money.

There is no general rule distinguishing contracts relating to *personalty* from those respecting *realty*; and it now seems to be established that where the breach of a contract would occasion irreparable mischief, such breach, if affirmative, may be prevented by injunction, and if negative, by bill and decree of specific performance. It would further seem, that although where the damages which a party might recover at law must necessarily, from the nature of the case, be commensurate with the injury sustained, a court of equity will not interfere, yet specific execution of agreements will be decreed where damages would not answer the intention of the party making the contract, and a specific performance is therefore essential to justice.

We have seen that a court of equity will secure and decree the delivery of *particular* kinds of chattels, as *heir-looms, family pictures, title-deeds, specific bequests*, or other property in which a claimant may have a particular interest. And chancery will decree a specific chattel to be delivered up, without measuring the value, when from its nature there can be no compensation by damages. But in an application to the court to stay the disposal of *personalty*, a specific right to the property must be shown, as well as the danger of loss.

So the specific performance of a covenant to *indemnify* may be decreed, though sounding only in damages, upon the principle on which bills *quia timet* are entertained; but this is not to be extended to a contract to pay an annuity not otherwise secured than by personal contract, so as to compel the party, who has engaged to pay, to give any collateral security for prospective payments, and to recover which the party entitled must therefore proceed only at law.

A mere contract for the sale and delivery of any kind of *goods*, the usual and daily subject of purchases and sales, and which might be readily and as conveniently obtained elsewhere, will not be specifically enforced. But there are exceptions to this rule; as when the non-delivery would be productive of serious loss, or where the purchaser has paid the price, and is justly entitled to the specific delivery.

With respect to a purchase of *stock in the funds*, the decisions have been contradictory. In one of the last cases it was considered to be perfectly settled that equity will not enforce the specific performance of an agreement for a transfer of stock. But it has been recently decided that a bill may be sustained for the specific performance of a

* See 3 Western's Conveyancing, p. 483. Agar v. Macklin, 2 Sim. & Stud. 418.

contract for the sale of the stock of a foreign government (Neapolitan stock), the bill praying the specific delivery of certificates relating to such stock, which gave the legal title thereto; and the vice-chancellor was of opinion, that inasmuch as the bill prayed a delivery of the certificates, which would constitute the plaintiff the proprietor of a certain quantity of stock, the bill in equity would hold. But the distinction drawn in this case is very nice.

Contracts for the purchase and assignment of a *chose in action* and delivery of the security may be enforced specifically in equity. And an agreement to divide equally whatever should come to either of two or more parties by the will of a third party will be specifically enforced; and even a contract to bequeath by will, when founded on consideration, will be substantially enforced.

A contract to *grant an annuity* may be specifically decreed, as in favour of a female whom the covenantor has previously seduced.

No suit in equity is, in general, sustainable (except in cases of trusts) to compel the *specific payment of a sum certain*, or a penalty secured by speciality or other contract; but the remedy is in general only at law. But where a son promised to pay his father's legacies if he would forbear to alter his will, such promise was enforced in equity.

Specific performance will be decreed of an agreement to sell the *good-will of a trade*, when accompanied with the exclusive use of a secret therein; and a contract for the sale of the lease of a public-house and the good-will of the trade, licences, household furniture, and stock in trade at a valuation (which had been made), was also decreed. But it has been considered that a sale of a good-will merely without some real property could not be enforced in equity. And contracts of this nature will not, it is said, be enforced without great caution and consideration.¹

We have seen that where a party has agreed, though verbally, to give a valid security, and by mistake an insufficient security has been executed, invalid either at common law or from the insufficiency of the stamp, or varying from the intended terms, a court of equity will compel the execution and delivery of a proper security, according to the original intention of the parties.

When the legal right of a party to maintain an action for damages in respect of breach of contract may be doubtful, sometimes a court of equity will on that account, without other reasons, decree specific performance.

With respect to *real estates*, covenants or contracts to *repair, build, or rebuild* a house or other erection, were formerly specifically enforced. But the more recent decisions appear to settle, that a suit for specific performance of any such covenant cannot now be sustained. Nor will specific performance of the ordinary covenants in a lease be enforced in equity. Equity, however, will execute a covenant in a building lease, that the lessee's erection shall correspond with adjoining houses, pursuant to express covenant.

An agreement to invest money in land, and an agreement to settle boundaries, will be specifically enforced, because damages in an action would not in either case effect the object of the grantee.

¹ There is no objection to the sale of the goodwill of a trader, or to the seller engaging that he will not make use of it. - *Bryson v. Whitehead*, 1 Sim. & Stu. 74.

We shall hereafter consider the *practice* in filing and proceeding upon bills in equity.

The adjustment of an account at law is frequently attended with difficulties, and between partners it can only be affected in equity, unless a balance has been admitted, or there has been an express covenant; and although between joint-tenants and tenants in common an action of account at law is sustainable, yet a court of equity has a more perfect jurisdiction, by compelling discovery on oath, and avoiding the difficulty and delay where the account comes before auditors in an action of account; and in almost all cases a bill is maintainable for this purpose. But after a decree to account, a party is not allowed to bring an action at law on the same subject. On such a bill the defendant is allowed on his own oath all payments under 40s.; but then he must mention in his affidavit to whom, when, and for what he paid, and the whole so allowed must not exceed 100*l.* The plaintiff is not allowed any thing upon his own oath. If an account be sought by bill, and a balance should be reported due to the defendant, he may enforce payment under the decree, and both parties are so far considered actors, that either may revive. If the right at law be doubtful, an issue is directed, and if the right be established the account follows; and in general, where the party cannot recover at law, a bill for an account is not sustainable. But the issue directed to be tried should be upon a question of right, and not to investigate the items of the account.

As courts of equity will *enforce* the specific performance of certain contracts, so, on the other hand, they will *prevent the specific enforcement* of some contracts and rights, and compel the party who seeks to enforce the same to be content with the performance or delivery of the thing really intended to be performed, as in case of bonds in penalties conditioned for the performance of some other act. But where the sum named is not a penalty, but in the nature of stipulated damages, as 5*l.* per acre increased rent for ploughing ancient meadow, it will be otherwise. Courts of law, even in violence to the terms of a contract, will frequently construe a sum expressly described as stipulated damages to be only a penalty.

CHAPTER IV.

Of References to Arbitration.

HOWEVER imperfect and objectionable may be the mode of deciding upon facts by a jury, it seems difficult to suggest a more satisfactory tribunal. The best-informed individuals so frequently differ in opinion upon questions of fact, that men naturally prefer an open trial by jury, with the chance of a new trial, and of an appeal to a superior tribunal, to a private decision by an arbitrator. It is a natural desire of liti-

gating parties not to trust their case to the decision of a single arbitrator, or even of three; for if judges doubt, and even misapprehend the law or the facts (as is sometimes, though not frequently, the case) what confidence can be justly reposed in the opinions of men naturally supposed to be of inferior talent? Arbitrations, however, are often desirable.

The principal instances of successful attempts to compel arbitrations will be found in the acts relating to Friendly Societies and Savings Banks, and for settling the disputes of labourers and servants in certain trades. So, disputes respecting *seamens' wages*, and certain claims for *salvage*, are to be settled by the award of magistrates. The first class of these cases relate to persons little able to sustain the expence of formal litigation, and therefore it was even mercy to compel them to adopt a summary mode of settling their disputes; and as to salvage, as ships might be detained whilst a formal suit in the Admiralty was deciding, a more expeditious remedy became essential for the interests of shipping and commerce.

I. PRELIMINARY OBSERVATIONS.—1. *When a Reference is proper.*—Arbitration should be adopted in cases of long and intricate accounts, where, to obtain a clear understanding, it would be necessary to refer to numerous documents, and to make or explain calculations, through which each of the twelve jurors in a jury box could not conveniently proceed, so as to form his own judgment. In such a case the whole cause might be referred in the first instance; or the parties might agree to refer the matters of figure, and try the cause upon distinct points of fact, that may be readily disposed of by a jury. So where it would be impracticable or difficult to collect or keep together several witnesses, as in disputes between neighbours respecting supposed nuisances by buildings or otherwise to ancient lights or watercourses, ways, or other property, where not only the rights of the parties may be referred, and the damages, but also the question whether upon any and what terms, and subject to what modifications, the alleged nuisance shall or shall not be continued. It would also be proper in questions of right to small landed property. So, subjects of delicacy, unfit to be exposed to public investigation, especially between near relations, should be referred, unless some injury to character has been occasioned.

But, on the other hand, in cases of calumny, requiring public contradiction or open apology, it would not be proper to refer to arbitration; nor should a claim for compensation for criminal conversation be so referred, because the House of Lords requires the verdict of a jury antecedent to a divorce *a vinculo matrimonii*. In general, matters of a criminal nature cannot be legally or effectually referred to arbitration, unless by permission of the court. Again, when one or more witnesses to an important fact would require strict cross-examination in public before a judge and jury, so as to elicit truth, it might be dangerous to refer to arbitration. So, where sureties, or bail in an action or replevin suit, are responsible, a reference without their concurrence will, in some cases, discharge them from liability.

When the plaintiff or defendant resolves to stand upon some strict legal right or objection, that may not accord with the apparently moral equity or justice of the case, then it would be injudicious to refer,

at least without expressly stipulating that if any legal objection, either to the evidence or the result, should be taken, then absolutely, that the party shall have the benefit of it, and negatively, that it shall not be in the discretion of the arbitrator to deny effect to it. In such a case the submission and rule of court must be express, not that the arbitrator shall be at liberty to state the facts or objections specially, but that he *shall* state the same if requested; and even then, sometimes, he may come to a conclusion that no legal objection is raised by the evidence; so that in each particular case it will be essential to be cautious in the terms of the reference.

2. *Who may refer.*—An infant or married woman cannot effectually refer to arbitration. One of several partners may bind himself, but not the others, by his submission. With respect to agents, in general, they must have express power to refer; but a power of attorney “to act on his behalf in dissolving a partnership, with authority to appoint any other person he may think fit,” will authorize the agent to submit the accounts to arbitration. At law, a counsel or attorney may bind his client by his consent to an order of *nisi prius* referring a particular case. And an attorney has an equal power to consent to an enlargement of the time for making the award. But the prudent course is always to have the client in court, and let him decide for himself.

Executors should not, when claimants, refer to arbitration without the concurrence of creditors, legatees, and next of kin. When defendants, they would incur the risk of an award subjecting them personally to liability, unless by the terms of the reference the power so to award be carefully guarded against. Assignees of a bankrupt or of an insolvent debtor may refer to arbitration; but unless done with the consent of creditors according to the 6 Geo. IV. c. 16, § 88, they are liable to be called on by any single creditor to show that they have acted wisely. Assignees and trustees should, in their submission to reference, expressly guard against personal liability.

3. *Distinctions between References at Common Law and under the Statutes.*—Agreements to refer are either at common law or under the statutes 9 & 10 Wm. III. c. 15, and 3 & 4 Wm. IV. c. 42, § 39, 40, & 41. Those at common law may be either verbal, or in writing not under seal, or by specialty, either bond or covenant, or by rule or order of a judge or of the court in which an action is depending.

An award, when made before revocation, was equally binding upon the parties at common law, whether it were made under a verbal or written authority. And an award so far changes the nature of an original claim, when for unliquidated damages, that it precludes a party previously entitled to sue from afterwards so doing, and compels him to confine his remedy to an action for the non-observance of the award.

But unless the parties be bound by submission made a rule of court, they may, if no arbitrators have been named, refuse to appoint them, although they have expressly covenanted to refer; or they may, at any time before an award has been made, countermand the arbitrator's authority, so as to render a subsequent award, after notice of the revocation, a *nullity*. The agreement to refer, also, is no bar to an action at law or suit in equity; and in general a court of equity will not compel specific performance of a covenant to refer.

Hence when parties considered it probable that an arbitration would turn out unfavourable, they refused to appoint arbitrators; or, when appointed, revoked their authority. To remedy these defects, the statutes 9 & 10 Wm. III. and 3 & 4 Wm. IV. c. 42, § 39, 40, & 41, were passed, which, especially the recent act, take away the power of revocation where the reference has been under a submission made a rule of court, or under a rule of court or judge's order or order of *nisi prius* in the first instance, and enable the arbitrator to proceed *ex parte* and to compel the attendance of witnesses, and subject them to an indictment for perjury if they swear falsely. But still, where the agreement does not contain any stipulation that the covenant to refer shall be made a rule of court, there is no perfect mode of enforcing the covenant. When, however, a proceeding by arbitration and award is enjoined by a public act, then it may be enforced by *mandamus*; and if an act direct that a claim shall be adjusted only by reference and award, a party proceeding by action would fail.

The statute 9 & 10 Wm. III. c. 15, intituled "An act for determining differences by arbitration," recites, that "it has been found by experience that references made by rule of court have contributed much to the case of the subject in determining of controversies, because the parties become thereby obliged to submit to the award of arbitrators, under the penalty of imprisonment for their contempt in case they refuse submission; now, for promoting trade, and rendering the awards of arbitrators the more effectual in all cases for the final determination of controversies referred to them by merchants and traders and others concerning matters of account or trade or other matters, it is enacted, that it shall and may be lawful for all merchants and traders and others, desiring to end any controversy, suit, or quarrel, controversies, suits, or quarrels, for which there is no other remedy but by personal action or suits in equity, by arbitration to agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of his majesty's courts of record which the parties shall choose, and to insert such their agreement in their submission, or the condition to the bond or promise whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons; which agreement being so made and inserted in their submission or promise or condition of their respective bonds shall or may, upon producing an affidavit thereof made by the witnesses thereunto, or any one of them, in the court of which the same is agreed to be made a rule, and reading and filing the said affidavit in court, be entered of record in such court, and a rule shall thereupon be made by the said court that the parties shall submit to and finally be concluded by the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire pursuant to such submission. And in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same or any part thereof shall be subject to all the penalties of contempt of a rule of court where he is a suitor or defendant in such court, and the court, on motion, shall issue process accordingly; which process shall not be stopped or delayed in its execution by any order, rule, command, or process of any other court, either of law or equity, unless it shall be made appear on oath to such court that the ar-

bitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage was procured by corruption or other undue means."

The second section enacts, "that any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity, so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage made and published to the parties."

The 3 & 4 Wm. IV. c. 42, § 39, after reciting "that it is expedient to render references to arbitration more effectual," enacts, "that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court, or judge's order, or order of *nisi prius*, in any action now brought or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his majesty's courts of record, shall not be revocable by any party to such reference, without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may, and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the court or any judge thereof may from time to time enlarge the term for any such arbitrator making his award."

Section 40 enacts, "that when any reference shall have been made by any such rule or order as aforesaid, or by any submission containing such agreement as aforesaid, it shall be lawful for the court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire before whom the attendance is required, shall also be served, either together with or after the service of such rule or order. Provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money and payment of expences, and for loss of time, as for and upon attendance at any trial. Provided also, that the application made to such court or judge for such rule or order shall set forth the county where such witness is residing at the time, or satisfy such court or judge that such person cannot be found. Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce upon a trial, or to attend more than two consecutive days to be named in such order."

Section 41 enacts, that "when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that

the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are hereby authorized and required to administer an oath to such witnesses, or to take their affirmation in cases where an affirmation is allowed by law instead of an oath; and if upon such oath or affirmation any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly."

4. *Who to be Arbitrators.*—In selecting an arbitrator, it is scarcely necessary to suggest, that he should be free from interest or even bias, and in general not a near relative. If the parties, fully aware of the objection, constitute a party so interested their arbitrator, they will be bound by his decision.

If the question in dispute be entirely matter of account, or a question of damages, then proper valuers may be appointed; but in general, as it is difficult to anticipate that some question of law, either as respects the admissibility of evidence or otherwise, will not arise, it has been found that a reference to a barrister is more certain and satisfactory.

It is always advisable, before the agreement or rule or order of reference is concluded, to ascertain whether the arbitrator will accept the office, or at least to provide for the contingency by specifying "or his nominee or nominees, until an award has been perfected," or "such other person as shall be appointed in that behalf by the said court or any judge thereof."

In case the appointed arbitrators should refuse to accept the reference, or at any time refuse to proceed further, then, unless the appointment of another arbitrator has been provided for as suggested, the only course will be to proceed in the action or prosecution; for the Court of Chancery has refused to compel an arbitrator to proceed, although he had accepted the reference and in part heard the case. In general, where a reference has become abortive without fault of the defendant, the court will not assent; and if he refuse to consent to a perfect appointment of an arbitrator, the only course is to proceed in the cause, unless the appointment of a fresh arbitrator has been originally provided for.

II. THE PRACTICE AND LAW OF ARBITRATION.—The next consideration is the practical mode of conducting an arbitration.

1. *Terms of the Submission.*—The terms of submission or reference require much care; and they should be well considered even before they may probably be proposed in court, especially when the party interested would wish any deviation from what are called "*the usual terms*," which means, that the costs of the cause shall abide the event, and that the costs of the reference and award shall be in the discretion of the arbitrator; and in special jury causes it is usual to provide expressly "that the costs of the special jury shall be in the discretion of the arbitrator." The terms "abiding the event" mean, that if the arbitrator shall award that the verdict shall be for the plaintiff, then he shall have the costs of the action, and *vice versâ* as regards the defendant; and that as regards the costs of the reference and the award, the arbitrator may direct either party to pay the whole, or each to pay half; or, to avoid the trouble and expences of taxation, that each party shall bear and defray

his own costs of the reference, and pay half the expences of the arbitrator and of his award. In general, when the plaintiff or defendant is clearly right, it would follow that the whole should be paid by the opponent; but where both parties are in a degree to blame, then each ought to bear a proportion of such expence, and the award should be framed accordingly.

The principal point to provide for, in agreements of reference, is against the power of revocation; for which purpose the statute 9 & 10 Wm. III. c. 15, § 1, requires that there should be an agreement in writing to refer the controversy; and secondly, that such agreement should also stipulate that the submission of the parties shall be made *a rule of a court of record*.

If the submission be by *an agent*, or person acting on behalf of another party, care must be observed that the submission be framed accordingly, so as to avoid personal liability on the part of the agent.

If *executors* refer, the submission should be so framed as to protect them from personal liability unless they have assets. So *assignees* of a bankrupt should take care to provide that the sum awarded shall be only payable out of the assets, and not by them personally. And if several parties have distinct interests or liabilities, then it should be expressly provided that each shall only be separately liable for his own default, and not also for other parties.

If it be intended to *limit the powers of the arbitrator*, and prevent him from making a general award, or to require him to state any facts or point of law, care must be observed to introduce express words in the submission to that effect.

The other terms of reference are entirely matter of particular agreement, but frequently require much precaution and consideration.

If the reference be directed by a rule of court or order of a judge, it may be amended by inserting such omitted matters as were incident to the substance of the agreement of the parties; but not so as to substitute A for B as an arbitrator.

2. *Affidavit of the Execution of the Agreement or Deed of Reference*.—Although, in order to make the submission a rule of court, an affidavit of its execution may be made at any time after, and the making of such affidavit may be enforced, yet it is in general most prudent to obtain the same immediately after the instrument is signed.

3. *Making the Submission a Rule of Court*.—As the statute speaks only of courts of record, it has been considered that the Court of Chancery (which is not, in strictness, a court of record) is not within the act; but the second section of the 9 & 10 Wm. III. c. 15 imports that the legislature intended to include the superior courts of equity; and, in practice, courts of equity have long assumed concurrent jurisdiction. In equity, as well as at law, a submission to reference may be made a rule of court as well after the award has been made as before. When the note of reference has been thus drawn up, upon showing the same to any officer who has arrested a witness or party whilst attending the arbitrator, he ought instantly to discharge the person arrested.

4. *Appointment of Umpire*.—If the arbitrators have power to appoint another arbitrator or an umpire in case they should disagree,

they may immediately, and before any disagreement, appoint their umpire; and it seems better to make the appointment before any possibility of disagreement, as they are more likely to concur in such choice before than after disagreement.

In general, the appointment of another arbitrator, or of an umpire, must be the result of the exercise of sound discretion, and not of chance, as by tossing up or drawing lots. But if the parties expressly or tacitly concur in such mode of appointment, or suffer subsequent proceedings before the umpire without protest, it will be too late to object.

5. *The Meetings, and securing the punctual attendance of Parties.*—It was also advisable, and since the enactment in 3 & 4 Wm. IV. c. 42, § 40, would be necessary, in order to bring a party or witness into contempt for his non-attendance before an arbitrator, to serve upon him, together with a rule or order therein mentioned, “an appointment of the time and place of attendance in obedience to such rule or order, signed by one at least of the arbitrators, or by the umpire before whom the attendance and production of documents is required.” Upon the acceptance of the reference, the arbitrator should be required to appoint the first, and sometimes even the subsequent meetings.

The 3 & 4 Wm. IV. c. 42, § 40, contains ample powers to enforce the attendance of witnesses, and care should be observed to take all proper measures, and in due time, to secure their attendance at such meetings, in the manner directed by the statute, viz., by obtaining a proper rule or order of a judge, commanding the attendance of the party and the production of documents, which must be described in the rule or order, and by further obtaining a written appointment of the time and place of attendance, signed at least by one of the arbitrators, if several, or the umpire, and that each of them be served in reasonable time before the meeting. There must also be a due tender of expences; and the witnesses cannot be required to attend more than two consecutive days, to be named in the judge’s order.

6. *Enlargement of the Time.*—In general, by the terms of the reference, the arbitrator has particular and express power to enlarge the time for making his award; and a power to enlarge, without express limitation, enables the arbitrator to enlarge several times, and from time to time. This power should be as general and comprehensive as possible; for if it be precise and limited, it must be exactly pursued.¹

At the first meeting, or at least as soon as the arbitrator has ascertained the nature of the matters referred, if he find that by the terms of the rule or order, or agreement of reference, his powers are too limited, or it is essential for the purposes of justice that he should have power to decide upon all matters in difference, instead of deciding

¹ An agreement to enlarge the time for the making an award must contain a consent that it shall be made a rule of court, otherwise no attachment will be granted for not performing an award made under it. See 3 Western’s Conveyancing, 136.

An award which is required to be made in writing and ready to be delivered at a specified time, is complete if made in

writing and ready to be delivered within the time allowed, although not *actually* delivered. - *Brown v Vawser*, 4 East. 584. And it may be made upon the fixed day. *Knox v. Simmons*, 3 Bro. C.C. 358. And it is to be considered as published when the parties have notice that it is ready for delivery on payment of the charges. See 3 Western’s Conveyancing, 132.

only upon a particular cause and excluding an equitable set-off, he should, before he discloses the inclination of his opinion on one side or the other, suggest to the respective solicitors the expediency of extending his powers, so as to put an end to future litigation.

7. *Proceedings before the Arbitrator or Umpire.*—In most cases, it is considered most expedient for the arbitrator to observe the ordinary rules of evidence and law; and therefore the proceedings before him should in general be conducted precisely as in a court of law, viz., by first hearing the statement of the counsel for the party who has to establish the affirmative, with his evidence delivered *vivâ voce*, avoiding leading questions, precisely as in court, and then the statement of the counsel for the opponent with his evidence, conducted in like manner; and then, in cases of importance, the counsel on each side should make their observations on the whole case, on behalf of their respective clients.

8. *Enforcing the attendance of Witnesses and the production of Documents.*—Any material witness may, on application to a judge or the court, be ordered to attend and be examined, upon his being served with the order or rule, and a duplicate of the arbitrator's appointment signed by him, and upon being duly tendered his reasonable expenses *eundo, morando, et redeundo*; and to produce any document in evidence which a witness could not in general withhold from a court and jury; and if he be guilty of false swearing, he may be indicted for perjury.

9. *Swearing the Witnesses.*—In cases of references at *nisi prius*, it is usual to swear all the witnesses then assembled to give evidence before the arbitrator. But if this has been omitted as to one or more witnesses antecedent to the meeting before the arbitrator, the witnesses may be sworn before a judge, and the *jurats* produced to the arbitrator. But since the recent act much expence may be saved and facility given under the 41st section, which enacts, that when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, then the arbitrator may administer an oath to each witness, or take his affirmation.

10. *Examination of Witnesses.*—It is very generally provided in orders of reference, that the arbitrator shall be at liberty to examine the parties themselves; this, however, is entirely matter of discretion. There is certainly no foundation for the common supposition, that under such a power a party has no right to require the arbitrator to examine him to give evidence in his own favour, but only to expose him to cross examination.

With respect to the nature of the evidence which the arbitrator should receive or act upon, it will in general be found that the rules of evidence have been wisely settled, and are best calculated to elicit truth; but there are exceptions, or at least disputed points. But when the arbitrator is a barrister, the court will not, unless he was expressly restrained in his powers, set aside his award on account of his having resolved to admit evidence not in point of law admissible on a formal trial, or of having heard an incompetent witness.

11. *Mode of taking the Evidence.*—The evidence, when any case of perjury is apprehended, should be carefully taken down in writing in the form of questions and answers; and, when concluded, the witness should read over the same, and be asked by the arbitrator whether he would wish to add any thing; and the further questions and answers should also be written down; and then the witness may as well sign the statement.

12. *Revocations in Fact or Law.*—In cases not within the act, although an award after notice of revocation would be invalid, yet if there has been a mutual agreement, bond, or covenant to submit to arbitration, and abide by an award to be thereupon made, it is clear that upon proof that there was a debt or damages to a certain or ascertainable amount justly recoverable, and which probably would have been awarded, the same sum would probably be recovered from the party revoking and his surety, in an action upon the contract of submission, assigning the revocation as a breach thereof; and probably, upon stating the payment of costs and expences occasioned by the revocation as special damages, those also would be recovered.

It will be observed, however, that the recent statute 3 & 4 Wm. IV. c. 42, § 39, does not absolutely prohibit a revocation, but only requires the leave or sanction of the court or judge to such a proceeding. And as before, so still since the act, there may be cases where perhaps even without previous leave a revocation might be given effect to, although in all respects the submission were perfect under the act; as if the arbitrator should act partially or otherwise improperly.

The marriage of a woman pending a reference would not prevent an arbitrator from proceeding.

The death of either of the parties is in law an implied revocation of the power to proceed, unless it be expressly or impliedly provided otherwise. The law upon the subject of revocation by death has been recently fully examined in the privy council; and it was held, that an award is invalid if one of the parties to the reference should die before it was made, unless the heir or representative of the party has been expressly named in the submission.

The bankruptcy of either party is not necessarily a revocation of the arbitrator's authority to proceed and make his award, at least so as to bind the bankrupt and his opponent. But in case the assignees should, before the award has been made, give notice of their dissent to any further proceeding in the reference, or if they should forbear to attend the arbitrator, it would seem that a subsequent award would not be conclusive against the estate; though if the assignees should adopt the arbitration, they will then be bound by the award.

13. *The Award.*—The award must strictly pursue the power, or it will be void, even in respect of a slight informality; as where the submission required an award under *hand*, and the award was not signed, though under seal.

On the other hand, an arbitrator must, when all matters in difference are referred to him, take care by his award, either in terms or in effect, to decide upon all matters of claim that are brought before him, and which are to any extent tenable; and must not, because a claim has been admitted before him, or because the parties have not

pressed or even requested him to arbitrate upon the subject, omit to notice or include it in his award.

If by the terms of the submission it is compulsory on the arbitrator to award *separately* upon each claim, and to state therein whether he determine for or against the same, his award must be framed accordingly, or it will be void.

Although, in general, an award absolutely that a party shall do a thing which is *impossible* is altogether void, yet if it also give the party an alternative which he can perform, it would be otherwise.

The award must be *certain, clear, decisive, and final*.

Where upon reference to a surveyor of a cause and all matters in difference, he awarded "that the defendant had overpaid the plaintiff 34*l.*;" this was held insufficient to entitle the plaintiff to enforce the award by attachment. The best course, when the submission so authorises, is for the award not only to order payment on a named day, or on request, but also to direct what judgment shall be signed as a security.

14. *Fees*.—The fees of an arbitrator or umpire should be moderate, and commensurate with the actual trouble and time consumed. When there have been briefs or statements of moderate length to read, the arbitrator's usual fee is five guineas for the first meeting, and three guineas for every subsequent meeting of two or three hours' duration: and if the award itself should occupy much time in considering and framing, then a moderate fee for that trouble is added. The barrister's clerk names an aggregate sum, which is to be paid before the award is taken away, or its contents even known; and a small fee of five or ten shillings for each meeting is expected by such clerk. The best course, when the sum demanded is obviously and enormously unreasonable, would be, to make a short affidavit, stating the time and trouble of the arbitrator, his charges, and his clerk's refusal to deliver the award unless the sum be paid, and then to apply for a summons why, on payment of a named reasonable sum, the arbitrator and his clerk should not deliver the award.

In causes of small importance, or when the mere quantum of damages is referred to a barrister, and there is little probability of the necessity for any motion to set aside the award, it is usual, in order to save the expence of a formal award on stamps, to take the verdict generally for the damages in the declaration, with an authority to a named counsel to certify the amount; and in that case, after hearing the witnesses precisely as in an ordinary reference, he will return his certificate to the judge's marshal, in order that he may enter the verdict accordingly.

In general, when an award has been delivered by the arbitrator as his award, he is *functus officio*, and cannot afterwards alter it, even to correct a mistake, unless the parties will concur. The court cannot interfere to alter the terms of an award in order to make them consistent with the submission, even where the submission to arbitration gave minute directions for the course to be pursued by the arbitrator. Hence the greatest care should be taken in drawing up an award.

15. *Setting aside Awards*.—If the submission cannot by its terms be made a rule of court, then the only course will be to resist an action,

or to file a bill in equity, though the grounds are but few upon which relief can be obtained; and if the award be seemingly upon the face of it correct, relief upon the merits or facts can rarely be obtained, except indeed in cases of fraud or grossly corrupt or irregular misconduct of the arbitrator.

Where the submission has been made a rule of court, the statute authorizes relief "where an arbitration or umpirage has been procured by corruption or undue means, so as complaint of such corruption or undue practice be made, in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties."

A court of equity will not, upon a bill filed, set aside an award on a question of fact, except for corruption, partiality, or irregularity of conduct in the arbitrator; and evidence of the merits is only to be received so far as it may throw light on the conduct of the arbitrator, in order to establish those objections. In general, as to mistakes in law, unless the objection appear on the face of the award or in some other authentic written document, no objection can be sustained which is founded on matter of law. But if the arbitrator in his award state reasons for his decision which are untenable, it might be otherwise.

As to *what misconduct* of an arbitrator may induce a court to set aside his award, it will be obvious that it ought to be of such a nature, as probably to have affected the decision on the merits and justice of the case; that, at least, is the rule in equity. Private meetings of the arbitrators with one of the parties, and admitting him to be heard to induce an alteration in the award, was considered such partiality as to induce the court to set aside the award.

All the witnesses of the party against whom an award is made should regularly be examined, and in his presence, if he require it, so that he may have them cross-examined, or it would be ground for setting aside the award. But, generally speaking, the mode of conducting an arbitration must be left to the arbitrators; and at all events, if either party would take advantage of any objection as to the mode of doing so, he must give notice *at the time* that he intends to rely on it as an objection.

Where an award is void upon the face of it, and nothing can be done upon it without suit, the court will not interfere to set it aside, because such suit must fail. But if a cause is referred by order of *nisi prius*, and the arbitrator has power to order a verdict to be entered for either party, and he erroneously make an award ordering a verdict to be entered, the court will set it aside; for otherwise the party against whom it is made will have judgment against him upon the verdict without a possibility of redress.

A party, after receiving the costs of a reference and award, cannot move to set aside the award; and acquiescence may, especially in equity, preclude a party from objecting to an award.

16. *Proceedings to enforce Performance of an Award.*—The party in whose favour an award has been made has in general the choice of two modes of enforcing obedience, either by motion for an attachment or by action.

We have in a previous page alluded to some of the statutes compelling parties to submit to arbitration, or at least affording them a right to claim a reference; of this nature are the Friendly Societies and the Savings Banks Acts. The acts respecting masters and servants in husbandry, and in certain trades, either enable magistrates to hear complaints for nonpayment of wages, or enable such masters to demand and have a reference. The acts relating to Seamen's Wages, and the Salvage Acts, also afford powers of arbitrating; and when they give a power to demand an arbitration, the provision is construed to be imperative, and to preclude parties from suing in cases within the enactments. But the Salvage Acts have been expressly holden not to take away the general common law right to sue for recompence in those cases.¹

CHAPTER V.

Of Summary Proceedings before Justices.

WE will now examine the practical proceedings to obtain a summary conviction, and compensation or punishment, before justices of the peace for small private injuries, whether to the person or property; which will, in general, also apply to the recovery of pecuniary penalties under penal statutes, which impose them as measures of police.

The cases in which these proceedings are principally applicable are where the injury is small, or the parties are poor, and it is desirable to seek redress by an economical and expeditious summary remedy. Great risk attends proceedings by action in the superior courts for small injuries, in respect of costs; and unless there be a permanent and valuable right to be contested, and the opponent is a responsible person, or the object is to prevent a repetition of the injury, it is sometimes most prudent to forbear proceeding at all. The late enactments giving a summary remedy in cases of this kind form a new class of jurisdiction delegated to justices, which we shall now consider.

The original functions of justices of the peace, when not assembled at general or quarter sessions, were mostly to preserve and prevent breaches of the peace, and to cause malefactors to be apprehended, so as to be tried either at the assizes or sessions; and in cases of forcible entries and detainers. They were then extended to the prevention or punishment of breaches of some police regulations. Their jurisdiction was next extended to cases of contract between masters and servants in trade. The next step was to afford compensation before a justice for verbal abuse by stage-coachmen to passengers. At last, general compensation or punishment for small private injuries was provided by three statutes recently passed, viz., the 7 & 8 Geo. IV. c. 29, relative to small illegal takings of property, whether strictly per-

¹ 2 Chit. Gen. Prac. 73—126.

sonal or in part connected with the freehold, not exceeding 5*l.* in value; the 7 & 8 Geo. IV. c. 30, relative to small wilful or malicious injuries to personal or real property, whether private or public, not exceeding 5*l.*; and the 9 Geo. IV. c. 31, relative to common assaults and batteries, not causing injury exceeding 5*l.* The two former acts enabled one justice summarily to determine the complaint of the party aggrieved, and award him compensation to the extent of 5*l.*, unless when he had given evidence, and then to be paid in aid of the county rate; and the latter act requires two justices to hear and determine, and convict in not exceeding 5*l.*, to be paid in aid of the county rate.

I. We shall first consider the terms of the principal recent enactments of a general nature or of most practical importance, and then state the practical proceedings in regular order.

1. *Common Assaults and Batteries.*—The 9 Geo. IV. c. 31, § 27, after reciting that it is expedient that a summary power of punishing common assaults and batteries should be provided under certain limitations, enacts, that where any person shall unlawfully assault or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence; and the offender, upon conviction thereof before them, shall forfeit and pay such fine as shall appear to them to be meet, not exceeding together with costs, if ordered, the sum of five pounds; which fine shall be paid to some one of the overseers of the poor, or to some other officer of the parish, township, or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division in which such parish, township, or place shall be situate, whether the same shall or shall not contribute to such general rate; and that the evidence of any inhabitant of the county, riding, or division shall be admitted in proof of the offence notwithstanding such application of the fine incurred thereby: and if such fine as shall be awarded by the said justices, together with the costs, if ordered, shall not be paid either immediately after the conviction or within such period as the said justices shall at the time of the conviction appoint, it shall be lawful for them to commit the offender to the common gaol or house of correction, there to be imprisoned for any term not exceeding two calendar months, unless such fine and costs be sooner paid: but that if the justices, upon the hearing of any such case of assault or battery, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred.

The 28th section then enacts, that if any person, against whom any such complaint shall have been preferred for any common assault or battery, shall have obtained such certificate, or having been convicted shall have paid the amount adjudged to be paid, or shall have suffered imprisonment for nonpayment thereof, he shall be released from all further proceedings for the same cause. The 29th section provides that these provisions shall not apply to cases accompanied by any attempt to commit felony; and in such case, and where justices shall

think it is a fit case, they shall direct a prosecution at the sessions. Nor are justices to determine any case of assault in which any question as to the title to land &c., or as to bankruptcy, insolvency, or execution under the process of any court of justice, shall arise.

The 33d section enacts, that if after summons the party do not appear, the justices may either proceed to determine the case *ex parte*, or issue their warrant for apprehending the party; or the justice may, if he think fit, issue such warrant in the first instance.

By the 34th section, prosecutions under the act punishable on summary conviction must be commenced within three calendar months after the commission of the offence.

The 36th section enacts, that no conviction shall be quashed for want of form, or be removed by *certiorari* or otherwise into any superior court; and that no warrant of commitment shall be held void by reason of any defect therein, provided it allege that the party had been convicted, and there be a valid conviction to sustain the same.

This act, 9 Geo. IV. c. 31, as respects summary proceedings by conviction for common assaults and batteries before two justices, does not require a complaint on oath, or even in writing; but there must be an oath before the issuing any summons or warrant. And as it contains no clause authorizing an appeal, and the writ of *certiorari* is expressly taken away, the decision of two justices is final.

2. *Taking of Personal Property, Trees, Fences, &c.*—As respects the illegal taking of personal property, or of things annexed to the realty, when not indictable, almost every possible injury in the nature of an illegal taking is remediable or punishable before one or more justices under the 7 & 8 Geo. IV. c. 29.

Section 30 enacts, that the unlawfully and wilfully taking or killing any hare or coney in the day-time, in any warren or ground lawfully used for breeding or keeping of hares or coneys, whether inclosed or not, shall subject the offender to the payment of not exceeding 5*l.*, on conviction before one justice.

The stealing any dog, or beast or bird ordinarily kept in a state of confinement, and not the subject of larceny at common law, subjects the offender to not exceeding 20*l.* for the first offence, and imprisonment for twelve calendar months with hard labour; and for the second offence, on conviction before two justices, the like punishment, and, if a male offender, also whipping.

The unlawfully and wilfully killing, wounding, or taking any house dove or pigeon, under such circumstances as shall not amount to larceny at common law, subjects the offender to forfeiture of the value of the bird and not exceeding 2*l.*

The unlawfully and wilfully taking or destroying, or attempting to take or destroy, any fish in any water, which shall be private property, or in which there is a private right of fishery, (but not being water running through or being in any land adjoining or belonging to the dwelling-house of any person being the owner of such water or having a right of fishery therein, for in such case it is a misdemeanor) subjects the offender to pay the value of the fish taken or destroyed, and not exceeding 5*l.* Angling in the day-time is excepted from this regulation; but an offender, by angling in the day-time in the excepted water,

is liable to pay not exceeding 5*l.*; and if the angling has been in water not as above excepted, the party is subject to not exceeding 2*l.* penalty, and the tackle may be seized.

All these penalties are recoverable before one justice, except where mentioned to the contrary.

The act then contains numerous penalties against stealing trees, shrubs, live and dead fences, stiles, gates, fruit, vegetables, and other things, recoverable as therein directed before one or two justices.

Receivers of property, and abettors, where the original offence is punishable on summary conviction, are subjected to similar penalties, also recoverable before one justice. Offenders found committing any prohibited offence may be apprehended without warrant; and the act authorizes a justice, upon oath of a reasonable cause to suspect that a party has in his possession any such stolen property, to grant his search-warrant. The act limits prosecutions for summary conviction to three calendar months after the commission of the offence, and renders the party aggrieved or any inhabitant of the county a good witness. But if the testimony of the former is required on his own behalf, the penalty awarded goes to the county rate.

The 65th section then directs the mode of proceeding for the penalty, which is nearly similar to the 33d section of the 9 Geo. IV. c. 31.

The value of the property stolen or taken, or amount of injury done, must be assessed by the justice, and paid to the party aggrieved, if known, except as before mentioned; in which case, or where the party aggrieved is unknown, then such sum and the penalty shall be paid to one of the overseers of the poor of the parish, and by him paid over to the county rate. If several persons are convicted of the same offence, each is adjudged to forfeit a sum equivalent to the value of the property or the amount of the injury. The party aggrieved has only one sum forfeited, and the others are applied to the county rate. In case of non-payment the justice may commit the party to the common gaol or house of correction, to be kept to hard labour for not exceeding two calendar months where the sum does not exceed 5*l.*, and prescribes a further scale of imprisonment; but the imprisonment is only till payment of the sum awarded and costs.

The 72d section gives a power of appeal in certain cases.

The 73d section enacts, that no conviction shall be quashed for want of form, or removed by certiorari; and no warrant of commitment shall be void by reason of any defect, provided it be therein alleged that the party has been convicted, and there be a valid conviction to support the same.

3. *Small Wilful or Malicious Injuries.*—The principal statute against small malicious injuries to any real or personal property is the 7 & 8 Geo. IV. c. 30. The 24th section enacts, that if any person shall wilfully and maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, whether of a public or private nature, for which no remedy or punishment is thereinbefore provided, every such person being convicted thereof before one justice of the peace shall forfeit and pay such sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of five pounds; which sum of money shall, in the case of private property,

be paid to the party aggrieved, except where such party shall have been examined in proof of the offence, and in such case, or in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in such manner as every penalty imposed by a justice of the peace under that act is thereafter directed to be applied. And if such sum of money together with costs (if ordered) shall not be paid, either immediately after the conviction or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common gaol or house of correction, there to be imprisoned only, or imprisoned and kept to hard labour, as the justice shall think fit, for any term not exceeding two calendar months, unless such sum and costs be sooner paid. Provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass, not being wilful or malicious, committed in hunting, fishing, or in the pursuit of game; but that every such trespass shall be punishable in the same manner as before the passing of this act.

By the 25th section, proof of malice against the owner is not essential to establish an offence under the act.

The other provisions are similar in almost every particular to those already mentioned of the 7 & 8 Geo. IV. c. 29.

4. *Trespasses in Pursuit of Game.*—The statute 1 & 2 Wm. IV. c. 32 contains some strong summary measures for the preservation of game and rabbits. Section 12 subjects even the tenant or occupier to a penalty of 2*l.* if he pursue or give permission to others to pursue, kill, or take game upon land in his own occupation, when the right to the game is exclusively in his landlord or any other person, and also to 1*l.* for every head of game killed by him, recoverable before two justices. And section 24 subjects all persons to a penalty of 5*l.* for every destroyed egg of any bird of game, or of swan, wild duck, teal, or widgeons, recoverable before two justices. And section 3 subjects any person to a penalty not exceeding 10*l.* for laying poison to destroy or injure game, recoverable before two justices. And section 30 subjects all trespassers in the day-time in pursuit of game to a penalty of not exceeding 2*l.*, recoverable before one justice; and if five or more be assembled together in the day-time for the same purpose, they shall forfeit 5*l.*, also recoverable before one justice. And other penalties are imposed by the same act. But the 35th section contains an exception in favour of persons hunting or coursing with hounds or greyhounds, and being in fresh pursuit of any deer, hare, or fox already started upon any other land, and of any person *bonâ fide* claiming free warren or free chace, and of gamekeepers within their proper manors.

It will be observed, that the four enumerated acts introduce summary proceedings for punishment, and sometimes for satisfaction, for very numerous small injuries which would not be the fit subjects of indictment; but, at the same time, they take from justices the investigation of a case where a *bonâ fide* right is fairly in contest.

The Game Act was intended to prohibit the mere occupier of the land from sporting, as a tenant under a lease for not exceeding twenty-one

years granted before the act, and upon which no fine had been taken, although the lease did not except or reserve the game, but merely contained a clause that the lessor should be at liberty to enter to shoot, hunt, fish, or otherwise sport; but a small majority of magistrates at the Kent Sessions recently held otherwise, and that the lessee under such a lease had a right to kill game after the act came into operation. It is clear, however, under the 8th section, that if a lease be executed after the passing of the act (5th Oct. 1831), containing merely a right of entry for the lessor to kill or take game, although the game be not reserved, the lessee would have no right to sport.

II. PRACTICAL PROCEEDINGS.—1. *Within what Time the Information must be exhibited.*—With respect to the time within which a summary proceeding before a justice or justices must be commenced, it in general depends on the particular statute. All the recent acts of a general nature require that “the prosecution be commenced within three calendar months after the commission of the offence. If no time is mentioned, it is necessary to proceed within one year. Some acts prohibit the commencement of a summary proceeding until after the lapse of some time, and require notice to the offender of the intended prosecution, as the General Turnpike Act, 3 Geo. IV. c. 126, § 143, which requires twenty-one days notice.

The term *month*, unless expressly declared otherwise, is generally construed to be lunar; though when the question relates to ecclesiastical affairs or commercial or nautical subjects, it is generally otherwise.

The decisions are contradictory as to whether the *day* of committing the offence is to be reckoned inclusively or exclusively, and therefore no risk should be incurred in that respect by avoidable delay. Cases seem now to establish, that the first day ought to be excluded; as in proceedings against the hundred for a demolition by fire, when the act requires that the owner of the demolished building or his servant shall, “within seven days after the commission of the offence,” go before a justice and submit to examination respecting it; it was held that such seven days are to be calculated exclusive of the day on which the damage was committed.

2. *Who may Prosecute.*—Sometimes, as will be seen by referring to the several acts, only the injured party can support the complaint, and sometimes a *credible witness* is sufficient.

Particular statutes (as the General Highway Act, 5 & 6 Wm. IV. c. 50) authorize a justice to convict upon *his own view*; but if a driver of a cart refuse to inform him the name of the owner, this does not justify the magistrate in stopping the cart and horses in order to examine the board, although the driver wilfully placed himself before the board on which his master’s name was painted; and it was holden that the magistrate was liable to an action of trespass. The justices’ view must also be expressly stated.

3. *Against whom.*—In general the proceeding can be only against a party actually present and committing the offence; but a principal who instigates, although absent, may be proceeded against for the act of his agent or servant; and masters as well as partners are frequently liable to penalties for the acts of their servants or partners in the course of their employ or joint trade, although absent and not actually authorizing

the commission of the offence. Married women and infants are, in general, liable for trespasses and torts unconnected with contract.

As respects the number of offenders, when several are jointly guilty, they may be proceeded against accordingly, and they incur only one or several penalties according to the terms of each particular enactment.

4. *Before what Justices.*—It is a general rule, that no justice should act in any case in which he is interested, or where he may be supposed to be prejudiced; and in some instances this is particularly prohibited, as by the 1 & 2 Wm. IV. c. 37, prohibiting the payment, in certain trades, of workmen's wages in goods or otherwise than in coin, and which enacts that no justice, being a person also engaged in any of the trades or occupations enumerated in the act, or even the father, son, or brother of any such person, shall act as a justice under that act.

In general, a county justice has jurisdiction over offences committed throughout the county: but it must not only appear that he is a justice of the county, but also that the proceeding is within its limits. If the jurisdiction be given to a justice in or near a parish or place, or acting for the division, this is only directory, and any justice of the county may act; but if the authority is only to the next justice, then he only can act.

5. *The Information or Complaint.*—In practice, it will be observed, that the information usually states the name and addition of the informer or complainant, and that on such a day, at a named place, in the county of which the magistrate is a justice, he cometh before a named justice of the peace in and for the said county, and on his oath states that &c. (showing the time and place of committing the particular offence); and when it is not an offence at common law, concluding, contrary to the statute in that case made and provided, whereby he forfeited and became liable to pay a named penalty or damages, &c. (as in the particular act), to be distributed or paid according to law; and then praying that proceedings thereupon may be duly had; which information is usually signed by the informer, and he is sworn to the truth of the statement when the statute requires his oath.

Unless expressly or impliedly required, it is not necessary that the information should be in writing; but when so required, it is imperative. In practice it is usual to have it in writing, so as to enable the magistrate correctly to frame his summons thereon, and to limit the subsequent evidence.

If the particular statute do not require the information to be on oath, that form is unnecessary, though the addition of it will not prejudice. But when an oath is required, then the magistrate cannot legally act unless such oath has been made.¹

6. *Oath or Deposition after Information and before Summons.*—We have seen that sometimes the statute giving the summary proceeding allows a complaint of a party aggrieved or other person without oath; but all the four modern acts which we have particularly considered appear to require that the justice shall not issue his summons or warrant without the previous "oath of some credible person," of the offence charged in the information having been committed. A magistrate should

¹ Very excellent and useful remarks upon the form of the information or complaint are contained in 2 Chit. Gen. Prac. 159—171.

in the first instance interrogate the deponent as to all the circumstances, and really be of opinion that the story imputes a clear offence, and is to be credited, before he issues his summons. The party aggrieved may be wholly ignorant of the circumstances under which the injury was committed; and therefore it is essential that some third person who witnessed the transaction should be enabled to make the necessary oath upon which to found the subsequent proceedings. In framing such oath, care must be observed that it expressly avers that the offence was committed at the same time and under the same circumstances as those charged in the information, so as to show that the particular prohibited offence has been committed. If the justice should cause a party to be imprisoned upon his warrant without a sufficient oath of an offence having been committed, he would be liable to an action of trespass.

Upon a clear charge of an offence before one or more justices, and when there can be no reasonable ground for doubting the jurisdiction or the propriety of exercising it, a justice ought to receive the information and issue his summons, or warrant when proper, and cause the charge to be heard; and if he should refuse, he might, in a very clear case, be compelled to act by *mandamus* from the Court of Queen's Bench, and by some particular enactments he would incur a penalty for the neglect.

7. *The Summons*.—A magistrate, unless in cases where he is empowered and required to issue a warrant in the first instance, should issue his summons, requiring the defendant to appear before one or two justices, according to the nature of the charge; and ought always himself to sign such summons after he has heard the charge. In order that the defendant may know what he has to answer, and may prepare his defence accordingly, it is the safest course to copy the whole charge as in the information; and where a particular form of summons is prescribed by the statute, it must be observed. The summons may be directed to the accused party himself; or, unless otherwise prescribed, there may be a precept to the constable, ordering him to summon the party; but the former mode is preferable. It must name a time and place of appearance, and should fix a certain hour of the day; but nevertheless the party must, if the justice or justices be not ready to proceed at the appointed hour, wait during all reasonable hours of the same day. The summons must be dated subsequent to the day on which the information is laid. If it be to appear on an impossible day, as on Tuesday the 17th April when the 17th April falls on a Friday, no proceedings could be had thereon, unless the party appear and defend, or perhaps unless it appear that he was not misled. The time appointed must always allow sufficient opportunity, between the service of the summons and the time of appearance, to enable the party to prepare his defence and for his journey; and the justice should in this respect take care to avoid any supposition of improper hurry. The precise time will generally depend on distance and the other circumstances of each particular case. A man ought not to be required instantly to answer a charge of a supposed offence less than an indictable misdemeanor on the same or even the next day, and should be allowed not only ample time to obtain legal advice and assistance, but also to collect his evidence; and even the convenience of witnesses should be considered; and therefore, in general, several days

should intervene between the time of summons and hearing. It is a general rule in these cases, that appearance cures any defect or uncertainty either as to time or place; and the safe and only prudent course is for a defendant, when served too late, nevertheless to attend before the justice and state his objection to the time, and require an adjournment to another day, which the justice will be bound to make.

8. *Service of the Summons.*—The summons must also be served in a reasonable time before the day appointed for the hearing. In ordinary cases, as in that of a notice to quit, it may be either delivered to the party himself, or left at his residence; and, upon proof of the latter, it will at least be presumed that he has actually received it, and in due time. But as a party upon a conviction may incur a penalty, and even imprisonment, no such presumption is allowed; and, in general, it must be proved on the hearing that he actually received the summons in due time to enable him to attend. In some cases the summons may be left at the dwelling-house, and in others with any inmate there, provided the purport of the summons be explained to them. But in the former case, it must appear that the service was on the wife, or an immediate servant of the party charged.

9. *Of the Warrant to apprehend an Offender.*—By the common law, no party could be arrested or imprisoned for an offence not indictable before he had been indicted or convicted; but it being found that transient offenders, for want of a power to apprehend them, eluded justice, modern acts have introduced in numerous instances powers to apprehend even without warrant; and we have seen that the recent acts (9 Geo. IV. c. 31, 7 & 8 Geo. IV. cc. 29 and 30, and 1 & 2 Wm. IV. c. 32) contain express powers for a justice in certain cases, if he think fit, after oath of the offence, to issue his warrant to apprehend for petty offences in the first instance, and even without any previous summons. Before any warrant or imprisonment, there must have been a formal charge of an offence within the particular act, or the magistrate will be subject to an action, even for a slight and temporary imprisonment; and even in cases where imprisonment before conviction would be legal, care must be observed expeditiously to bring the party before the justice, and that the justice himself proceed speedily to a final hearing, and do not detain the party an unreasonable time under colour of re-examination.

When a statute requires the justice to cause the offender to be brought before him, it has been considered that this implies an authority to use a compulsory process. But unless an express power be given to apprehend before conviction, a justice cannot issue his warrant to imprison in default of appearance to his summons, but can only proceed *ex parte* to a hearing of the informer's evidence, and dismiss the information, or acquit, according to the weight of the evidence.

10. *Of a Search Warrant.*—It is a general maxim, that every Englishman's house is his castle, and that no outer door shall be broken for the purpose of apprehending him, except in cases of treason, felony, or breach of the peace, or contempt of the House of Lords or Commons; and though, if an outer door be open, a person may, if he be certain that his goods are therein, and illegally placed there by the occupier, lawfully enter to take the same away, yet he does so at his peril, and is

subject to an action of trespass if it should turn out that his goods were not there. Until the recent enactments, a search warrant could only be obtained upon an oath that a felony or indictable misdemeanor had been committed, and showing reasonable suspicion that the stolen goods were concealed in a particular house; and if such a warrant were maliciously obtained without reasonable cause, the party obtaining and acting under it is subject to an action on the case; and if the warrant were illegal in form, the magistrate is liable also to an action of trespass. But now, we have seen, the 7 & 8 Geo. IV. c. 29, § 63, enacts, "that if any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession, or on his premises, any property whatever, on or with respect to which any such offence (*i. e.* any illegal stealing of personalty or part of the realty, not constituting felony or indictable misdemeanor, but punishable summarily) shall have been committed, the justice may grant a warrant to search for such property, as in the case of stolen goods." The course of proceeding will be the same as in the case of a search warrant where goods have been feloniously stolen.

11. *Of securing Evidence and Attendance of Witnesses.*—Before the hearing, the informer and the defendant must respectively consider the means of obtaining the appearance of witnesses and the production of documents. Justices of peace out of sessions have not, in the absence of express authority given by the particular act, any power of summoning witnesses, or at least of enforcing attendance. But such a power has been given, though only in particular cases, by modern acts; and a penalty of even 5*l.* (as in the Game Act, 1 & 2 Wm. IV. c. 32, § 4) has been imposed upon witnesses for non-attendance; but no such power is given by the 9 Geo. IV. c. 31, or 7 & 8 Geo. IV. c. 29, or c. 30.

The proper course, as well for the complainant as the defendant, is, as soon as practicable after service of the summons, to apply to the justice who issued the summons, for his summons to each material witness; and as the issuing of the same will be in furtherance of an authorized proceeding, and at least an innocent act, even when not expressly authorized, a justice should, when essential to justice, grant it *valeat quantum*. When an express power has been given to summon witnesses, as in the Game Act, 1 & 2 Wm. IV. c. 32, § 40, one or two justices must sign the summons; and in case of neglect to attend at the time and place appointed, no sufficient excuse being proved, or if he should refuse to answer, the party summoned forfeits not exceeding 5*l.*, recoverable by summary proceeding.

12. *The Hearing.*—At the appointed hour, the complainant or informer, with his witnesses, and the party charged, with his evidence, are to attend before the justice or justices, and wait, as we have seen, a reasonable time until he be ready. But a magistrate who is not as punctual in his other official duties will admit is unfit for his station. The hearing and proceedings before drawing up the formal conviction are now to be considered.

We have already mentioned the requisite number of justices, together with the extent of their jurisdiction and the consequences of the non-attendance of the party offending.

If the defendant confess the charge without qualification, he thereby

dispenses with the necessity for the complainant adducing any evidence. The better opinion is, that the confession must be made in open court, and before the convicting magistrate. A confession, however, will not (unless perhaps under the 3 Geo. IV. c. 23) aid a substantial defect in the information.

Upon request and good cause shown, the justice may exercise a liberal discretion and *adjourn* the hearing, taking care first to ascertain whether the particular statute requires a conviction within a limited time.

If the information upon which the summons is founded be defective, the party charged with the offence may, upon the hearing, in the first instance, object to its validity; and if the objection be well founded, the magistrate should immediately dismiss the information, or he will proceed at his peril.

Upon a valid objection the informer may abandon the charge and prefer one more formal; and therefore when the objection is of substance, and would not be aided by a conviction, as under the 3 Geo. IV. c. 23, the prudent course may be for the defendant not to disclose his objection until it is too late to commence a fresh proceeding.

In cases of summary proceedings before justices, it is usual to allow counsel or an attorney to attend and make objections on behalf of either party. But though their assistance is thus allowed, it is not of *right*. In a recent case¹ the Court of King's Bench held, that though an attorney has a right to be present, to advise and assist his client, yet a justice may refuse to permit him to act as a counsel, that is, in making speeches. And in a subsequent case,² the court limited the right (without permission of the justice) to mere attendance and *private* assistance or advice and taking notes; and held, that neither the informer nor the defendant has a right to have the assistance of a counsel or attorney to interfere as an advocate for either party, either in examining or cross-examining witnesses, or in arguing technical or other objections, at the risk of embarrassing the justices, though each or a friend may take notes.

All persons, interested or not, have a *prima facie* right to be present; and therefore where a magistrate had, without any specific reason, caused a party who claimed a right to be present to be removed from a justice-room where such a proceeding was going on, it was held that he was liable to an action of trespass. But justices may prohibit taking notes of the evidence, except on behalf of the informer or the defendant; and if it be persisted in, they may cause the party to be removed.

13. *Evidence*.—In general, the particular act creating the offence, or making it punishable by summary proceeding, contains some express directions about the witnesses and evidence; as that the party aggrieved, or any inhabitant of the parish or district, shall be a competent witness. When the statute is silent, the admissibility of evidence will be governed by general principles and rules.

The oaths to witnesses and their examination, as indeed all the proceedings, should be conducted as nearly as practicable the same as in the superior courts; and the rule there observed, that leading questions shall not be put to a witness, so as to suggest favourable and probably

¹ Daubeny v. Cooper, 10 Barn & Cres. 237. R. v. Coleridge, 1 B & C. 37; 2 Dowl. & Ry 86.

² Collier v. Hicks and others, 2 B. & Adolph. 663; and as to coroners, see Gar-nett v. Ferrand, 6 Bar. & Cres. 611.

incorrect answers, so accords with justice, that it should be observed before magistrates with the utmost strictness. It has been lately decided, that if a witness give evidence against the interests of the party who called him, such party may nevertheless bring other witnesses, not indeed to discredit him generally, but to contradict him on the facts he has deposed to, if they be material to the matter under investigation, though not so if they be merely collateral.

It is the duty of a magistrate, as well at common law as under the 3 Geo. IV. c. 23, upon all summary proceedings, to cause his clerk to take down the evidence verbatim in the language of the witnesses, not perhaps all the exact words, but the whole of the very words that are material, and these not in the terms of the statute, but in the actual expressions of each witness; and the difficulty of so doing is no excuse for the omission. It is recommended that the questions and answers be taken down precisely in the words and tense in which they are uttered, and that in cases of importance the evidence be immediately afterwards read over by the magistrate to the witness, and he be asked whether he has any thing to add or explain or qualify.

In the case of a criminal charge, it has been laid down that if a prisoner be brought before a magistrate, his statement of the facts ought not to be taken till the evidence against him has been gone through, and he should then be asked if he has any thing to say in answer to the charge, and be cautioned that if he make any statement it may be used against him, and that he must not expect any favour if he confess. Perhaps these suggestions should also be observed in cases even of summary proceeding.

At common law, and also expressly under the recent acts, if the defendant make it appear, by cross-examination of the complainant's witnesses, or by his own, that there was a *bonâ fide* claim of right, in asserting which the act was committed, the justices ought not to proceed, but should dismiss the complaint and leave the complainant to try the question in an action. But the claim must not be merely colourable, but under circumstances inducing at least a reasonable ground for supposing that it may be established; and cases of this nature are, as we have seen, provided for by the three recent acts.

14. Decision of the Justices.—After the evidence on both sides is closed, the justices may take time to consider their decision. But then if two justices must convict, they should be present together when they resolve upon the conviction, so that the parties may have the benefit of their compared, considered, and discussed judgments and decision; and it will be proper for the justices to give the complainant and the defendant reasonable notice of the intended time and place when the justices will decide, so that they may be present, if they think fit, and hear their verbal judgment, and receive a copy of the conviction if they so decide. The justices are the sole judges of the weight of the evidence.

It is principally at this stage of summary proceedings, though it may be before, that, by the recommendation of the justice or justices, amicable adjustments or compromises take place. Under the recent acts, which, as affording remedies for small private injuries, are now principally under our consideration, a justice has express power, even after

conviction of the specified petty injuries, "to discharge the offender from his conviction, upon his making such satisfaction to the party aggrieved for damages and costs, or either of them, as shall be ascertained by the justice;" and this, although the penalty on conviction would have been applicable in aid of the county rate. So, independently of express enactment, informations of offences of a private nature, not amounting to felony or to an indictable misdemeanor, may, it should seem, be compromised by leave of the justices before whom the charge is preferred.

If the justices are of opinion that the evidence does not clearly establish that the offence was committed as charged in the information, they ought to acquit; and in general an acquittal, though erroneous, is conclusive; though it may be otherwise if the ground of acquittal be merely the want of jurisdiction, in which case indeed it is obvious that the decision is rather a dismissal of the complaint than an acquittal on the merits.

The 9 Geo. IV. c. 31, § 27, enacts, that if the two justices shall deem the offence not proved, or that the assault or battery has been justifiable, or so trifling as not to merit punishment, then they may dismiss the complaint; and in this case they are forthwith to make out a certificate under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred; and such certificate, or a conviction, shall be a bar to any other proceeding.

15. *The Conviction.*—The document called a conviction is rather a formal recital of the antecedent proceedings, to show that all have been regular, and of the decision of the justices or justice, than the decision itself, which is usually pronounced verbally; or, at most, only minutes or memoranda are made by the justice or his clerk at the time of declaring the decision, which are afterwards (in case the penalty is not paid) with all due expedition to be drawn up in the full form of a conviction.

It is, however, exceedingly imprudent for a magistrate to make any statement, and still more so to deliver any written document, as the result of his decision, before he has with due care and strictly according to the evidence before him, completed his formal conviction; and if in the conviction he should falsely recite any fact, or mis-state the evidence, or omit any thing material, he may be compelled by *mandamus*, with some degree of discredit, and perhaps costs, fully and correctly to state the facts and evidence; and if he were wilfully to mis-state the evidence, he might be prosecuted for the misdemeanor. Indeed, there is no part of the magisterial duty more difficult or delicate than that of a justice properly framing his conviction.

Formal convictions should be completed with due expedition. This is requisite at common law; for it is incumbent on justices, within a reasonable time, gratuitously to deliver to the party convicted a copy on paper of his conviction, in order that he may determine whether he will appeal, when that remedy is allowed, or whether he will endeavour to obtain a writ of *certiorari*. The conviction on parchment should also be returned to the clerk of the peace at sessions, not only in cases where a convicted party may appeal, but in all other cases, in order that the

crown or some public fund (now, in general, the county rate) may not be deprived of the penalties which are given.

As respects the form of convictions, difficulties can rarely occur, since the 3 Geo. IV. c. 22 directs, that "in all cases wherein a conviction shall have taken place, and no particular form for the record thereof hath been directed, the justice or justices, the deputy lieutenant, or other person duly authorized to proceed summarily therein, and before whom the offender or offenders shall have been convicted, shall and may cause the record of such conviction to be drawn up in the manner and form therein prescribed.

16. *Costs*.—The general act, 18 Geo. III. c. 19, provides for the costs of proceedings, as well for the informer as the defendant. It enacts, "that where any complaint shall be made to a justice &c., and any warrant or summons shall be issued, it shall be lawful for the justice or justices who shall have heard and determined the complaint, to award such costs to be paid by either of the parties, and in such manner and form as to him or them shall seem fit, to the party injured; and if not forthwith paid, the said justice or justices, by warrant under their hands and seals, may levy the same by distress and sale of the goods and chattels of the person; and if no goods, may commit the party to the house of correction for the county where he resided, there to be kept to hard labour for not less than ten days nor more than one month, or until such sum, together with the expences attending the commitment, be paid."

Under this act, or any other authorizing a justice on summary conviction to award the costs of and antecedent to conviction, he should ascertain and insert the same in his conviction, and not leave the amount to the discretion of the constable or other person. But the 27 Geo. II. c. 20, § 2, enables the constable or officer making a distress for a penalty to deduct the reasonable charges of taking, keeping, and selling the distress out of the money arising from the sale, and to pay the overplus to the party distrained upon; and in that case the officer, and not the justice, is to fix correctly, and at his peril, the reasonable costs. If the officer retain too much, he may be sued for the amount; and if he neglect to return what he has done, the justice may fine him.

The form prescribed in 3 Geo. IV. c. 23, concludes, "Given under my hand and seal [or, our hands and seals], the — day of —, in the year of our Lord —." This form implies that the convicting justices must respectively sign, and formally seal and deliver or execute the conviction, as if the same were their deed.

17. *Defects in Convictions*.—If it appear upon the face of the conviction that no offence was committed, it will be invalid; and in case any proceeding by distress or imprisonment take place under colour of the same, the magistrate who issued the warrant will, although the conviction remain unquashed, be liable to an action of *trespass* for the seizure or imprisonment; and if the same has been quashed, he may be liable under the 53 Geo. III. to an action *on the case*, if malice can be proved. But if a conviction be legal on the face of it, then, as long as it stands unquashed, it will protect the magistrate for any thing done under it. If, however, the conviction, although correct in form, is nevertheless improper on the merits, and an appeal has been expressly given to the convicted party, he may again try the merits by appeal to the sessions

on certain terms (in general, those of entering into a recognizance, and giving notice of appeal); and if there be any material defect in the conviction or previous proceedings, and the writ of certiorari be not expressly taken away, then the defendant may remove the same into the Court of Queen's Bench, and there cause the conviction to be quashed, and prevent process thereon; or if such process has issued and been enforced, he may obtain restitution, or release from imprisonment.

By the 3 Geo. IV. c. 23, § 3, it is enacted, that in all cases where it appears by the conviction that the defendant has appeared and pleaded, and the merits have been tried, and that the defendant has not appealed against the said conviction when an appeal is allowed, or, if appealed against, the conviction has been affirmed, such conviction shall not afterwards be set aside or vacated in consequence of any defect of form whatever; but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case.

But convictions *ex parte*, where the defendant having been summoned has neglected to appear, or having appeared will not plead, or otherwise say Not guilty, and defend upon the hearing, are not, when defective even in form, aided by this act. Nor are defects in substance in any case aided.

A justice may amend his conviction, even after he has given a copy of it to the defendant, at any time before the conviction has been returned on certiorari or to the sessions; but he should never mis-state facts or evidence in so doing.

The mode of *enforcing a conviction* adjudging that a pecuniary penalty shall be paid, either with or without costs, depends entirely on the particular act creating the offence, and whether it expressly authorizes a distress warrant. At common law, and by the present general law, no warrant of distress upon goods can be issued or levied; and it is only by particular statute and express enactment that even at this day a distress can be made. Therefore in each particular case the statute upon which the summary proceeding is founded must be examined, to ascertain the precise powers. If it contain such an express enactment, then the general act, 5 Geo. IV. c. 18, enables the justice either to issue a distress warrant or a warrant of commitment; which, by the 2d section of the 3 Geo. IV. c. 23, may be issued either by the convicting justices or by any one justice of the county where the conviction took place. And it would seem that in all cases the payment of the costs of a summary conviction may be enforced by distress under the express enactment of 18 Geo. III. c. 19.

Although the statutes use the term *distress*, yet the proceeding is in the nature of an *execution*; and goods taken under a distress founded upon a conviction are not replevable.

When a distress is authorized, then the 27 Geo. II. c. 20 contains a general power to sell the distress at such time as the justice may direct; and the 33 Geo. III. c. 55 authorizes justices to execute a warrant of distress in a county other than that where the conviction took place, on the warrant having been duly backed or indorsed by a justice of the county where the offence was committed.

Under the 5 Geo. IV. c. 18, § 2, it has been very recently decided, that the justice's authority to detain a convicted party must be in

writing; and that a detention without a written commitment, for a longer time than is absolutely requisite to draw up a warrant in due form, is not authorized.

18. *Appeal to Sessions*.—Unless an appeal be expressly given, or clearly implied by the terms of the particular act, none is sustainable. As there is no general act giving or prohibiting an appeal, it is always necessary in each case to examine all the statutes relating to the subject, to ascertain whether an appeal is or is not afforded.

When the party has a right to appeal, he is in strictness bound to know the law, and, unless expressly directed by a particular statute, it is not legally incumbent on the justices to inform him of his right; though they must not mislead; and it may be advisable for them in general to inform the party of his right, and of the necessity of his entering into the requisite recognizance, and giving a proper notice of appeal. Before incurring the expence of a recognizance or notice of appeal, the defendant should well consider, first, whether his objections in point of form may not be amendable, and in effect aided under the 5 Geo. II. c. 19, § 1, or the 3 Geo. IV. c. 23, § 3; and secondly, whether the merits of his case are likely to occasion a different decision. Appeals are to be heard and determined at the next general or quarter sessions of the peace for the same division of the county where the order or conviction is made or pronounced, and not at the sessions holden in any other division of the county.

In most cases the act giving an appeal imposes as a condition the terms of entering into a recognizance with two sufficient sureties, to abide the judgment of the court of appeal, and pay the costs (if any) that may be adjudged; and this, when imposed, is a condition precedent, the performance of which cannot be dispensed with.

In general there must be a notice of appeal, stating explicitly all the objections to the conviction or proceedings on which the same is founded, and which must be served before the prescribed time; or when the time is not prescribed, then a reasonable time (usually eight days) as fixed by the practice of each session. If the charge in the conviction be general, as under the Vagrant Act, 5 Geo. IV. c. 83, § 4, the notice of appeal may merely state that the defendant was not guilty of the supposed offence; but in general it must state all the particular objections very distinctly. If the notice be too short, the court of sessions should receive the appeal, and adjourn the hearing.

If the sessions erroneously quash a conviction for want of form, that decision is not an acquittal on the merits, so as to preclude the Court of Queen's Bench from commanding the sessions by mandamus to rehear the conviction upon the merits.

With respect to the *costs of appeal*, the Game Act, 1 & 2 Wm. IV. c. 32, § 44, and other modern acts, expressly give the sessions power to award costs.

In general, upon an appeal under the 44th section of 1 & 2 Wm. IV. c. 32, the respondent ought to begin, and to prove the facts of the trespass over again, precisely as in support of the original information, with the exception of the facts mentioned in the 42d section; and either party may give fresh evidence which was not mentioned on the first occasion.

19. *Certiorari*.—A certiorari is in the nature of a writ of error, removing the conviction (and other proceedings in some cases) from before the justice or from the sessions, before or after the appeal, into the Court of Queen's Bench, where only objections and defects appearing on the face of the conviction or in some stage of the proceeding can be discussed; and there cannot, in the court above, be any rehearing or investigation of the merits, though sometimes affidavits may be heard on each side as to extrinsic proceedings.

It is an established general rule, that a certiorari to remove a summary conviction on any reasonable ground into the Court of Queen's Bench always lies as a matter of right, unless it has been expressly taken away.

By the general act, 13 Geo. II. c. 18, § 5, the writ must be moved for within six calendar months next after the conviction, exclusive of the day of its date; nor can the writ be issued until it has been sworn that the party suing out the same hath given six days' notice thereof in writing to the justice or justices who convicted him. If the party has appealed to the sessions against a conviction, he cannot move for a certiorari before the sessions has heard and determined the appeal.

The notice of motion must contain a statement on whose behalf the motion is intended to be made, and should be signed by such party, who of course is usually the party who has been convicted; and a certiorari cannot be issued at the instance of any party who did not sign the notice, although that party has avowedly dropped the proceeding, and it is too late to give a fresh notice. If two or more persons have been convicted, then all should concur and sign the notice. The service of a rule nisi for the issuing of a certiorari, although more than six days be thereby given to show cause, will not dispense with the notice; and such notice is requisite, although the court of sessions has ordered a case to be stated for the opinion of the Court of Queen's Bench.

In order to support the motion to the court for the writ, there must always be an affidavit of the due service of the notice upwards of six days before the day of moving. The affidavit should be entitled "In the Court of Queen's Bench," but not in any cause. It is advisable, although not apparently expressly required by any enactment, to specify in the notice all the then discovered grounds of objection to the conviction, in the same explicit manner as is required in notices of appeal against a conviction on a poor rate assessment.

20. *Liability of Complainant or Informer*.—The general rule is, that if a party *bonâ fide* supposing that he has a well-founded charge against another, and not taking the law into his own hands by himself apprehending the party or causing others to do so, goes before a justice of the peace, who is supposed to know the law, at least as regards his own jurisdiction, and states the facts according to the best of his knowledge and without malice, he is not liable for any imprisonment or other annoyance to the party under the subsequent proceedings authorized by the justice, although it finally appear that in truth the charge and proceeding were wholly unfounded. But if a party maliciously, without reasonable cause, obtain a search warrant or other process against the person or goods of another, and thereby occasion inconvenience or ex-

pence, he will be liable to a special action on the case for the malicious imputation and all its natural consequences.

21. *Liabilities of Justices.*—If a justice acts beyond his jurisdiction, and irregularly causes the property or person of another to be imprisoned, he is liable to an action, generally of trespass; but after a conviction has been quashed, to an action on the case.

The principal instances of illegal proceedings before conviction, where a justice or inferior officer is liable to an action, are cases of the apprehension of a party without a sufficient oath of a crime or offence having been committed; or where a constable has, after apprehension, neglected to take a party before a justice within a reasonable time; or where a justice has kept a party in custody too long, under pretence of re-examination; or has, before conviction, been guilty of any other unauthorized act, or has committed a person as a vagrant without personally hearing the witnesses in the presence of the party.

Sometimes also a justice may be liable to trespass, because the facts did not bring the case within the statute on which he has proceeded; as if, under the statute giving summary jurisdiction over particular servants working for wages, but not over persons working by contract, he should commit a person of the latter description, it would be false imprisonment; or it may be because the facts did not warrant his interference, as where the justice granted a warrant to distrain on a party who had no land in the parish, or convicted a party for not doing statute duty in consequence of his supposed occupation of lands within the parish which he did not occupy; though it would be otherwise if he merely relied upon a personal exemption, which he ought to have established before the justices antecedent to conviction.

But when a conviction is legal and sufficient on the face of it, and the warrant of commitment or distress or other execution thereon is not in itself defective, then, unless the conviction be quashed, it constitutes a complete defence and protection to the justices for any thing done upon it, however irregular or unjust the conviction may have been as regards the merits.

Protection is afforded to magistrates by the general acts, 7 Jac. I. c. 5, 21 Jac. I. c. 12, 24 Geo. II. c. 44, and 43 Geo. III. c. 141. The 24 Geo. II. c. 44 requires an action against a justice to be brought within six calendar months, and one month's previous notice of action, during which he may tender amends; or he may pay money into court at any time, even just before the trial. The venue must be laid in the proper county; and he may plead the general issue, and give in evidence any ground of defence under that plea.

Supposing a justice has exceeded his jurisdiction by erroneously committing a person to prison, the court will discharge the party imprisoned upon habeas corpus, without imposing any terms whatever that no action shall be brought.

There are other summary proceedings before justices, such as between landlord and tenant, and under the customs and excise laws; as to which we must refer the reader to those particular subjects in a former part of this work.

CHAPTER VI.

Of Courts in General, and their several Kinds.

WE have now to consider the redress of injuries by *action* or *suit*. For the purpose of expounding and enforcing those laws by which rights are defined and wrongs prohibited, courts of justice are instituted in every civilized society, which, in all instances of an injury being committed, either inflict a punishment on the offender, or give a recompence to the person injured. On the original formation of most independent states the laws are in general few and simple, and administered without much regard to precise form; but as population and the intricacy of transactions increase, it is found that the establishment of different courts, with an appropriation of particular business to each, becomes necessary. Thus in England the law has appointed a great variety of courts, some with a more limited, others with a more extensive jurisdiction, some to determine in the first instance, others upon appeal and by way of review only. One distinction runs through the whole of those courts which judge and determine according to the general law of the land, namely, that some are of record, and others not of record.

A *court of record* is one where the judicial proceedings are enrolled on parchment for a perpetual memorial, and which has power to hold pleas according to the course of the common law in all actions where the debt or damage amounts to 40s. or upwards, and of *trespass vi et armis*. These records are of such high authority, that their truth is not to be called in question; though if there appear to be any mistake of the clerk in making up the record, the court will order him to amend it. But nothing can be averred against a record, nor any plea or even proof admitted to the contrary; and if its existence be denied, it can be tried by nothing but itself, that is, by inspection. No other except a court of record hath power to fine and imprison (unless, indeed, for a contempt committed in its view); so that the erection of a new jurisdiction with power of fine and imprisonment makes it at once a court of record. From these courts a *writ of error* lies after, and of *certiorari* before judgment; and they have power to protect and discharge suitors and witnesses from arrest in going to or returning from their tribunals.

A *court not of record* is one whose proceedings are not enrolled, or are not according to the course of the common law; such are the county courts, hundred and baron courts, the courts ecclesiastical, &c. The proceedings in these courts may be tried as to the truth of their existence, like other matters of fact, by a jury, and not by mere inspection; and they are removeable by *writ of false judgment*, and not of error or certiorari, to a superior jurisdiction. Inferior courts not of record cannot hold pleas of *trespass vi et armis*, or of any forcible injury whatever, because they cannot assess a fine, and have no process to

arrest the person of the defendant. Neither can they in general entertain suits above the value of 40s., except actions of replevin, which are reserved to the sheriff's court by the statute of Marlbridge, 52 Hen. III. c. 21. On the other hand, the superior courts were restrained by the statute of Gloucester from holding pleas under the value of 40s., except for trespass *vi et armis*, and in some cases concerning lands, as for detainee of charters and title deeds.

Courts, again, may be distinguished into *civil* and *criminal* courts.

The CRIMINAL courts, consisting of the courts of oyer and terminer and gaol delivery, the sessions of the peace, and various other courts having general or local jurisdiction over crimes, misdemeanors, or offences, will be considered in a subsequent part of our work.

The CIVIL courts, having jurisdiction over civil matters, consist of the *courts of common law*, for the decision of all legal claims; the *courts of equity*, for enforcing merely equitable claims, or claims in some respects imperfect at law, and for giving effect to merely equitable defences; the *ecclesiastical courts*, for the decision of spiritual offences and ecclesiastical rights, questions on the validity of wills of personalty, matrimonial causes, and suits for defamatory words attributing fornication or other mere spiritual offence; and the *maritime courts*, for the decision of maritime questions; with the several courts of appeal or error, and numerous inferior courts, either general or local.

The SUPERIOR COURTS, usually termed "THE COURTS AT WESTMINSTER," are those of law and of equity. The former, having jurisdiction principally over legal claims and defences, and some other peculiar matters, are, 1. The Queen's Bench; 2. The Common Pleas; and 3. The Exchequer. The jurisdiction of these, as regards most personal actions, is nearly concurrent, though in respect of other actions and proceedings it is in many respects dissimilar. The courts of equity include, 1. The Court of Chancery held before the Lord Chancellor; 2. The Court of the Master of the Rolls; and 3. The Vice-Chancellors' Courts. The equity jurisdiction of the Court of Exchequer was abolished by the act 5 Vict. c. 5, which authorized the appointment of two additional vice-chancellors.

The ECCLESIASTICAL COURTS have jurisdiction principally over rights and injuries of a spiritual and ecclesiastical nature; questions upon the legality of a marriage, the propriety of a divorce, and the right of a wife to alimony; questions relative to wills of *personal* property, probates, letters of administration, legacies, and distribution of assets; defamation imputing a mere spiritual offence, and not actionable or punishable at law; and certain spiritual offences, as adultery, incest, fornication, brawling in churches, and many other offences against religion or morality. The courts are principally the Archdeacons, Consistory, Peculiars, Arches, and Prerogative Courts.

The only MARITIME COURTS are the Court of Admiralty and the Prize Court; the former being the ordinary court for deciding controversies relating to contracts made at sea, and sometimes called the Instance Court; the other, or Prize Court, for determining the right to maritime captures and seizures.

There are also various COURTS OF ERROR OR APPEAL, which have

no *original* jurisdiction, but are merely intended to review the proceedings of the courts before mentioned. These are, 1. The Court of Exchequer Chamber, which is a court of error for revising the judgments of the three superior courts of law, and holden before the judges of the other two courts not concerned in the judgment impeached; 2. The House of Lords, which is not only a court of error from the judgments of the Court of Exchequer Chamber, but also the court of appeal from decrees and proceedings in chancery; and 3. The Judicial Committee of the Privy Council, the ultimate resort from the decrees and proceedings of the superior ecclesiastical courts, the Court of Admiralty and Prize Court, as well as of the various vice-admiralty and other courts in the East Indies, the plantations and colonies in America, and other dominions of her majesty abroad.

The more particular jurisdiction of each of these courts will be presently considered in due order.

The legal and equitable jurisdiction of the Court of Bankruptcy, including that of the Court of Review, constituted by the 1 & 2 Wm. IV. c. 56, has been already noticed;¹ as have been also the constitution and proceedings of the Court for Relief of Insolvent Debtors.²

The jurisdiction of all these courts is to be considered with reference, *first*, to the subjects of which they have original cognizance; *secondly*, to the course of their proceedings, which are either formal or summary; and *thirdly*, to the superintending jurisdiction which they exercise over other courts or jurisdictions.

Each of the courts has a particular description of proceeding and practice; but in all it will be found that they have adopted two courses of proceeding, the one *formal*, and the other *summary*. And it is of great importance not only to know the limits of these formal and summary jurisdictions, but to be able to decide whether it will be judicious to adopt the one or the other. In cases of doubt, the safest course is to proceed more formally; but when a summary proceeding is clearly permitted, it is not only less dilatory and expensive, but also often more effectual, and avoids difficulties that might be encountered in a formal suit. Thus, if an attorney has given an undertaking in that character in reference to a pending suit, it may be enforced against him by summary proceeding, whereas if a formal suit were brought, the same undertaking might be considered void for want of stating the consideration, as required by the Statute of Frauds. The applicant's affidavit is also received by the court, although on the trial of an action the evidence of a party to the suit is in general inadmissible. There is, however, one considerable objection to a summary proceeding, viz., that the party opposing it usually swears last, and unless there be two or more deponents to swear positively to the same matter in favour of the application having occurred at the same time, it not unfrequently happens that the party resisting the application will swear so positively in the negative (knowing that two witnesses to the same fact are in general required to convict of perjury), that the application fails. Therefore, before a summary application should be attempted, the probability of the opponent's swearing so as to defeat it should be well considered. In general, also, a plaintiff succeeding in a

¹ *Ante*, p. 739.

² *Ante*, p. 809.

formal suit is certain of judgment for his costs, whilst upon a motion the courts frequently exercise as much discretion over costs as a court of equity, and the applicant may be deprived of costs, although he succeed in other respects.

In many cases when formal suits are not absolutely essential, the courts permit the merits or propriety of the proposed proceeding to be discussed upon a preliminary motion, by granting a rule to show cause, founded on the applicant's affidavit, why a writ of *habeas corpus*, or *mandamus*, or *prohibition*, or *quo warranto*, or *certiorari*, should not be issued, and then the opponent shows cause upon his affidavits, and the court hear and determine upon the propriety of the required proceeding before it actually takes place, by which, in many cases, much trouble and expence are saved.

The same distinction between formal and summary jurisdiction also prevails in the Ecclesiastical, Admiralty, and Prize Courts, where, instead of the proceeding being always by libel, answer, and decree, the question may frequently be determined on petition or motion, &c.

One important distinction until lately existed between proceedings in courts of law and those in equity or in the ecclesiastical courts, viz., that in the former, whenever a debt of 20*l.* could be sworn to, the defendant might have been arrested, and must have remained in prison or found bail as a security for his forthcoming at the termination of the action; whilst, with the exception of a writ of *ne exeat*, to prevent a defendant leaving the kingdom, a defendant in equity or in an ecclesiastical suit can only be served with process, or cited, and required to enter an appearance; and the complainant has no security, in case he should leave the country. The decree, also, is in general only *in personam*, and enforced by attachment for the contempt in not obeying it; but at law the plaintiff may, immediately after judgment in his favour, issue process for the debt or damages and costs recovered, and take in execution the personal property, real estate, or person of the defendant,—circumstances much in favour of the jurisdiction of courts of law. However, a court of equity has power in many cases to order the payment of the fund or money in dispute into court at an early stage,—a power which no court of law exercises, except as a condition for granting a favour, as a new trial. And a court of equity may, after a person has been imprisoned for some time, for his contempt in not obeying a decree, *sequester* his personal estate and the rents and profits of his lands; and the new acts, 1 Wm. IV. c. 36, and 2 Wm. IV. c. 58, have in some other respects extended the jurisdiction in equity.

If either a court of common law, a court of equity, a criminal court, or an ecclesiastical court, assume a jurisdiction which it clearly has not, the proceedings will in general be wholly void, and even the officer enforcing its sentence will be liable to an action; and, in general, the defendant may stay proceedings by plea to the jurisdiction, or by writ of prohibition.

CHAPTER VII.

Of the Superior Courts of Common Law.

ORIGINALLY the three superior courts of law had in most respects separate, distinct, and exclusive jurisdiction; namely, the Queen's Bench over criminal matters, and trespasses *vi et armis* committed in the county where the court sat; the Common Pleas, exclusively over real, personal, and mixed actions between party and party, except in a few cases where the officers of another court were concerned; and the Court of Exchequer, over all revenue matters. But each of these courts, by certain contrivances, have long assumed a co-extensive jurisdiction over all personal actions, when the right of the plaintiff is legal, and not equitable, spiritual or ecclesiastical, or maritime, nor has arisen out of an illegal capture; so that complainants (subject to a very few exceptions) now have in general, in all personal actions, the option of suing in either of these courts.

To this general rule there are exceptions; as, that officers of any of the superior courts, and attorneys, must be sued in their own particular court. Where the plaintiff also is such officer or attorney, then his privilege to sue in his own court prevails against that of the defendant; and though it was held in the King's Bench, that in the latter case the defendant could not be arrested, though he might be sued in the plaintiff's court, yet the Court of Exchequer in a subsequent case held the contrary, and that attorneys and clerks of the Exchequer of Pleas might in that court arrest as well as sue attorneys of another court. Serjeants and their clerks are also privileged to be sued in the Common Pleas.

It was at one time doubted whether the Uniformity of Process Act, 2 Wm. IV. c. 39, affects the privilege of an officer or attorney to be sued in his own particular court. The first section of the act abolishes the necessity to sue a privileged person by any particular form of process different from that against ordinary persons, and prescribes a new general form of process, enacting "that such process may issue from either of the said courts;" but the 19th section continues all exemptions from arrest, and as the statute contains no express clause taking away the right to be sued only in a particular court, it has been determined that such privilege continues.

So revenue officers must in general be sued as such in the Court of Exchequer.

So officers of courts of equity, for all acts done by them in discharge of their duty, or even in the irregular execution of it, must be proceeded against in the Court of Chancery. This is one of the very few instances in which courts of equity enter into questions of the amount of damages, which peculiarly belong to common law; but in these instances the court of equity will refer it to a master to ascertain what is a fair compensation to be made to a party injured, and will restrain him from taking proceedings at law or in any other court against its officers.

These superior courts have jurisdiction, however small the debt or injury; for at common law it is no defence, that the debt or damages to be recovered will be under forty shillings. But, under the 43 Eliz. c. 6, when the damages recovered are less than forty shillings, the judge may certify, and thereby deprive the plaintiff of his costs. Again, in most parts of England there are local inferior jurisdictions, as formerly the various Courts of Request, or Courts of Conscience, and now the new County Courts. By the acts constituting the former, suits were prohibited from being brought in any other court, in some cases for debts under 10*l.*, in others under 5*l.*, and in others under 2*l.*; of which advantage might be taken by the defendant in different ways, pointed out by the particular act, as by motion, plea, or suggestion; and sometimes the objection was even a ground of nonsuit. So now by the New County Courts act, with certain exceptions therein specified, if an action be brought in a superior court for which a plaint may be entered under this act, and a verdict be found for the plaintiff for less than 20*l.* if on contract, or for less than 5*l.* if founded on tort, the plaintiff shall have no costs; and if the verdict be not found for the plaintiff, the defendant shall be entitled to costs as between attorney and client; unless in either case the judge certify that the action was fit to be brought in such superior court.

Subject to the before-enumerated exceptions, the great bulk of litigation between private subjects (consisting principally of personal actions and the action of ejectment) may be instituted in either of these three principal courts, at the option of the plaintiff. But still there are many circumstances, not strictly of jurisdiction, but of essential importance to be considered, in preferring one court to another. We shall therefore proceed to state the jurisdiction of each court in particular, and occasionally suggest the expediency, under particular circumstances, of proceeding in one court in preference to another.

I. THE COURT OF QUEEN'S BENCH.

The jurisdiction of the Court of Queen's Bench is by far the most extensive of all the courts; for it has cognizance as well of all criminal matters as of most civil injuries, and has also considerable jurisdiction over matters collateral or distinct from any formal suit, and over inferior courts. It administers justice either in *formal* civil actions, decided upon demurrer on points of law, or by a jury trying formal issues of fact; or it affords justice *summarily* upon affidavit, motion, rule *nisi*, and rule absolute, and enforces the latter with costs by attachment. So as regards criminal and public proceedings, there will be found a similar distinction between formal indictments and informations and more summary proceedings.

I. OVER CIVIL MATTERS. — 1. *Formal Actions*.—Subject to the exceptions before noticed relative to officers and attorneys of another court, revenue officers, and persons executing the process of the Court of Chancery, and also subject to a few enactments requiring actions thereby given to be brought in the Exchequer, it is now established, that every complainant has the choice of commencing in the Queen's Bench all formal actions of account (strictly so called), as-

¹ See Chit. Eq. Ind. Jurisdiction, III.

sumpsit, covenant, debt, detainee, case of every description (whether for injury to the person or property, real or personal), trover, replevin, and all actions of trespass *vi et armis*, whether for direct injuries to the person, as for assault, battery, false imprisonment, or for direct injuries to personal or real property in England or Wales; and this whether the cause of action arose in Middlesex or elsewhere, in England or any part of the world; with the exception of local injuries, where the real property affected is out of the kingdom; and also over writs of *scire facias* on record, whether recognizances or judgments in favour of private individuals.

But the Court of Queen's Bench has no jurisdiction in real or mixed actions, except only in the action of ejectment, which is in the nature of a mixed action, or unless at the suit of the crown, which has the choice of all the courts. Even *quare impedit*, also a mixed action, can only be brought in the Court of Common Pleas.

2. *Summary Jurisdiction*.— Besides this extensive jurisdiction over personal actions, this court has, at common law and by particular statutes, very extensive summary jurisdiction. The summary proceedings in this court of a civil nature, to obtain redress for private injuries, are principally by habeas corpus, or relating to awards, annuities, mortgages, bail bonds, replevin bonds, warrants of attorney, officers of the court, sheriffs, bailiffs, attorneys, articulated clerks, &c. In general, in every summary proceeding founded on a statute, the direction of the act must be strictly pursued.

The practice in obtaining a discharge from unjust imprisonment by *habeas corpus* has been already stated. Although the courts of Common Pleas and Exchequer, and the judges of those courts, have concurrent jurisdiction with the Court of Queen's Bench and its judges in issuing a writ of habeas corpus, yet in general it is advisable to apply to this court in preference to the others, more especially when the party is illegally imprisoned upon a criminal charge under the statutes for the protection of the revenue; for this court, as observed by Lord Holt, is the constitutional protector of the liberty of the subject, and it is more in the practice of deciding upon criminal subjects, and the requisite forms of process, warrants, convictions, &c. than the other courts. This court also has peculiar power not only to discharge where the imprisonment upon a criminal charge is wholly illegal, but also to *bail* the party, although in custody for supposed high treason or capital felony. Where, however, the imprisonment is under the *civil* proceeding of any other court, the application for a habeas corpus would be more properly made to the court out of which such process issued.

In order to enforce or to appeal against an *award*, the statutes 9 & 10 Wm. III. c. 15, and 3 & 4 Wm. IV. c. 42, §§ 39, 40, and 41, create a summary jurisdiction over the decision of the arbitrator; and whether there be any action depending or not, this court has jurisdiction in cases where the submission to arbitration has been made a rule of the court. Where, by the terms of the submission, it is agreed that it may be made a rule of this or any other court, it will in general be found best to apply to this court, because its constant practice on these subjects has induced a peculiar facility of decision in the Queen's Bench.

In *annuity* transactions the legislature has given to each of the superior courts summary jurisdiction in certain cases. The 53 Geo. III. c. 114, § 2, requiring a memorial of the transaction, enacts, that within thirty days after the execution of every deed, bond, instrument, or other assurance whereby any annuity or rent-charge shall, after the 14th July, 1813, be granted for one or more life or lives, or for any term of years, or yearly estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, of the names of the parties, and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, of the pecuniary consideration for granting the same, and of the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery in the form therein prescribed, or with such alterations as the nature and circumstances of any particular case may reasonably require, otherwise every such deed, bond, instrument, or other assurance shall be null and void to all intents and purposes.

The 5th section gives a judge of the Queen's Bench or Common Pleas (omitting the Exchequer and courts of equity) summary power, by summons and order, to compel the delivery of a copy of the deed.

If the consideration for which the annuity is granted be not properly paid, then, according to the 6th section, the grantor of the annuity may apply to the court in which an action shall be brought for payment of the annuity or rent-charge, or in which judgment shall be entered, by motion, to stay proceedings on the action or judgment; and if it appear to the court that any such practices as are mentioned in that section have been used, the court may order the deed &c., whereby the annuity or rent-charge is secured, to be cancelled, and the judgment, if any has been entered, to be vacated.

The statute contains other enactments declaring void all annuities as to infants, and relative to the extortion of annuity brokers, and exceptions with respect to annuities charged on property of adequate value whereof the grantor was seised in fee, &c.

In considering the practical application of this statute, the distinction between the general jurisdiction of the court over warrants of attorney, and the particular power given by the 6th section to the court to interfere on summary motion, should be constantly kept in view. The first section declares the instrument void for want of a proper memorial; but that section gives the court no power to interfere summarily on that account; and therefore, when that is the objection, the court of law can only set aside a warrant of attorney, constituting one of the securities, upon the common law jurisdiction of the court over warrants of attorney. And it is only when a case can by affidavits be brought within the precise terms of the 6th section, that a court of law has a discretionary power (at least when an action is not depending) to order the deeds &c. to be cancelled.

Courts of equity have more extensive jurisdiction to cancel annuity deeds than a court of law; and therefore in some cases, especially where the deeds constitute an incumbrance upon an estate, it may be preferable to file a bill in a court of equity in the first instance.

Summary relief at law is afforded to *mortgagors* by the 7 Geo. II. c. 20, upon bringing the principal money and interest into the court in which the proceeding at law is depending; and although the statute contains some exceptions, it is in general very liberally construed. If, however, it appear that the mortgagor had agreed to convey his equity of redemption, a court of law will not in general interfere.

The 4 Ann. c. 16, § 20, as to *bail bonds*, and the 19 Geo. II. c. 19, § 23, as to *replevin bonds*, enable the court in which the action is brought (*i.e.* in which the process in the original action was returnable), by rule of court, and consequently on affidavit and rule *nisi*, "to give such relief to the parties upon the bond as is agreeable to justice and reason," and provide that such rule shall have the effect of a defeazance to such bond.

This court, and also the Common Pleas and Exchequer, exercise a summary jurisdiction, as well of an equitable as of a legal nature, over *warrants of attorney*, and will, on proper grounds, interfere upon affidavit and motion to set them aside.

This instrument is a written authority, to the attorney or attorneys to whom it is directed, to appear for the party executing it, and receive a declaration for him in an action, usually of debt, for a named sum, at the suit of a person therein mentioned, and to confess the same, or suffer judgment to pass by default, and also authorizing such attorneys to release any errors in the proceedings. It has now become one of the most usual collateral securities on loans of money, on contracts to pay an annuity, and for debts, though usually accompanied with some other deed or security.

As the nature of this security enables the creditor to sign judgment and issue execution, without affording the debtor an opportunity of pleading illegality or other objection, the courts have always considered it necessary to exercise a summary jurisdiction over them, by interfering, on affidavit and motion, whenever the security is tainted with illegality, as having been obtained by fraud or upon an usurious consideration; and if the objection be clear and unanswered, they will order the warrant to be delivered up to be cancelled, and set aside all proceedings thereon. If the facts be doubtful, they will either refer it to the master, who may receive further affidavits, or will direct an issue, so that the truth may be tried by a jury.

The Common Pleas will not interfere on the ground of usury, except upon the terms of paying the principal sum and legal interest due. But the Queen's Bench will cancel the warrant, and set aside a judgment and execution thereon, without imposing any terms; unless the party signing the warrant of attorney has induced a third person to purchase the debt by representing it as legally due.

With respect to the *form* of a warrant of attorney, the defeazance ought to be written on the same instrument, or at least a memorandum of the substance; but the defect does not vitiate the instrument. It need not, in strictness, be under seal.

By the 1 & 2 Vict. c. 110, no warrant of attorney to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall be of any force unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by

him and attending at his request, to inform him of the nature and effect of such warrant or cognovit before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney.

By 3 Geo. IV. c. 39, for preventing frauds upon creditors by secret warrants of attorney, every such warrant, with an affidavit of the time of executing the same, is to be filed within twenty-one days after it is executed, or the same will be void in case of bankruptcy; and by section 3, if the instrument is subject to a defeazance, the latter ought to be written on the same paper, or the instrument will be void. But this has been held only to invalidate it as to creditors, and not as against the party himself.

The 6 Geo. IV. c. 16, §§ 81 and 108, as to bankrupts, prevents any preference from being obtained by an execution founded on a warrant of attorney, unless the goods be seized upwards of two months before the fiat; and similar provisions have been enacted as to warrants of attorney executed by persons who take the benefit of the acts for relief of insolvent debtors, both by the late (7 Geo. IV. c. 57) and the present act (1 & 2 Vict. c. 110). It is therefore, in general, advisable to require the sheriff to assign goods under a *fiери facias* immediately after the seizure.

With respect to the time of signing judgment, the general rule of Hilary Term, 1832, requires leave to enter up judgment on a warrant of attorney above one and under ten years old to be obtained by a motion in term, or by order of a judge in vacation; and if ten years old or more, then upon a rule to show cause.

Each of the superior courts has a summary jurisdiction over all its own immediate officers, and will compel them to return any excess of fees, or attach them for official misconduct; also over sheriffs; and, by express statute, may, on petition, summarily punish gaolers, bailiffs, and others employed in the execution of process, who have been guilty of extortion or other abuse of their office, and compel them to make reparation.

By ancient statutes ignorant and unskilful attorneys may be punished and prohibited from practising. An attorney cannot practise whilst in prison; and if he do, he may be struck off the roll. If any person convicted of forgery, perjury or subornation of perjury, or common barrettry, practise as an attorney or agent in any suit or action in any court, that court shall, upon complaint or information thereof, examine the matter in a summary way in open court; and if the offence be established, shall cause the offender to be transported for seven years as a felon. So if an attorney practise for the profit of an unqualified person, he may be struck off the roll, and the unqualified person imprisoned for a year. He may, however, sometimes be re-admitted. Independently of these and other express regulations and penalties, each of the courts has summary jurisdiction over the attorneys of its own court, when guilty of professional misconduct, and this although the malpractice was committed in an inferior court.

Proceedings in furtherance of the Court's own Jurisdiction.—At common law the courts would in general protect their own officers. when acting *bonâ fide* in executing the process of the court, from th

risk of double liability to two different claimants, as where a sheriff had seized goods under a writ of *fiery facias*, provided he applied to the court as soon as he found himself in peril; and they would compel the adverse claimant to try the right, whilst the proceeding against the sheriff or officer was suspended, upon the terms of his bringing the proceeds into court to abide the result. But this only related to cases where a bill of interpleader in equity would not lie. Therefore, when the sheriff of Hertfordshire hastily returned, on a writ of *fiery facias*, that he had seized goods, and that they remained on hand for want of buyers, the Court of Queen's Bench refused leave to amend his return on an affidavit that writs of extent had since been received for sums exceeding the value of such goods, because he ought to have made more diligent inquiry before he returned the writ. However, this power of interference at common law is now further extended by the 1 & 2 Wm. IV. c. 58, called The Interpleader Act. The first section, after reciting "that it often happens that a person sued at law for the recovery of money or goods where he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claim but by a suit in equity against the plaintiff and such third party, usually called a *bill of interpleader*, which is attended with expence and delay," for remedy thereof enacts, "That upon application made by or on behalf of any defendant sued in any of her majesty's courts of law at Westminster, or in the Court of Common Pleas in the county palatine of Lancaster, or the Court of Pleas of the county palatine of Durham, in any action of assumpsit, debt, detinue, or trover, such application being made after declaration and before plea, by affidavit or otherwise, showing that such defendant does not claim any interest in the subject matter of the suit, but that the right thereto is claimed or supposed to belong to some third party who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court or to pay or dispose of the subject matter of the action in such manner as the court, or any judge thereof, may order or direct, it shall be lawful for the court, or any judge thereof, to make rules and orders calling upon such third party to appear and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the mean time to stay the proceedings in such action, and finally to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or, with the consent of the plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims and determine the same in a summary manner, and to make such other rules and orders therein as to costs and all other matters as may appear to be just and reasonable."

If the sheriff has accepted the indemnity of a third person, or has paid over the proceeds to the judgment creditor, he will not be relieved under this act. The application must be at the first opportunity, and the affidavit must positively deny collusion.

The act does not take away the right of a party to file a bill of interpleader, for the remedy is merely concurrent; though if a sheriff or stakeholder have filed such a bill, then, having made his election, the common law courts will not interfere.

As the statute in express terms is limited to summary interference in actions of assumpsit, debt, detinue, and trover, many cases will arise where the act will not apply, and where it will still be necessary to apply to a court of equity for relief. Frequently a plaintiff has an election to proceed in an action of trespass or trover; and if he wish to avoid a summary application under the Interpleader Act, he may do so by issuing his writ and declaring in trespass. So by declaring in covenant on a lease instead of debt, it would seem doubtful whether the court could interfere under the terms of the act; and case and replevin are certainly not actions within the act.

By the 1 & 2 Wm. IV. c. 22, any of the superior courts, or a judge thereof, has now an absolute power of ordering an examination of a witness upon interrogatories if within the jurisdiction of the court, or of ordering a writ in the nature of a mandamus or commission for the examination of a witness out of such jurisdiction. Before that act the common law courts had no power to *compel* consent to such a proceeding; though the court would put off the trial at the instance of the defendant if the plaintiff would not consent, and if the defendant refused, would not allow him to sign judgment as in case of a nonsuit. Still, if it was necessary to proceed to trial, and the opponent refused consent to examine witnesses abroad, it was necessary to file a bill in a court of equity to obtain a commission for such purpose.

In the instances in which the courts of law permit summary application, as against attorneys, and in cases of awards, annuities, mortgages, bail bonds, replevin bonds, and other cases before noticed, the proceeding of the applicant is by filing affidavits, on which he founds his motion, and obtains a rule *nisi*. This proceeding in effect operates somewhat like a bill in equity praying a discovery, but with this difference, that in equity the party must make the required disclosure, or be committed for his contempt; but at law the party showing cause need not absolutely make an affidavit, but may decline to show cause and let the rule be made absolute without discussion, or he may rely upon the affidavits of third parties. In general, however, if the affidavits of the applicant charge some particular transaction by or with the privity of the opponent, then, unless he make an affidavit denying such allegation, the matter will be taken *pro confesso* against him; so that in general a rule *nisi* at law operates as a bill of discovery, compelling him to state the facts on oath at the peril of an indictment for perjury, if the applicant and another person can distinctly swear to the contrary.

The foregoing, it will be observed, are proceedings to extend the jurisdiction of the Queen's Bench and other courts of law, by affording summary assistance in such courts. But, moreover, the Court of Queen's Bench, and indeed equally so the other superior courts of law, claim and exercise a very useful and extensive legal and equitable jurisdiction over the proceedings in their own particular court, so as to prevent their misapplication or abuse, by which they might, if permitted, become the engines of malice and oppression.

In Aid or Restraint of the Jurisdiction of other Courts.—This court has an extensive jurisdiction as well *in aid* of other courts and jurisdictions, as also in proper cases to compel them to act, or to restrain them from acting, or to correct their judgments or proceedings, by *writ of error* or *false judgment*, or on *certiorari*.

Of the first description are the instances of this court receiving and hearing arguments *upon a case*, and certifying their opinion for the assistance of an equity court; or trying an issue directed by a court of equity, or by some act of parliament; or enforcing the judgment of an inferior court by *certiorari*, and issuing execution. Of the second description are the proceedings by *mandamus* to inferior courts and officers of a public nature. Of the third, are writs of prohibition. And of the last, are writs of error or false judgment, and the removal of proceedings by *certiorari*, for more summarily examining their sufficiency, or giving them effect.

In aid of the jurisdiction of inferior courts, when the defendant has removed himself or his effects out of their jurisdiction, and the debt is under 20*l.*, this court, and indeed the courts also of Common Pleas and Exchequer may, under the 19 Geo. III. c. 70, and 7 & 8 Geo. IV. c. 71, remove the record of the proceedings from the inferior court, and issue execution against the defendant's person or effects in any county of England. But these acts do not extend to an action of ejectment, but are confined to *personal* actions. There are similar enactments in some of the Courts of Request Acts.

The Court of Queen's Bench has also jurisdiction, by *writ of prohibition*, not only to prevent another court from proceeding where it has no jurisdiction, but also to *prevent the committing* of a public irremediable injury, analogous to the jurisdiction in equity of granting an injunction; but the court seems reluctant to exercise this summary jurisdiction, unless in a very clear and urgent case, and will in general leave the applicant to proceed by indictment for the injury when completed, or to apply to a court of equity, which will in general interfere by injunction to prevent the commission of waste or of nuisances, but not of other crimes or injuries. Indeed, in practice, there is no remedy in courts of law to *prevent* any injury, except personal violence, by articles or sureties of the peace.

As a Court of Error or Appeal from Inferior Courts or Tribunals.—By the 1 & 2 Wm. IV. c. 70, § 18, all writs of error from the Court of Common Pleas on matters of law are returnable direct into the Exchequer Chamber. But still from all inferior courts of record (except in London and a few other places) the writ of error is returnable into the Queen's Bench, and not into the Common Pleas. But writs of error in *fact*, as infancy and coverture, lie from a judgment of the Court of Common Pleas, returnable in that court or in the Queen's Bench.

A *writ of false judgment* from the formal judgment of an inferior court not of record, but proceeding according to the course of the common law, and which writ is issued out of Chancery, is properly returnable into this court or into the Common Pleas. But no such writ lies from a court of request or other court, which by statute is directed to give judgment according to equity and good conscience, and not

according to the usual course of proceeding at common law, because a court so constituted is not bound by the rules of pleading or evidence, as in formal suits at law. In general the decisions of courts of request are final, unless in some of the acts, as now in the Southwark act, the proceedings in which are removable by *certiorari*, and if erroneous may be set aside by the Court of Queen's Bench.

The Court of Queen's Bench and Common Pleas (but not the Exchequer) are constituted courts of summary appeal from the decisions of justices of the peace who have, under the 11 Geo. II. c. 29, § 16, given possession of untenanted premises to the landlord upon the tenant having deserted them when the rent has been in arrear. The 17th section of that act enables the tenant to appeal to the judges on the circuit, or to the Court of Queen's Bench or Common Pleas when the premises are in London or Middlesex; who may order restitution, or affirm the act of the justices. The courts, under this power of appeal, are not bound by any strict rule, but may order restitution on such equitable terms as they shall think fit, although the landlord's legal right of re-entry was clear, and the proceeding perfectly regular. Upon the other hand, the justices' record protects them, and all acting under them, from any liability to an action.

The Court of Queen's Bench, or its judges, are in many instances constituted by statute, in effect, though not in form, a court of appeal from inferior commissioners or persons, as under the Assessed-Tax acts, by which the commissioners are directed, at the instance of the appellant or assessor, to state a case for the opinion of one of the judges of Queen's Bench, Common Pleas, or Exchequer.

II. OVER CRIMINAL AND PUBLIC MATTERS.—The Queen's Bench has also original jurisdiction, by *indictment* or *criminal information*, over most crimes, misdemeanors, and offences committed in Middlesex; and, indeed, these subjects were originally the principal objects of its jurisdiction. This court is the highest and most extensive of criminal justice within the realm as regards such offences. It has, at common law, jurisdiction by indictment over every description of criminal offence committed in Middlesex. Indictments for perjury (which in general cannot be preferred at the general or quarter sessions, but only at the assizes, or in this court when committed in Middlesex) and for *conspiracy* are now the most frequent in this court, especially for perjury in answers or affidavits. So, by different statutes, some offences committed out of the realm may be prosecuted by indictment in Middlesex; but in general, without some express enactment, offences committed out of England are not cognizable in this court, but it is now usual to proceed by special commission.

For the purpose of exercising this criminal jurisdiction by indictment in Middlesex, grand juries for Middlesex are, on two days in each of the four terms, summoned and sworn before the senior of the puisne judges, who charges or addresses them respecting their duty in the Court of Queen's Bench, and such jury afterwards find or ignore the bills of indictment presented to them for crimes committed in the county, principally for conspiracies, perjury, and other misdemeanors.

So all misdemeanors, whether committed in Middlesex or in any other county in England, may, as regards jurisdiction, be prosecuted

by criminal information filed by the attorney-general *ex officio*; or on the application of a subject, by leave of the court, an information for misdemeanor may be filed in the Crown office. But in no case of treason or felony can an information be sustained, but there must be a bill of indictment found by a grand jury.

The principal difference between the proceeding by indictment and by information is, that the former must be first presented to and found by a grand jury of the county in which the offence was committed, and afterwards tried by a petty jury; whereas, when the attorney-general *ex officio* files an information, or when upon affidavit and motion and hearing of both parties on affidavit, the court give leave to file an information, the necessity for the finding of a bill of indictment by a grand jury is dispensed with, and the criminal process immediately issues against the offender.

With respect to misdemeanors in general, although unquestionably this court has jurisdiction over every variety of that description of offences however inferior, yet great inconvenience having been felt from compelling persons in low circumstances to show cause against informations in the Queen's Bench, and after conviction to travel to Westminster from perhaps a remote part of the country to receive judgment, the court came to a resolution not to grant any information against such persons, however fit the subject might be in other respects for such mode of prosecution. The court has also resolved not to grant informations against overseers or other persons for procuring the marriage of a pauper with intent to burthen another parish, though formerly such informations were frequent. But, subject to these and a few other exceptions in practice, a very considerable portion of the time of this court is occupied by motions for leave to file criminal informations in the Crown office, either against magistrates or other public officers, or for challenges, libels, and other misdemeanors. And where the parties concerned are of rank, and the offence committed demands immediate interposition, and when it appears the party applying gave no provocation, and was wholly free from blame, or in case of libel free from the least ground of suspicion of the offence imputed to him, it may be advisable to adopt this course in lieu of indictment or proceeding by action, and in all these cases it is almost certain that the court will make the rule absolute. The jurisdiction to grant leave to file a criminal information in the Crown office is one of the highest and perhaps most delicate and discreet branches of jurisdiction, somewhat in the nature of the ancient Court of Honour; and whether a criminal information will be granted or refused, depends on showing that the party applying has in all respects acted properly, and therefore deserves the protection of the court, or that the other party has acted malignantly and without provocation.

Though formerly otherwise, now, by 1 Wm. IV. c. 70, § 9, the judge who presides on the trial may pronounce judgment immediately after the sittings or assizes on the party convicted, whether by default, confession, or verdict, and whether such person be present in court or not, except in cases of criminal information filed by leave of the court, or by the attorney-general, and wherein he shall pray that the judgment may be postponed; but the court above may still on motion grant a new trial.

It is only in this superior court, or by application to the chancellor, that *articles of the peace* can be exhibited, so as to obtain security against threatened personal injury, when the party against whom the application is made is a peer. In ordinary cases application must be first made to a local magistrate or court of session for sureties to keep the peace; but if the party required to find sureties be a peer, or the local magistrates have refused to interfere, or if the parties be of rank, or if a married woman require immediate protection against her husband, this court may with propriety be applied to.

Quo Warranto.—Another important jurisdiction peculiar to this court is the *quo warranto*, which is a proceeding adopted where any subject or body politic has usurped or assumed to act on any franchise or privilege not being legally entitled, and which is supposed to be either injurious to another party really entitled to the franchise, or to the public, and calls on the defendant to show by what authority (*quo warranto*) he has assumed to act in such public office, &c. It cannot be filed against an entire corporation by the master of the Crown office, but only by the attorney-general; though when only against a particular individual, it is otherwise. It cannot be against persons for usurping a franchise of a mere private nature not connected with public government; in which respect the interference of this court in cases of *quo warranto* is influenced by the same principle as in the instance of granting a mandamus. Upon proper affidavits, the court grants a rule to show cause why an information in the nature of a *quo warranto*, directed to the party supposed to have been guilty of the usurpation, should not issue; and this is afterwards discharged or made absolute according to circumstances; or the court receives an information filed *ex officio* by the proper officer of the crown, upon affidavits of private persons showing sufficient grounds; and if the usurpation be found upon the trial unlawful, then the party proceeded against will be ousted, and the franchise, if capable of seizure, seized into the queen's hands. Informations in the nature of *quo warranto* are now considered as civil proceedings, that is, to try a civil right, usually a corporate franchise, though of a public nature; but still the proceedings are in the Crown Office.

Writs of Certiorari and of Error.—A most important jurisdiction is exercised exclusively by this court in the *removal of proceedings* on indictments and presentments of justices or constables, or on coroners' inquests, into this court, in order that the form and merits may be there discussed, prosecuted, and tried. A certiorari is a writ under the chief justice's name, directed in the queen's name to the judge or officer of an inferior court, commanding him to send the record or proceeding before him to the Court of Queen's Bench, in order that the court "may further cause to be done therein what of right and according to law that court shall see fit to be done." And its use is, that the superior court may consider and determine the validity of indictments, presentments, convictions, orders, &c., and the proceedings relating to the same, and may quash or confirm, or proceed to trial of the former, or issue process of outlawry against the offender in those cases where the inferior court cannot reach him, or have a trial by a special jury after a view and the assistance of a queen's counsel. By certiorari any

indictment, presentment, &c., found or presented in any part of England, may be removed into the Queen's Bench, after which the proceedings are to be according to the course and practice of that court.

As a general rule, if the indictment or other proceeding was originally insufficient, or was found by an improper court or jury, the circumstance of its removal by *certiorari* into the Queen's Bench, and the subsequent proceedings thereon, will not get rid of the objection. Still, however, if a defendant has thus been prosecuted before an improper tribunal, it will be safer to remove the proceeding, and then apply to the Court of Queen's Bench to quash the same.

Before verdict the removal is by *certiorari*, whereas after judgment below it is by *writ of error*. At common law, before judgment, indictments and convictions are removable by *certiorari* as of course, unless some express enactment has taken away the right to remove; and even then, if one count be introduced not affected by such express enactment, the whole indictment is removable. But as the acts 5 W. & M. c. 11, and 9 & 10 Wm. III. c. 33, require in term time a motion and rule, and in vacation the permission of a judge, to issue a writ of *certiorari*, it is obvious that it is no longer of right, or as a mere matter of course, that an indictment or presentment can be removed at the instance of the defendant. And, to support his application, there must be an affidavit entitled only "In the Queen's Bench," showing facts or circumstances sufficient to induce the court or a judge to allow the writ. In general it will be granted on an affidavit showing that there are, or that the deponent has been advised by counsel that it is expected and believed that upon the trial will arise matters of law and of doubtful decision unfit to be decided by the inferior court, sometimes showing the particular point, or that some of the justices at sessions are interested; and any, even slight, ground for doubting a satisfactory trial or judgment below will in general induce the court to grant the writ.

The motion of counsel should be made before issue joined and at the earliest opportunity, and at all events before conviction or judgment; and if there be several defendants, it must appear by affidavit, or by counsel for each defendant appearing, that all concur in the application. The application may be made after a warrant has issued and recognizance to appear, even before indictment found. When the propriety of the removal, even upon the *ex parte* application of the defendant, appears clear, the court or judge will at once grant the writ; though it seems that there must be a rule *nisi* in cases of proceedings before commissioners of sewers. The *certiorari* only removes the indictment; therefore, in order to remove the prisoner also (if the party be such), an *habeas corpus* is also necessary.

After judgment of an inferior court upon an indictment or presentment, or coroner's inquest, &c. tried by a jury, the removal cannot be by *certiorari*, but must be by *writ of error*, upon which the merits cannot be discussed; and such a writ of error must in all cases be returnable in the Court of Queen's Bench, and there, after issue joined in error, the case is argued in full court. For this the attorney-general's authority must be first obtained; which is usually granted upon the

production of a petition and a case, with counsel's opinion or certificate that there is ground of error.

The court, on the application of the attorney-general, may by certiorari remove and set aside a *coroner's inquisition* for apparent defect, and may declare a rule for that purpose absolute even in the first instance.

All judicial proceedings of *justices of the peace*, upon which they have decided by *conviction* or *order* (such as an illegal conviction under the Building Act, or an illegal order of justices for turning a highway) are of common right removable into this court by certiorari, unless that remedy has been expressly taken away by particular enactment; and even where a statute declared that no other court whatever should intermeddle with any causes of appeal upon that act, but that they should be finally determined in the quarter sessions only, yet it was decided that the Court of Queen's Bench was not ousted of its jurisdiction by certiorari. It has been the practice in the Queen's Bench not to grant a certiorari to remove an order of justices, from which an appeal lies to sessions, before the matter has been determined upon appeal, because the removal might take away that privilege; but when there is no restriction as to the time of appeal, it would be otherwise.

In order to restrain the vexatious removal of convictions and orders, which issued as of course at common law, the statute 5 Geo. II. c. 19, and 13 Geo. II. c. 18, have been enacted, which now regulate the proceeding. Section 1 of the 5 Geo. II. enables the sessions to amend defects of form. And section 2 enacts, that no certiorari shall be allowed to remove any such judgment or order unless the party prosecuting such certiorari, before the allowance thereof, shall enter into a recognizance, with sufficient sureties, before a justice of the peace or justice of sessions, or before a judge of the Queen's Bench, in 50*l.*, conditioned to prosecute such certiorari with effect and without delay at his own costs, and to pay full costs if the judgment or order shall be confirmed; and unless such recognizances be executed, the justices are to proceed and enforce the judgment or order. And section 3 directs, that the recognizance shall be certified and filed with the certiorari and judgment or order thereby removed in the Queen's Bench; and if confirmed, the payment of costs is to be enforced by attachment.

The 13 Geo. II. c. 18, § 5, extends in terms to *all* convictions, judgments, orders, and other proceedings before justices, and prohibits any certiorari, unless applied for within six calendar months next after conviction &c.; and six days previous notice of the intended motion for the certiorari must be served on the justices, or two of them, so as to enable them to show cause in the first instance; and such notice must state the name of the party or parties intending to apply for the writ; and all the parties must respectively sign such notice, and not merely an attorney or agent for them.

Another very extensive and exclusive branch of jurisdiction relates to the hearing and determining of *cases stated by courts of sessions*, upon appeals to them, usually upon the validity of poor rates, or particular assessments therein, or upon a question of parochial settlement, and the validity of an order of removal; but though cases are more usually granted or stated upon questions of parochial settlement

or rating, they may be granted in *all* cases of orders or convictions, where the certiorari is not expressly taken away by statute.

In all cases where the sessions entertain a doubt upon the law as applicable to a particular case, they authorize the party against whom they decide to have their judgment reviewed by the Court of Queen's Bench; and this is called *granting a case*. When a case has been granted, it must be removed by certiorari into the Court of Queen's Bench.

The judges of this court are five in number, consisting of the lord chief justice, created by writ, and four other justices, created by letters patent, who, by the statute 12 & 13 Wm. III. c. 2, hold their places *quamdiu bene se gesserint*, and not, as formerly, during pleasure. And by the 1 Geo. III. c. 23, the judges are continued in their offices notwithstanding a demise of the crown, which was formerly held immediately to vacate their seats.

Four of these judges sit in court in term time to hear and decide points of law. The fifth judge sits apart from the rest for the dispatch of matters of practice and the minor business of the court. He also sits for the trial of causes within the term.

II. THE COURT OF COMMON PLEAS.

In the original formation or division of the superior courts it was intended that, with but few exceptions, all civil suits between subjects (*viz.* all real and mixed and personal actions) should be instituted in this court, and that only criminal matters should be prosecuted in the Queen's Bench, and revenue cases in the Exchequer.

Neither the Court of Queen's Bench nor Exchequer has any jurisdiction over real actions, so that if such an action were commenced therein the whole proceeding would be void and *coram non*, the Court of Common Pleas having exclusive jurisdiction over them, except that the crown has, by prerogative, a right to sue its real or mixed action in any court.

So whilst *fin*es and *recoveries* were in force, and still for many years to a certain extent, the practice relative to them, or rather as to the amendment thereof, will be exclusively confined to this court. And the 1 Wm. IV. c. 70, §§ 14 and 27, transferred the jurisdiction of the Courts of Great Sessions in Wales as to *fin*es and *recoveries*, and the power of amending them, to this court.

The Court of Common Pleas has also exclusive jurisdiction over all mixed actions, except actions of ejectment, which may be brought in the Queen's Bench, Common Pleas, or Exchequer. *Quare impedit* can only be sustained in this court, excepting at the suit of the queen, who may sustain that proceeding in any court. A writ of dower also, whether for the assignment of dower alone, or for that and damages, where the husband died seised, must be in this court, or in the county court by *justices*, or upon a special custom by plaint in the court of the lord of the manor; but it is usually in this court.

In case of illegal imprisonment, the Court of Common Pleas in term time, or one of its judges in vacation, has now equal and concurrent jurisdiction with the Court of Queen's Bench, to issue a writ of *habeas*

corpus under 31 Car. II., and 56 Geo. III. c. 100, already noticed. To this court appertains, as it did also to the Court of Exchequer at common law, the right where any officer of the court, or party to a suit therein, is imprisoned, to grant this writ, and, if it appear that the party is illegally detained, to discharge him. But before those acts, if the party was confined for a *criminal* matter, neither this court nor the Court of Exchequer could proceed to investigate the charge, but were bound to remand him, or, if the offence were bailable, to take bail for his due appearance in a court of criminal jurisdiction.

The statutes relative to *arbitration* and *awards*, giving a summary jurisdiction to the Court of Queen's Bench, equally extend to this court. And the *annuity acts*, 17 Geo. III. c. 26, and 53 Geo. III. c. 141, § 6, also extend to the Courts of Common Pleas and Exchequer, and authorize each, when an action is brought on the annuity deed therein, or when the warrant of attorney authorizes a judgment to be entered up in such court, to interfere on motion.

The statute 7 Geo. II. c. 20, as to summary applications for relief by *mortgagors*; the 11 Geo. II. c. 19, § 17, as to summary appeal by *tenants* against the proceedings and record of justices of the peace, and to obtain restitution; and the statute 4 Ann. c. 16, § 20, and 11 Geo. II. c. 19, § 23, as to *bail bonds* and *replevin bonds*, equally extend to the Court of Common Pleas.

This court also has original summary jurisdiction by rule of court and attachment over its own *officers* and ministers, and all other persons guilty of contempt against the court itself or its rules or orders; and by a rule of Hilary Term, 14 James I., the court may remove unfit or even unskilful attorneys.

With respect to its controlling jurisdiction over inferior courts, it was determined by all the judges, that this court, as well as the Queen's Bench, has jurisdiction by *prohibition* to confine temporal as well as ecclesiastical courts within their proper jurisdiction.

Before judgment the Court of Common Pleas always removed the civil proceedings of an inferior court, even of record, by *certiorari* or *habeas*. But a writ of error does not lie *after* judgment from an inferior court of record into this court. However, all proceedings in courts not of record are removable into this court either before or after judgment; *before* judgment by writ of *pone* or *recordari facias loquelam* or *accedas ad curiam*, and *after* judgment by writ of false judgment.

No indictment or presentment, or conviction or order, or matter of a public nature, can be removed by *certiorari* or other proceeding into this court; nor has it any jurisdiction to issue a *mandamus*.

Nor has this court any jurisdiction over or in relation to crime.

In this court, as in the Queen's Bench, the judges are five in number, namely, a chief justice and four puisne judges.

Formerly serjeants at law had the exclusive privilege of pleading in this court, and other barristers could only be employed as their juniors; but by the 9 & 10 Vic. c. 54, all barristers-at-law, according to their respective seniority, shall and may have and exercise equal rights and privilege of practising, pleading, and audience in the said court with the said serjeants-at-law; and the judges of the said court, or any three of them, of whom the lord chief justice shall be one, are

empowered to make rules and orders, and to do all other things necessary to give effect to this enactment.

III. THE COURT OF EXCHEQUER OF PLEAS.

The Court of Exchequer, as originally constituted, was a court of record merely for the hearing and determining of matters relating to the revenue of the crown; and in many respects revenue questions must still be exclusively heard and determined in this court.

The Exchequer was originally divided into eight distinct courts: 1. The Court of Pleas (still the proper law court); 2. The Court of Accounts; 3. The Court of Receipt, which was considered the true centre into which all the crown's revenue and profit ought to be paid; 4. The Court of Exchequer Chamber, being the assembly of all the judges of the superior courts for matters of law; 5. The Court of Exchequer Chamber, as erected by 31 Edw. III. c. 12, for errors in judgment of the Court of Exchequer of Pleas itself; 6. The Court of Exchequer Chamber for errors in the Queen's Bench, erected by 27 Eliz. c. 8, and now, by 1 Wm. IV. c. 70, the only court of error as well from the Queen's Bench, Common Pleas, as the Exchequer of Pleas; 7. The Court of Equity in the Exchequer Chamber, of which the lord treasurer and the chancellor and barons of the exchequer were the judges, and which was continued and improved by the acts of 57 Geo. III. c. 18, and 3 & 4 Wm. IV. c. 41, §§ 25, 27; but is now abolished by the 5 Vict. c. 5; 8. The Court of First Fruits and Tenths, erected in the time of Hen. VIII., but which was dissolved and the clergy discharged thereof by 2 & 3 P. & M. c. 4. By 1 Eliz. c. 4, the first-fruits and tenths were re-united to the crown; and although this ancient court itself was not revived, yet such first-fruits and tenths were placed within the rule, survey, and government of the Exchequer; and the circumstance of such first-fruits and tenths being cognizable especially in the Exchequer gave rise also to suits for tithes being anciently there instituted.

The Court of Pleas is the Exchequer court of law, and was properly and anciently the court in which debts or duties to the crown were to be recovered, usually by information by the attorney-general; and actions by and against officers of the court, or the crown's actual debtors, or against actual prisoners under process from the court, were also sustainable here. But the 10 Edw. I. enacted, that "no plea shall be held in the Exchequer unless it specially concern the king or his ministers." Under the fiction, however, that a party was the king's minister or debtor, and that by the defendant's withholding the debt or having committed the injury the plaintiff was less able to pay the king, jurisdiction was assumed and established over all private claims in personal actions between subject and subject, although in truth neither was actual debtor to the king. This jurisdiction has been recognized by the Uniformity of Process Act, so that it is not now necessary, or indeed proper, in a declaration in the Exchequer, to allege that the plaintiff is a debtor to the crown.

But this court has no jurisdiction in any real or mixed action, except in ejectment.

We have seen that in some cases of personal actions this court has *exclusive* jurisdiction, as where the revenue of the crown is concerned, or an action has been brought in another court against a revenue officer for something done or omitted by him connected with his office. So actions for penalties under the Lottery Act, 36 Geo. III. c. 104, § 38, must have been prosecuted in the Exchequer. So penalties incurred under the Stamp Acts must be sued for in this court. And indeed in all suits in another court, if it appear from the pleadings that the revenue is concerned in the event, the cause may be removed into the office of Pleas of the Exchequer.

Feigned issues, or other issues, are also properly framed and triable on the plea or law side of the Exchequer, but by plea only, and not merely on motion; and an issue will not be directed to be tried in the Exchequer, unless for some special reason, and on motion for that purpose.

With respect to the *summary jurisdiction* of this court in cases of awards, annuities, mortgages, bail bonds, replevin bonds, &c., over which we have seen the courts of Queen's Bench and Common Pleas have jurisdiction on affidavit and motion, the statutes giving such jurisdiction in general equally apply to this court. There is, however, an exception under the Annuity Act, 53 Geo. III. c. 141, which authorizes only a judge of the Queen's Bench or Common Pleas to compel the production of the deed; and it seems that an application by a tenant against the decision and record of justices of the peace, to obtain restitution under the 11 Geo. II. c. 19, § 17, only extends to the courts of Queen's Bench and Common Pleas, and not to this court.

The *Habeas Corpus* Acts, 31 Car. II. c. 2, and 56 Geo. III. c. 100, expressly extend to the Court of Exchequer and the barons thereof.

This court has jurisdiction over *warrants of attorney* authorizing a judgment in this court.

This court has a jurisdiction over its own *officers* and *attorneys*, similar to the courts of Queen's Bench and Common Pleas; and it has exercised such jurisdiction with respect to an attorney of another court who practised in the Exchequer in the name of a side-clerk before the late act.

Although an original writ out of Chancery could not be returnable in this court, so as to proceed to outlawry at the suit of a subject for debt, the Uniformity of Process Act, 2 Wm. IV. c. 82, §§ 56, 57, now expressly authorizes proceedings to outlawry upon a *capias* or *distringas* issued under that act.

It is also laid down, that although it is more usual to proceed in the Court of Queen's Bench upon informations in the nature of *quo warranto*, to try the right of particular persons to hold offices in corporations, or to exercise other franchises, yet that a writ of *quo warranto* also lies in the Exchequer.

As far as regards the *jurisdiction over inferior courts*, it seems that a prohibition may be issued out of this court to restrain an inferior court from proceeding in a suit or matter in which it has no jurisdiction.

The books of practice state, that this court has jurisdiction to remove by *certiorari* civil suits commenced in inferior courts of record into this court, whether on the behalf of a plaintiff or of a defendant; and we

have seen that unquestionably a jurisdiction exists in favour of the crown, when its interests are involved, or an action is brought against one of its officers for any thing done or omitted in that character, of prohibiting the plaintiff from proceeding otherwise than in this court.

Formerly, whenever a *recognizance*, of whatever description or wherever acknowledged, became forfeited, it was always estreated into and proceeded upon in the Court of Exchequer, as the proper revenue court of the crown. Afterwards the 3 Geo. IV. c. 46, § 6, and 4 Geo. IV. c. 37, transferred much of the jurisdiction as to recognizances to the respective courts of quarter sessions, which have power even to discharge the whole of the forfeited recognizance. It has been since doubted whether the courts of quarter sessions can now in any case, since September, 1822, cause a forfeited recognizance, taken before them or justices of the peace, to be estreated into the Court of Exchequer; and it should seem that if improvidently the recognizance should be so estreated, the court will not interfere. But as regards penalties, forfeitures, and fines, as on jurors for non-attendance, or occurring during the assizes, application for relief may still be made to this court.

The 1 Wm. IV. c. 73 requires every publisher of newspapers and pamphlets to execute a bond with sureties, for securing the payment of fines upon conviction for libels and damages and costs thereon; and the 3d section gives the Exchequer in particular summary power, on affidavit, to direct proceedings thereon. But, to obtain relief against a surety in this court, it must be shown by positive affidavit that the plaintiff has used due diligence to obtain satisfaction from the principal obligor.

This court, in connection with its revenue jurisdiction, has very extensive jurisdiction over *writs of extent* and *in aid*, and generally every description of proceeding connected with the revenue or debts to the crown or its debtors.

This court has particular jurisdiction in enforcing the payment of *legacy duty*.

It has been held, that the Court of Exchequer will not enter into any question of rateability to the assessed taxes; but several subsequent decisions establish that the questions upon assessment and rateability may be decided in this court.

A summary application may be sustained in this court against the commissioners of land tax, to compel a due assessment of that tax; and where the commissioners exceeded the power given them by the 43 Geo. III. c. 161, § 15, by discharging an assessment without a notice of appeal before them, the Court of Exchequer ordered them to amend their schedule, so as to cancel their discharge.

In the acts relative to the customs, under the head of management, and the power to compel private individuals or corporate bodies to let buildings, the 3 & 4 Wm. IV. c. 51 entitles the commissioners of the treasury, or any person interested in but dissatisfied with the verdict of the jury impanelled, to try the amount of rent &c. by appeal to the Court of Exchequer.

Unless where a particular statute gives jurisdiction to commissioners or justices of the peace, as in many cases under the laws of customs and excise, this court has exclusive jurisdiction. Thus, there cannot be

an information upon a seizure to condemn goods by proclamation but in this Court of Exchequer.

This Court of Exchequer appears to be the proper tribunal for the trial of a *petition of right*, or *bill of manifestation of right*, or a *traverse of office*. Where money has once reached the queen's hands, it can, it seems, be recovered only by petition; and it is said that a crown lease once extended cannot be restored, because by the judgment and extent the lease has become vested in the crown as the lessor, and thereby merged and extinct.

A defendant who has been arrested on a revenue information filed against him, and has entered into a recognizance of bail to appear and answer, cannot move to discharge such recognizance on the ground of the attorney-general not having proceeded to trial according to notice, till after three clear terms exclusively have elapsed, nor after issue joined, but after the time for which notice of trial had been given. Thus, a defendant arrested in Michaelmas term having given bail in Hilary term, and received notice of trial for the subsequent sittings, cannot move until after Michaelmas term. A defendant may plead *in person* to an information by the crown in the Exchequer.

This court has no immediate jurisdiction in relation to crimes; nor has it any crown side, like the Queen's Bench.

The judges of this court are also five in number: the chief judge is called the chief baron, and the puisne judges are called barons.

There was, until lately, a great impediment to bringing on business in this court. The whole body of attorneys could not practise here, as in the Courts of Queen's Bench and Common Pleas, but were obliged to employ a limited number of attorneys, who were a sort of peculiar officers of the court, which increased the expence of an action in the Exchequer very considerably. This monopoly, however, has been lately abolished, at the recommendation of the Common Law Commissioners; and the business of the court is now thrown open to the whole profession.

By 3 & 4 Wm. IV. c. 99, § 41, the offices of the lord treasurer's remembrancer, and of the clerk of the estreats, were abolished; as, by 5 & 6 Vict. c. 86, were those of the first and second secondaries, the sworn and side clerks, the register, and the bag-bearer, in the office of her majesty's remembrancer. The records &c. of these offices are transferred to the custody of the queen's remembrancer, who is also, subject to the orders of the barons of the exchequer, to perform the duties thereof. Section 37 of the former act expressly retains the jurisdiction of the barons as to fines, issues, amerciaments, penalties, forfeited recognizances and estreats, or any process or proceedings thereon. Where the amount of estreats to be certified by clerks of the peace, town clerks, &c. to this court is under 5*l.*, they may verify the return by affidavit, without commission or personal appearance. In *scire facias* against the conusor of a recognizance to the crown, no costs are recoverable by the defendant, although he succeed on demurrer and in error.

We have hitherto treated of each of the three superior courts of common law separately. What is further to be noticed, relating chiefly to their *practice*, or manner of transacting business, is to be considered as applicable to all of them.

THE TERMS.—There are four terms, Hilary, Easter, Trinity, and Michaelmas; being those times or seasons of the year in which the courts of law sit for the dispatch of business. It is only the common law courts which are confined to the terms: the Court of Chancery is not; nor are they observed by the High Court of Parliament, the Privy Council, the Court of the Lord High Steward, or any of the inferior courts. And it is said that the Exchequer may sit out of term.

These periods were formerly much more important than at present; as most of the proceedings in a suit were transacted or supposed to be transacted during term time. The sittings of the courts in banc are still confined to term time; though by a recent act, 1 & 2 Vict. c. 32, they are enabled to make a rule or order for sitting in banc during the Nisi Prius sittings. But the necessity that other judicial business should be transacted therein is almost altogether abolished by recent regulations and enactments.

Easter and Trinity were formerly *moveable* terms, their commencement being then regulated by the moveable feasts of Easter and Trinity. But now the commencement and duration of all the terms are fixed by the recent acts of 11 Geo. IV. & 1 Wm. IV. c. 70, and 1 Wm. IV. c. 3; by the former of which it is enacted, that in the year 1831 and afterwards—

Hilary Term shall begin on the 11th January and end on the 31st January.				
Easter Term	—	—	15th April,	—
Trinity Term	—	—	22d May	—
Michaelmas Term	—	—	2d November,	—
				8th May.
				12th June.
				25th November.

Provided, that if any of the days intervening between the Thursday before and the Wednesday next after Easter-day shall fall within Easter term, there shall be no sitting in banc on any of such days (although such intervening days shall be taken to be a part of such term, 1 Wm. IV. c. 3); and Easter Term shall in such case be prolonged, and the commencement of Trinity Term postponed and its continuance prolonged, for an equal number of days of business. And in case the day of the month on which any term is to *end* shall fall on a Sunday, the following Monday is to be taken as the last day of the term.

Neither of the statutes say on what day the term shall *begin* in case the day fixed for its commencement be a Sunday. In such a case, however, it has been decided, that the day so fixed must, for the purpose of computation, be considered as the first day of the term, although, as the courts do not sit, no judicial business can be done until the following Monday.

Hilary and Trinity terms are called *issuable* terms, because in them the records are for the most part made up of the issues joined in the various causes depending and which are to be tried at the assizes that respectively follow those terms.

RETURN OF WRITS.—Formerly there were only four, or, at most, five general return days in each term. The first was, as it still is, the fourth day before the commencement of full term, reckoning both days inclusive,

and was called the *Essoign* day of the term, because the courts at one time sat on that day to receive *essoigns* or excuses; but when *essoigns* were no longer allowed in personal actions, the courts discontinued to sit on that day. Still such *Essoign* day was for many purposes, until the 11 Geo. IV. & 1 Wm. IV. c. 70, considered as the first day of the term. Thus judgments (which were considered in law as having relation to the first day of term) related to the *essoign* day, in actions commenced by original writ. But this statute has, it seems, done away with the *essoign* day for all purposes as part of the term. The day after the *essoign* day was called the *day of exceptions*, because on that day the plaintiff might enter his exceptions and obtain a *ne recipiatur*, to prevent the defendant's *essoign* from being received. On the third day the sheriff formerly returned his writs into court, and this was called the *Retorna Brevium* day. The sheriff, however, now returns his writs at once into the office of the *Custos Brevium*. The fourth day, or *quarto die post*, called the Appearance day, was the day given, by the favour and indulgence of the court, to the defendant for his appearance; and on this day the parties appeared in court.

But now, by 1 Wm. IV. c. 3, § 2, "all writs, usually returnable before any of the courts of Queen's Bench, Common Pleas, or Exchequer respectively on general return days, that shall be made returnable after 1st January, 1831, may be made returnable on the third day exclusive before the commencement of each term, or on any day (not being Sunday) between that day and the third day exclusive before the last day of the term; and the day for appearance shall be, as heretofore, the third day after such return, exclusive of the day of the return, or in case such third day shall fall on a Sunday, then on the fourth day after such return, exclusive of such day of return."

But, as will be presently seen, the Uniformity of Process Act, 2 Wm. IV. c. 39, prescribing writs of summons and *capias* in all personal actions without any return day, has in practice almost extinguished, so far as regards such personal actions, the distinction as to return days in the terms. They, however, still apply to those actions the proceedings in which are not affected by that act, as dower, quare impedit, ejectment, replevin, scire facias, &c. So a writ of *distringas* to enforce the defendant's appearance on a writ of summons, also a writ of exigent proclamation and other writs subsequent to the writ of *capias* or *distringas* in proceedings to outlawry, are required by that act to be made returnable in term on a day certain. And all other writs not above-mentioned are also returnable in term on a day certain, with the exception of those in an ejectment founded on a supposed original, or in a replevin or other suit removed from an inferior court by an original writ of *pone*, *recordari facias loquelam*, or *accedas ad curiam*, which are returnable on a general return day.

SITTINGS OF THE COURTS IN BANC.—The courts sit every day in full term, except Sundays and the days between the Thursday before and the Wednesday after Easter-day, when any of such days fall in term. Before the late alteration of the terms, the courts never sat on the feast of the Purification, Ascension-day, or Midsummer-day; though if Midsummer-day happened to fall on the Friday next after Trinity Sunday, which was the first day in full term, it was *dies juridicus* by 32 Hen. VIII. c. 21. But the courts now sit on all these days.

There are certain days in each term called *paper days*, on which the courts hear the causes which have been entered in the paper for argument before they enter upon motions. In the Queen's Bench, Tuesdays and Fridays are paper days on the civil side; Wednesdays and Saturdays on the crown side. In the Common Pleas the sitting days at Nisi Prius, and in the Exchequer Mondays and Wednesdays, are the paper days. The causes set down in the paper for argument are argued in the order in which they stand entered; and all causes remaining undetermined at the end of a term are, without any new entry, continued in the books kept by the Clerk of the Papers, to come on in the next term in the order in which they stand.

All rules enlarged till the following term are set down in what is termed the *peremptory paper*, eight for the first day, and the same number for every following day, until the whole are disposed of. The rules thus entered in the peremptory paper are heard on the respective days for which they are made peremptory, unless special grounds, by affidavit or otherwise, be shown to the court for postponing them.

Mondays and Thursdays, in the Queen's Bench, not being paper days, are usually occupied in *motions*, and any other business which the court may have appointed for those days. The counsel have precedence in motions in the order of their precedence; those within the bar first, as the attorney and solicitor-general, the queen's serjeant, the queen's counsel, &c.; then the serjeants and barristers without the bar, beginning from the centre to the left, and then from the centre to the right of each row, until all the counsel in court have moved. This is termed "going through the bar." The motions then recommence with the attorney-general, and go through the bar in the same order, as long as it is convenient for the court to sit. It is usual to call upon the bar to make one round of undisputed motions before any are made requiring argument.

Upon paper days the courts, after having heard the causes entered in the paper argued in their order, will, if they have time, hear motions.

PRACTICE COURT.—Before the 1 Wm. IV. c. 70, the practice of one judge sitting apart from the rest during term in a separate court was confined to the Court of Queen's Bench, under the authority of the 57 Geo. III. c. 2, which enables one of the judges of that court, on account of the great increase of business therein, to sit apart when occasion should require, for the purpose of *adding to and justifying bail*; and the court in which he sat was thence called the Bail Court.

The 11 Geo. IV. & 1 Wm. IV. c. 70 (under the authority of which act an additional judge was appointed to each court, increasing the whole number of judges from twelve to fifteen) directs, that in each court the puisne judges shall sit by rotation in each term, or otherwise as they shall agree among themselves, so that no greater number than three shall sit at the same time in banc for the transaction of business in term, unless in the absence of the lord chief justice or lord chief baron; and that any one judge of either court, while the other judges are sitting in banc, may sit apart, "for the business of adding and justifying special bail, discharging insolvent debtors, administering oaths, receiving declarations required by statute, hearing and deciding upon matters or motions, and making rules and orders in causes and business depending

in the court to which such judge shall belong, in the same manner as may be done by the court sitting in banc."

Since this act, therefore, a puisne judge of each court, during the terms, may sit apart in a separate court, when the press of business requires.

In the Queen's Bench, one of the puisne judges in rotation, usually for a term continuously, while the others are sitting in banc, sits from half past nine o'clock in the morning, every day during term time, in a court called the Practice or Bail Court. And in this court it is usual not only to hear and determine common matters of practice, but also in ordinary cases even motions for writs of mandamus and of prohibition, certiorari, &c. A separate peremptory paper is made out and cleared in this court in the same manner as in the court in banc.

The decision of a single judge in the Practice Court is conclusive in all matters brought before him, unless he think fit to open the case for a rehearing; in which respect it differs from the decision of a judge at chambers, which does not preclude an appeal to the full court on the merits, except in those few cases where the legislature has expressly directed that the judge's decision shall be final.

BUSINESS BEFORE A JUDGE AT CHAMBERS.—The judges of each of the three courts also exercise at their chambers a very extensive jurisdiction over certain minor practical proceedings, especially irregularities that arise in conducting an action or defence, and this as well in the vacations as during the four terms. This jurisdiction has been much increased, as it has been also rendered more necessary, by recent enactments and regulations; for, as the new statutes, and the rules founded upon them, now enable parties to commence an action and proceed even to execution in vacation, unless a single judge had jurisdiction to interfere in cases of irregularity, there might be a failure of justice when the courts are not sitting. And, as it may happen (especially in vacation, while the judges are on the circuits) that no judge of the particular court in relation to which the assistance of a judge is required may be at hand, the 1 Wm. IV. c. 70 (amended by the 1 & 2 Vict. c. 45¹) authorizes a judge of either of the three courts, to whatever court he may belong, to transact such business at chambers or elsewhere, depending in any of the said courts, as may, according to the course and practice of the court, be transacted by a single judge. Since this act, therefore, one of the fifteen judges, by arrangement, remains in town and transacts the chamber business, while the others are on circuit.

The regular hours of attendance at chambers are, in vacation from eleven in the forenoon to one o'clock, and in term time from three to five in the afternoon.

Unless a judge's order is made under the authority of a statute declaring it final, or it has been agreed between the parties that it shall be final, it may be appealed from to the court. Such application should

¹ The 1 Wm. IV. c. 70, confined the power of a single judge at chambers, in causes not belonging to his own court, "*to matters over which the said courts had a common jurisdiction.*" But this restriction has been removed by the 1 & 2 Vict. c. 45; and any judge of either of the three courts may now

act out of court in all matters and things usually transacted out of court, and although the said courts have no common jurisdiction therein, in the same manner as if he were a judge of the court to which the particular matter belongs.

be made as early as practicable, and before the opponent has taken any proceedings in the next term upon such order.

A judge's order may be enforced by attachment; but an attachment for disobedience thereof will not lie until it has been made a rule of court. If made in vacation, it cannot, of course, be made a rule of court until the next term. By rules of Michaelmas Term 1832, and Hilary Term 1833, if a judge's order to return mesne or final process be made and served in vacation, and not promptly or duly obeyed, it may be afterwards made a rule of court in next term, and an attachment shall go, although in the mean time an attempt may have been made to purge the contempt by subsequent performance.

TRIALS AT NISI PRIUS ON THE CIRCUITS.—In the vacation after each Hilary and Trinity term, the judges make their circuits through the several counties of England and Wales for the purpose of trying, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the courts at Westminster, and which are then ripe for trial. These are called trials at *Nisi Prius*; and the origin of the name is this. All causes commenced in the courts at Westminster were formerly heard there in term time by a jury summoned from the county in which the cause of action arose. But as it was found, in course of time, an intolerable burthen to compel the parties, jurors, witnesses, &c., to come from the most distant parts of the country to try a cause at Westminster, the statute West. II. empowered the justices of assize (who were then, as the judges are now, in the habit of going circuit twice a year to try a species of real action called *assizes*) to try also issues joined in all personal actions. In order to enable them to do this, a clause was introduced into the writ of *venire facias* which was issued to the sheriff, commanding him to cause a jury to come to Westminster upon some day in the following Easter or Michaelmas Term, *NISI PRIUS justiciarii venerint*, that is, "unless before that time the justices of assize should come into his county." By virtue of this the sheriff, instead of returning his jurors to the court at Westminster, returned them to the court of the justices of assize, which was sure to be held in the vacation before each Easter and Michaelmas Term, and the trial was there had. But there was one inconvenience in this mode of proceeding, namely, that as the names of the jurors were not returned to the court above, but to the justices of assize when the cause was about to come on, the parties could not know, before the trial, the names of those by whom the cause was to be tried. The 42 Edw. III. c. 11 was therefore passed, by which the clause of *nisi prius* was taken out of the *venire facias*, and the following mode of proceeding adopted. A *venire* without any clause of *nisi prius* is directed to the sheriff, who, on the day mentioned therein, returns the names of the jurors upon an oblong piece of parchment called a *panel*. The jurors themselves are not summoned, and consequently make default; on which another writ (called in the Common Pleas a writ of *habeas corpora juratorum*, and in the Queen's Bench a *distringas*) issues, by which the sheriff is peremptorily commanded to insure their appearance in court on a day therein appointed, "unless the justices of assize" &c., inserting the clause of *nisi prius*. In pursuance of this writ the sheriff returns a jury to the assizes, which are sure to be held before its return, and there the

trial is had. This is the present method of proceeding, except that, instead of the writs of *venire facias* and *distringas* or *habeas corpora* being tested and made returnable in term time only, the writ of *venire* may be tested on the day on which it is issued, and made returnable forthwith, and the writ of *distringas* or *habeas corpora* may be tested in term time or vacation, on any day subsequent to the teste of the *venire*. When, indeed, any trial is to be had at bar, which now happens only in causes of great importance, the writ of *venire facias juratores* is returnable, as heretofore, in term time only.

The judges upon their circuits now sit by virtue of five several authorities: 1. A commission of the peace, as conservators of the peace generally. 2. A commission of oyer and terminer. 3. A commission of general gaol delivery. 4. A commission of assize, directed to the justices and serjeants therein named, to take (together with their associates) assizes in the several counties, that is, to take the verdict of a peculiar species of jury called an *assize*, and summoned for the trial of landed disputes. 5. That of *Nisi Prius*, which, as we have already seen, was annexed to the office of those justices by the statute of Westminster 2, and empowers them to try all questions of fact issuing out of the courts at Westminster that are then ripe for trial by jury.

These commissions are constantly accompanied by writs of *association*, in pursuance of the statutes of Edw. I. and II.; whereby certain persons (usually the clerk of assize and his subordinate officers, called from thence the judge's associates) are directed to associate themselves with the justices and serjeants, and they are required to admit the said persons into their society, in order to take the assizes &c., that a sufficient supply of commissioners may never be wanting. But, to prevent the delay of justice by the absence of any of them, there is also issued a writ of *si non omnes*, directing, that if all cannot be present, any two of them (a justice or serjeant being one) may proceed to execute the commission.

The number of circuits is now seven; namely, the Northern, the Oxford, the Midland, the Norfolk, the Western, the Home, and the Welch Circuit; and to each are appointed two judges. For this purpose the judges meet every Hilary and Trinity term at Serjeants Inn: the lord chief justice of the Queen's Bench makes his election first; the chief justice of the Common Pleas chooses next; he is followed by the lord chief baron of the Exchequer; and then the other judges choose according to seniority. After this choice amongst themselves, they wait on the queen, who, at her pleasure, either confirms or alters their arrangement.

The senior or superior judge generally sits on the crown side, for the trial of criminals, and the junior or inferior on the *Nisi Prius* side, for the decision of cases of property.

Each circuit is attended by counsel; and it is a rule at the bar, that those who have selected one circuit do not, even if they have leisure, practise at another, unless, on account of their great talent or reputation, they are brought there by a special retainer; and in that case they plead only in the causes wherein they are specially retained.

SITTINGS AT *NISI PRIUS* FOR LONDON AND MIDDLESEX. — The Courts of *Nisi Prius* in London and Middlesex are holden by the chief

justices of the common law courts in and after every term, and are called *Sittings*. Those for Middlesex were established by the legislature in the reign of Elizabeth. In ancient times all issues in actions brought in that county were tried at Westminster in the terms, at the bar of the court in which the action was instituted; but when the business of the courts increased, these trials were found so great an inconvenience, that it was enacted by 18 Eliz. c. 12, that the chief justice of the Queen's Bench should be empowered to try within the term, or within four days after the end of it, all the issues joined in the Courts of Chancery and Queen's Bench; and that the chief justices of the Common Pleas and the chief baron of the Exchequer should try in like manner the issues joined in their respective courts. In the absence of any one of the chiefs, the same authority was given to two of the judges or barons of his court. The 12 Geo. I. c. 31 extended the time to eight days after term, and empowered one judge or baron to sit in the absence of the chief; the 24 Geo. II. c. 18 afterwards extended the time after term to fourteen days; and by the 1 Geo. IV. c. 55, the sittings after term might be continued during the entire vacation.

But now, by 11 Geo. IV. & 1 Wm. IV. c. 70, not more than twenty-four days (exclusive of Sundays) after any Hilary, Trinity and Michaelmas terms, nor more than six days (exclusive of Sundays) after any Easter term, to be reckoned consecutively immediately after such term, shall be appropriated to sittings in London and Middlesex for the trial of issues of fact arising in any of the said courts. Provided, that if any *trial at bar* shall be decided by any of the said courts, it shall be competent to the judges of each court to appoint such days for the trial thereof as they shall think fit; and the time so appointed, if in vacation, shall for the purpose of such trial be deemed to be a part of the preceding term. Provided also, that a day or days may be especially appointed at any time, not being within such twenty-four days, for the trial of any cause at Nisi Prius, with the consent of the parties thereto, their counsel or attorneys.

And by section 4 of the same act, any of the judges, to whatever court he may belong, is authorized to sit in London and Middlesex for the trial of issues arising in any of the courts.

Accordingly, once every week during term, and for several days after term, one of the judges (usually the chief justice, but sometimes one of the puisne judges) sits at Nisi Prius at Westminster, and at the Guildhall in London, to try causes in which the jury process has been directed to the sheriffs or other returning officers of Middlesex and London respectively.

TRIALS BEFORE THE SHERIFF. — Previous to 3 & 4 Wm. IV. c. 42, trials by the country were either at bar or nisi prius. But, by § 17 of that act, "In any action depending in any of the said superior courts for any *debt or demand not exceeding 20l.*, the court or any judge of any of the said courts (if satisfied that the trial will not involve any difficult question of fact or law) may order that the issue shall be tried before the sheriff of the county where the action is brought, or before any judge of a court of record for the recovery of debts in such county. And for that purpose a writ shall issue directed to the sheriff, commanding him to try such issue by a jury to be summoned by him, and

to return such writ with the finding of the jury thereon indorsed at a certain day in term or vacation to be therein named. And sect. 18 provides, that when the jury have found their verdict, it shall be as valid and of the like force as a verdict of a jury at Nisi Prius; and the sheriff or his deputy, or the judge, presiding at the trial of such issue, shall have the like powers with respect to amendment at such trial as are thereafter given to judges at Nisi Prius. And at the return of the writ costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff, his deputy, or the judge, before whom the trial is had, shall certify upon the writ that judgment ought not to be signed until the defendant shall have had an opportunity of applying to the court for a new trial, or unless a judge of any of the said superior courts shall think fit to order that judgment or execution shall be stayed until a day to be named in such order.

The sheriffs of the respective counties of England and Wales have been immemorially considered ministerial officers of the superior courts, in executing their process and obeying their rules. And all sheriffs are required to appoint a sufficient deputy, having an office within a mile of the Inner Temple Hall, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders to be made on or touching the execution of any process or writ to be directed to such sheriff.

RECENT IMPROVEMENTS IN THE PRACTICE OF THE COURTS.—Each of the courts had always an inherent authority to make general rules for the regulation of its own proceedings, and the judges of each, as occasion arose, were in the habit of making general rules for the particular practice of their own court, so that formerly a very considerable difference existed in the practice of the several courts. With the view of assimilating such practice, however, the 1 Wm. IV. c. 70 enabled the judges of the three courts conjointly, or any eight or more of them, including the chiefs, to make general rules and orders for regulating the proceedings of *all the courts* in all matters of practice over which they have a common jurisdiction, or relating to the practice of the Court of Error in the Exchequer Chamber. The Uniformity of Process Act, 2 Wm. IV. c. 39, also gave the judges of all the courts a general power to make rules and orders for its effectual execution, and the judges of each a particular power to regulate the duties of their own officers. And by the 3 & 4 Wm. IV. c. 42, the judges were empowered, at any time within five years from the 1st June, 1833, to make such alterations as to pleadings, judgments, and other proceedings in actions at law, and as to payment of costs &c., as may seem expedient; provided that such rules shall not take effect till six weeks after they have been laid before parliament. In pursuance of these powers, many General Rules have been made, by which the practice of the courts has been assimilated and much improved. Under the first-mentioned statute (1 Wm. IV. c. 70) were made the General Rules of Trinity Term 1831, and of Hilary and Easter Terms 1832; under the 2 Wm. IV. c. 39, the rules of Michaelmas Term 1832, and of Hilary and Trinity Terms 1833; and under the 3 & 4 Wm. IV. c. 42, the rules as to pleading &c. of Hilary Term 1834.

CHAPTER VIII.

Of Actions :

THEIR SEVERAL KINDS, AND THE VARIOUS INJURIES TO WHICH EACH IS APPLICABLE.

AN *action* is the means afforded by law of obtaining the remedy for an injury; for it is a general principle, that wherever the law confers or recognizes a right, or prohibits an injury, it also gives a remedy. Actions are divided into *criminal*, or such as concern pleas of the crown, and *civil*, or such as concern common pleas. The former will be the subject of a subsequent part of the work; our present concern is only with the latter, or *civil actions*.

Civil actions have been, from their subject matter, distinguished into *real*, *personal*, and *mixed*.

Real actions are for the specific recovery of real property only.

Personal actions are for the specific recovery of goods and chattels, or for damages or other redress for breach of contract or other injuries of whatever kind, the specific recovery of real property only excepted.

Mixed actions partake of the nature of the other two, being brought for the recovery of real property, and also for damages for an injury thereto.

But the learning which relates to this ancient division of legal remedies has now lost much of its importance. Real actions had long been almost totally laid aside in practice, more expeditious modes of trying a title to real property having been introduced by other actions, personal or mixed; and now, by a recent statute, 3 & 4 Wm. IV. c. 27, provision is made for the entire abolition of all real and mixed actions whatever, except only the four following: *Writ of Right of Dower*, *Dower*, *Quare Impedit*, and *Ejectment*.

Another distinction as to actions, which may be here noticed, is, that some are *local*, and others *transitory*. The former must be sued in a particular county, in which the declaration must allege the facts to have happened, and to which the jurors must belong who are to try the issue: the latter may be laid and tried in any county, at the plaintiff's election. All real and mixed actions, which relate generally to the seisin or possession of land, are of the *local* kind, and must be tried in the county where the land lies. So a *quare impedit* must be prosecuted in the county where the church is, and if it be for a prebend, in that where the cathedral stands. On the other hand, personal actions (except trespass as to real property) are in general *transitory*, and may be brought and tried in any county, according to the maxim, "*debitum et contractus sunt nullius loci*." But actions on penal statutes are generally required to be brought in the proper county; as are also all actions against magistrates and other official persons for any thing done in the discharge of their duty. And in other personal actions, although the plaintiff has the option, in the first instance, of laying his action in

what county he pleases, yet if the defendant will make affidavit that the cause of action, if any, arose not in that, but in another specified county, the court will direct a change of the venue, and oblige the plaintiff to declare in the proper county, unless he will undertake to give material evidence in the county in which he had first laid the action; in which case, on his failing to do so, he will be nonsuited. On the other hand, either in a *transitory* or a *local* action, if the court were satisfied that an impartial trial could not be had in the proper county, it would always direct a change of the venue, on the application either of the plaintiff or defendant. And now the 3 & 4 Wm. IV. c. 42, reciting that unnecessary delay and expence is sometimes occasioned by the trial of local actions in the county where the cause of action has arisen, enacts, that in any action in any of the superior courts, the venue in which by law is local, the court or any judge may, on application of either party, order the issue to be tried, or writ of inquiry to be executed in any other county or place, and for that purpose may order a suggestion to be entered on the record that the trial may be more conveniently had, or writ executed, in the county or place where the same is ordered to take place.

I. PERSONAL ACTIONS are in form *ex contractu* or *ex delicto*; in other words, they are for breach of contract, or for wrongs unconnected with contract. Those of the former class are principally *assumpsit*, *debt*, *covenant*, and *detinue*; those of the latter are *trespass*, *case*, *trover*, and *replevin*. *Detinue*, being for the recovery of any specific chattel, may occur under either head. *Account*, *annuity*, and *scire facias*, also belong to the former class; but the first two of these are now almost entirely obsolete, and the last is rather a renewal or continuance of a former action than an original one.¹

1. *ASSUMPSIT* is an action for the recovery of damages for the breach of a simple contract, or promise not under seal, whether for the payment of money or for the performance or omission of any other act. Such promise may be either express or implied; for the law always implies a promise to do that which a party is legally liable to perform. This remedy is consequently of very large and extensive application. Thus, if a man employs another in the way of his profession or occupation without any mention of reward, law as well as reason imputes to the employer a promise of making a suitable recompence for the business to be done, and he thereby becomes as liable to an action of *assumpsit* as if he had expressly stipulated for the price. As the consideration on which the promise is made is always the principal object, a distinction exists between the general form of this action called an *indebitatus assumpsit*, and a more particular kind called a *special assumpsit*; both of which, however, are unavailable without a good consideration.

First, The *indebitatus assumpsit* is on a promise to pay a precedent debt, as upon the hire or sale of goods, for work and labour performed, for use and occupation, and other cases of express contract and executed consideration. An *indebitatus assumpsit* will only lie where debt can be supported; it is therefore not maintainable on a collateral promise or undertaking. Here the consideration is set out in the declaration only in general terms. The plaintiff declares as for a certain debt arising out of the execution of the contract, where that constitutes

¹ By 9 & 10 Vic. c. 95, all pleas of personal actions under £20 may be holden by plaint in the County Court, without writ.

the debt, or upon the promise raised or implied by the law upon the execution of the contract or delivery of the goods, where no specific sum had been stipulated to be paid, in which case the law implies that so much money is to be paid as shall be reasonably found due, *quantum meruit*, or *quantum valebant*.

The general causes for which an indebitatus assumpsit is brought are 1. For money lent; 2. For money laid out and expended; 3. For money had and received to the plaintiff's use; 4. For goods sold and delivered either for a sum certain, or on a *quantum valebant*; 5. For work and labour, either for a sum certain and agreed, or on a *quantum meruit*; 6. On an account stated, called an *insimul computassent*.

Secondly, The assumpsit is termed *special* where the circumstances that induce the liability cast by the law upon the defendant must be particularly set forth in the declaration, and the plaintiff declares upon the original contract, setting out its particular language or effect.

Special assumpsits are either to pay or repay money, or to do or forbear some other act: as, First, a promise to pay money founded on some consideration executed or executory, as in consideration of marriage, the sale, assignment, or use of lands &c., the sale, exchange or hire of cattle or goods, necessities, forbearance, works and services, or indemnity; which promises may be made either by the party benefited or by third persons. Secondly, on *mutual promises*, which are either to pay money, as on wagers or feigned issues, or to do some other act, as to marry, &c., or to perform special agreements, as charter-parties, policies of assurance, or awards, the breach of which may consist either in the nonpayment of money or the non-performance of some other act.

One species of these assumpsits is termed the *liability* assumpsit, as arising on a promise to pay money in consideration of a legal liability to pay it, as upon a bill of exchange, promissory note, banker's draft, by-law or custom of a corporation, foreign judgment, fine on admission to copyhold premises, legacy charged on land, toll, port duty, contribution to party walls, &c.

Special assumpsits on promises to do or forbear some other act may be considered as they relate to persons, to real property, or to personal property; as,—First, to sell, assign, or exchange lands &c.; or by or against landlord or tenant, as to take, let, hold, repair, cultivate, or quit them. Secondly, upon a sale or exchange of cattle or goods, as to accept, deliver, take back, or return them, or upon a warranty as to their title, quality, or value. Thirdly, upon a bailment of cattle or goods, to be kept either generally or by way of pledge; or concerning cattle or goods lent or let to hire; or against carriers, wharfingers, farriers, &c. Fourthly, to provide necessities for the plaintiff or for third persons. Fifthly, to forbear to sue, or to give time for the payment of a debt. Sixthly, to perform works, under which may be classed promises made by professional persons, as attorneys, surgeons, &c.; or respecting real or personal property. Seventhly, upon a retainer to serve or employ. Eighthly, respecting real or personal securities. Ninthly, to account for the profits of lands, or for money, goods, &c. And, lastly, on promises of indemnity.

While a contract is executory, it must be treated as a special contract; when executed, it may be declared upon as a promise arising by

operation of law out of the execution of the contract. An action of *indebitatus assumpsit* may be supported for the recovery of any debt due in respect of labour or other personal services where the remuneration is to be paid in money, and the plaintiff has completely fulfilled his contract, however special the conditions. But if, on the contrary, any act remains to be done on the part of the plaintiff, though its non-completion may be occasioned by the conduct of the defendant, he must proceed on the special agreement. And if a party undertake a work of specific dimensions and materials, and deviate from the specification, he cannot recover upon a *quantum valebant* for the work, labour, and materials.

Where money has been paid under a written agreement, but which agreement the party is unable to perform, the other may maintain an action for money had and received, and he is not bound to enforce the special agreement. But the contract must have been wholly rescinded or put an end to, as where, by the conditions of it, it is left in the power of the plaintiff to rescind it by any act, and he avails himself of that right, or where the defendant afterwards assents to its being rescinded. If, on the other hand, the contract continues open and unabrogated, the plaintiff's demand is not in fact for the whole amount, but for damages arising out of the non-performance, and he must then resort to the special contract. An agreement cannot be rescinded by one party for the omission or default of the other, unless both can be placed in the same situation they were in anterior to the contract.

Where a party is precluded from recovering upon the special agreement, as on a bill of exchange or promissory note, if he can adduce other evidence of the consideration, he may recover on the common counts.

Money lent and advanced may be recovered in the general form of an *indebitatus assumpsit*, whether it was absolutely delivered to the defendant or to a third person at his request. But if the defendant's liability arises out of a collateral engagement, as a promise to pay the debt of another, though the money be advanced at the request of the defendant, the action ought to be brought on the special contract, which, by the Statute of Frauds, must be in a written note or memorandum.

A master may sue in *assumpsit* a person who has enticed away or harboured his apprentice, for the work and labour of such apprentice.

Assumpsit is the proper remedy against attorneys and solicitors, surgeons, innkeepers, wharfingers, carriers, and other bailees, for neglect or other breach of duty.

Assumpsit is also the proper remedy for a breach of a promise to marry; and against a vendor for not delivering goods bought, or against a vendee for not accepting goods sold, or for not delivering a bill of exchange in payment for the same; or upon an express warranty of the goodness or quality of any personal chattel, either on the sale or exchange thereof; or upon an express or implied warranty as to the property therein; and by and against vendors and purchasers for not completing a contract for sale, and for not rendering a just account of moneys or goods.

This action may be brought by a landlord against his tenant, who, having by a written memorandum not under seal contracted for the lease of an estate, afterwards refuses to execute the indentures, though

he enters upon and occupies the farm. Other similar occasions for using this action may occur between landlord and tenant, where there have been agreements in writing but not under seal. It is maintainable to obtain a recompence for the occupation of the plaintiff's land by his permission, where there has been no stipulation for any precise rent. The declaration states a promise of the defendant to pay so much as the landlord reasonably deserved to have (*quantum meruit*) for such permission; which promise is implied by law: for, there being no certain rent fixed, the plaintiff could not distrain, nor perhaps properly bring an action of debt; this therefore becomes the plaintiff's genuine remedy.

The action of assumpsit is in general the only proper remedy for the non-performance of a collateral undertaking, as on a simple contract for the payment of the debt of a third person; or by the indorsee of a promissory note against the maker, or by the payee or indorsee of a bill of exchange against the acceptor. In these and similar collateral promises debt is not sustainable. Nor can that action be resorted to unless the whole amount is actually due; therefore to recover money payable by instalments, the only adequate mode is by action of assumpsit.

When a party has a *security of a higher nature*, he must found his action thereon. Therefore where there is an express contract under seal or of record, the party must proceed in debt or covenant when the contract is under seal, or in debt or *scire facias* if it be of record. But where the contract under seal is invalid, or where it was executed only by the plaintiff, if any evidence can be adduced to raise an implied assumpsit, an action of assumpsit may be maintained. So where, in respect of a new consideration, there has been a *new contract* to pay a debt or perform a contract under seal, assumpsit may be supported; as on a promise to an assignee of a bond, to pay him in consideration of forbearance, or on a promise by an heir having assets by descent to pay the debt of his ancestors for the same consideration. So between partners, who have by deed covenanted to account with each other and to pay over what shall appear to be due, if they state an account, and one expressly promise to pay the balance, assumpsit may be supported notwithstanding the deed. And where a contract under seal has been afterwards varied in the terms of it by a simple contract, such substituted agreement must be the subject of an action of assumpsit, and not of an action of covenant.

It is also a rule, that when a bond or other security under seal or of record has been accepted in *satisfaction* of a simple contract, the latter is *merged* in such higher security, and assumpsit is not sustainable, unless such new security be void on account of usury, or under the Annuity Act, &c.; in which cases the party may proceed on the original simple contract, if valid. If an infant give a bond in a penalty for necessities, the bond being voidable, the creditor may proceed in assumpsit. But the taking of a *collateral* security of a higher nature, whether from the principal or a surety, does not preclude the creditor from suing the original debtor in assumpsit on the first contract, though judgment may have been obtained upon such collateral security.

This action is sustainable upon the judgment of a foreign court, which is not considered as a debt of record in this country, unless in

the case of an Irish judgment since the Union. But it will not lie on the decree of a court of equity.

This action cannot be supported against a corporation, which cannot contract by parol, except in the case of promissory notes or bills of exchange, their power of drawing and accepting which is recognized by statute, and of other contracts sanctioned by legislative provisions. But a corporation may be plaintiffs in this action.

Where there has been an express contract, the party injured may sustain an action of *assumpsit*, though the breach amount to a trespass. But unless there has been such a contract, or the law will under the circumstances imply a contract, the plaintiff must resort to another form of action; therefore *assumpsit* for use and occupation cannot be supported where the possession is adverse, but the plaintiff should declare in trespass or ejectment. But if a tenant hold over, his landlord is at liberty still to treat him as his tenant. And *assumpsit* lies to recover rents tortiously received.

The *declaration* in this action must invariably disclose the consideration upon which the contract was founded,—the contract itself, whether express or implied,—and the breach thereof; and damages should be laid to cover the full amount. This action being transitory, the venue may be laid in any county, at the election of the plaintiff, subject to being changed at the discretion of the court under particular circumstances.

The most general plea is *non assumpsit*, that the defendant did not undertake and promise as alleged by the plaintiff, under which the defendant might formerly have given in evidence most matters of defence. But now, by the New Rules (Hil. T. 4 W. IV.) it is ordered, that—

“In all actions of *assumpsit*, except on bills of exchange and promissory notes, the plea of *non assumpsit* shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law: *Exempli gratiâ*—

“In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged consideration, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

“In actions against carriers and other bailees for not delivering, or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

“In an action of *indebitatus assumpsit* for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in point of fact. In the like action for money had and received, it will operate as a denial both of the receipt of the money, and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

“In all actions upon bills of exchange and promissory notes, the plea

of *non assumpsit* shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact, *ex. gr.*, the drawing or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

"In every species of assumpsit, all matters in confession and avoidance, including not only those by way of discharge, but those that show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded: *Ex. gr.* Infancy,—coverture,—release,—payment,—performance,—illegality of consideration, either by statute or common law,—drawing, indorsing, accepting, &c. bills or notes by way of accommodation,—set-off,—mutual credit,—unseaworthiness,—misrepresentation,—concealment,—deviation,—and various other defences, must be pleaded."

The *judgment*, if in favour of the plaintiff, is, that he recover a specified sum, assessed by a jury or on reference to the master, for his damages which he hath sustained, and for *full costs* of suit; to which the plaintiff is in all cases entitled in this action, unless the damages are under 40s., and the judge certifies under the 43 Eliz. c. 6. In cases of small debts the plaintiff's right to costs is taken away by the various statutes regulating Courts of Conscience. The defendant, if he succeed, is entitled to full costs.

2. **DEBT.**—The action of debt is founded on a contract either express or implied, and is confined, in legal consideration, to the recovery of a debt *eo nomine* and *in numero*, and not for a compensation in damages.

Debt is in some respects a more extensive remedy for the recovery of money than assumpsit or covenant. It lies to recover money due upon legal liabilities; upon simple contracts, express or implied, verbal or written; upon contracts under seal, or of record; and on statutes, whether by the party grieved or by a common informer. It lies in most cases where the demand is for a sum certain, or is capable of being readily reduced to a certainty, but not where it is in the nature of unliquidated damages.

Debt lies upon all *simple contracts*, where there is a commutation of property for money; as for the value of goods sold and delivered, for money lent, had and received, due on an account stated, or for work and labour, &c. It is a general rule, that wherever *indebitatus assumpsit* lies, debt is also maintainable; therefore this action may be sustained on by-laws, foreign judgments, fines and amerciaments, on bills of exchange by the payee against the drawer, or on a promissory note by the payee against the maker. But an action of debt cannot be supported by the payee against the acceptor of a bill; for the acceptance is only a collateral engagement, and the drawer, who was the original debtor, continues liable. And it does not lie by or against the indorsee or acceptor, or on any similar promise to pay the debt of another.

It lies on an award to pay money, but not to perform any other act, unless there was an arbitration bond, in which case the action must be brought thereon.

Debt lies to recover money due on any *specialty* or contract under seal to pay money, as on simple bonds, on charter-parties, on policies of assurance under seal, and on bonds conditioned for the payment of money or the performance of any other act, by or against the parties thereto and

their personal representatives, and against the heir of the obligor, if he is named in the deed, or against a devisee having legal assets.

It also lies on *records*, as upon the judgment of a superior or inferior court, and even upon the decree of a colonial court which has no power to enforce its decrees in this country. And though the judgment was erroneous, yet debt lies until it has been reversed. Where, however, the defendant has been taken in execution on the judgment and discharged with the plaintiff's concurrence, no action can be supported on the judgment; and where the defendant has been discharged under the Lord's Act, debt is not sustainable. Actions of debt upon judgments have become less frequent since the 43 Geo. III. c. 46, which precludes the plaintiff from recovering costs in such an action unless the court or one of the judges shall so direct; and the courts uniformly discourage actions of debt on judgments, as being oppressive and vexatious. Debt is sometimes brought upon a recognizance of bail; but the remedy thereon is more frequently by *scire facias*, because the proceeding is more expeditious, and the bail have less opportunity of discharging themselves by rendering the principal.

In some cases this remedy is given to the party grieved by the express words of a *statute*, as for an escape out of execution, or against a tenant for not quitting in pursuance of a notice to quit given him by his landlord. And if a statute prohibit the doing an act under a penalty or forfeiture to be paid to the party grieved, and do not prescribe any mode of recovery, it may be proceeded for in this form of action.

When a penal statute expressly gives the whole or a part of the penalty to a common informer, and enables him generally to sue for the same, debt is sustainable; but if there be no express provision enabling an informer to sue, debt cannot be supported in his name for the penalty.

In some cases this action is the *peculiar* remedy, as against a lessee for an apportionment of rent where he has been evicted from part of the premises by a third person, though covenant is in such case sustainable against the assignee of the lessee. It is also the only remedy against a devisee of land for a breach of covenant by the deviser.

Debt is preferable in some respects to the action of *assumpsit*, because the judgment is final in the first instance, and not interlocutory, as in *assumpsit*.

It was once thought that in an action of debt the plaintiff could not in any case recover less than the sum demanded; which notion greatly discouraged this action on simple contracts. It is, however, now settled that the plaintiff may prove and recover less than the sum stated.

Formerly also the defendant might wage his law in this action when brought on simple contract; that is, he might purge himself of the debt by his own oath, supported by a sufficient number of witnesses as to his credibility. But wager of law, after having been long disused, was at length abolished by 3 & 4 Wm. IV. c. 42.

Debt on simple contract was formerly not maintainable against executors or administrators; but this remedy is now made available against them by the 3 & 4 Wm. IV. c. 42.

The *declaration* in this action, if on simple contract, must shew the consideration on which the contract was founded, precisely as in

assumpsit, and should state either a legal liability or an express agreement, though not a promise to pay the debt. But on specialties or records no consideration need be shown, unless where the performance of the consideration constitutes a condition precedent, when performance must be averred. Where the action is upon a deed, it must be declared upon, except in the instance of debt for rent.

As to the pleas in this action, it is ordered by the General Rules of Hil. T. 4 W. IV., that—

“ In debt on specialty or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

“ The plea of *nil debet* shall not be allowed in any action.

“ In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead, that “ he never was indebted in manner and form as in the declaration alleged,” and such plea shall have the same operation as the plea of non assumpsit in indebitatus assumpsit; and all matters in confession and avoidance shall be pleaded specially, as above directed in actions of assumpsit.

“ In other actions of debt, in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specially some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.”

The judgment in the plaintiff's favour (which at common law is final in all cases) is, that he recover his debt, and in general nominal damages for the detention thereof; and in cases under the 8 & 9 Wm. III. c. 11, it may also be awarded that the plaintiff have execution for the damages sustained by the breach of a bond conditioned for the performance of covenants. The plaintiff, unless in some penal and other particular actions, is entitled to *full costs* of suit, although the damages recovered be under 40s., unless the judge certify under the 43 Eliz. c. 11.

When the action is for rent, or on a money bond, or on a written contract for a sum certain, and the defendant suffers judgment by default, he must in general find bail in error, which renders this action frequently preferable to assumpsit or covenant.

3. COVENANT is a remedy for the recovery of damages for the breach of a covenant or contract under seal. This action is founded upon articles of agreement, awards, charterparties of affreightment, policies of insurance, indentures of apprenticeship, leases, mortgages, &c.; and is either for the nonpayment of money, or for not doing or forbearing to do some other act.

Covenant is the *peculiar* remedy for the nonperformance of a contract under seal where the damages are unliquidated and depend in amount on the opinion of a jury; in which case, we have seen, that neither debt nor assumpsit can be supported. It is the proper remedy where an entire sum is by deed stipulated to be paid by instalments, and the whole is not due, nor the payment secured by a penalty.

It is frequently more advisable to proceed in covenant on a lease &c. for general damages, than to declare in debt for the penalty, because

the party having proceeded for the penalty is precluded from afterwards suing for general damages, and he cannot, in case of further breach, recover more than the penalty; and in many cases, before he can issue execution, he must proceed under the 8 & 9 Wm. III. c. 11; whereas if he proceed in covenant for every repeated breach, he may ultimately recover more than the amount of the penalty.

Where rent is due upon a lease, and there has also been another breach, as for not repairing, for which the plaintiff claims damages, covenant is preferable to debt, as by it damages for the whole demand may be recovered.

Covenant cannot in general be supported unless the contract is under seal;¹ when it is by parol, the plaintiff must proceed by action of assumpsit &c., unless by special custom in London and some other places, or against the lessee or patentee of the crown, when covenant may be supported although he did not seal any counterpart of the lease, it being matter of record, and the lessee's acceptance of the demise being in such case as obligatory as an express covenant.

In some cases, where the breach of a covenant is misfeasance, the party has an election to proceed by action of covenant or by action on the case for the tort, as against a lessee, either during his term or afterwards, for waste.

As it is a settled rule, that a tenant's liability on his covenant to pay rent subsists during the continuance of the lease, notwithstanding he may become bankrupt or insolvent and be deprived of all his property, it has been determined that a plea of bankruptcy and certificate is no bar to an action of covenant for nonpayment of his rent.

So where the grantor of an annuity has become a bankrupt or an insolvent debtor, the grantee should proceed for arrears which have accrued due after the insolvency by action of covenant on the annuity deed, and not by action of debt on the annuity bond, to which the bankruptcy and certificate would be a bar.

There is properly no general issue in covenant; matters of defence must be pleaded specially. By the Gen. Rules of Hil. T. 4 Wm. IV., "*Non est factum* operates as a denial of the execution of the deed in point of fact only; and all other defences shall be specially pleaded, including matters which make the deed absolutely void as well as those which make it voidable."

The *judgment* is for the recovery of such damages as the plaintiff proves, with full costs of suit, to which he is entitled though the damages be under 40s., unless the judge certify under the 43 Eliz.

4. *DETINUE* is the only remedy for the recovery of a personal chattel in specie, unless in those cases where the party can regain the possession by replevin; for in the actions of trespass and trover for taking away or detaining goods, or in assumpsit for not delivering them, damages only can be recovered; and even in this action it is at the election of the defendant whether he will deliver the specific goods or pay the value as estimated by the jury.

In order to maintain an action of detinue, it is requisite that the thing detained should be capable of being identified; hence it will not lie for money, corn, &c., unless in a bag or chest, or otherwise distinguishable. But it lies for a horse or cow, or for money in a bag, or for deeds or

¹ Churchill v. Day, 3 Man. & Ry. 71. Baber v. Harris, 9 Adol. & Ell. 532.

other writings, if the plaintiff can describe them, although the date be not mentioned. It is sustainable upon a contract for not delivering a specific chattel in pursuance of a bailment or other contract.

A person who has the absolute or general property in goods, and the right to immediate possession, may support *detinue*, although he has never had the actual possession; therefore an heir may maintain this action for an heir-loom; and if goods be delivered to A, to deliver to B, the latter may support this action, the property being vested in him by the delivery to his use.

So a person who has only a special property, as a bailee, may support this action, where he delivered the goods to the defendant, or they were taken out of such bailee's custody.

But if the plaintiff's interest be not immediate, but only in reversion, he cannot support either *detinue*, *trover*, or *trespass*.

If a person detain the goods of a woman which came to his hands before her marriage, the husband alone must bring the action, because the property is in him alone at the time of the action brought.

The gist of this action is the continued and wrongful detainer, and not the original taking; therefore it may be sustained against any person who has acquired possession of the chattel by lawful means, as by bailment, finding, or borrowing. But it does not lie against a bailee, if before demand he lose them by accident; though if he wrongfully deliver them to another, he will continue liable.

But the action cannot in any case be supported against a person who never had possession of the goods, as against personal representatives on a bailment to the deceased, unless they came actually into their possession. But if, after the death of the bailee, a stranger take the property, *detinue* lies against him.

If goods be delivered to a woman before her marriage, and afterwards detained, the action must be brought against husband and wife. But if the bailment were to the husband and wife after marriage, it is said, the husband must be sued alone.

In the *declaration* in this action, more certainty is necessary as to the description of the chattels than in an action of *trover* or *replevin*; and the number, quantity, and value of the goods should be stated. In the case of a special bailment, it is proper to declare, at least in one count, on the bailment, and to lay a special request; but in other cases it is sufficient to declare upon the supposed finding, which is not traversable.

The general issue is *non detinet*; which, under the General Rules of Hil. T. 4 Wm. IV., "operates only as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein; and no other defence than such denial shall be admissible under that plea."

The *judgment* is in the alternative, that the plaintiff recover the goods, or the value thereof if he cannot have the goods themselves, and damages for the detention, with full costs of suit. The jury ought by their verdict to find the value of the goods, and, if they consist of several parcels, of each separate parcel; and if they neglect, the omission cannot be aided by a writ of inquiry.

This action was subject to *wager of law* till that mode of trial became obsolete; on which account it was not much in use and it is now not very frequently adopted.

5. **ANNUITY** is an action which lies for the recovery of an annuity or yearly payment of a certain sum of money granted to another in fee, for life, or for years, charging the person of the grantor only. It may be brought by the grantee or his heirs. This action, however, is at present out of use, being superseded by the action of debt or covenant.

6. **ACCOUNT** lies at common law against a guardian in socage, bailiff, or receiver, to compel an account of profits or moneys received by the defendant; and, by the statute 4 & 5 Anne, c. 16, it may be maintained against the executors and administrators of every guardian, bailiff, and receiver, and also by one joint tenant or tenant in common against the other, as bailiff, for receiving more than his share or proportion, and by and against their executors and administrators. The proceedings in this action being difficult, dilatory, and expensive, it is now seldom used; especially as the party has in general a more beneficial remedy by an action for money had and received &c., or, if the matter be of an intricate nature, by resorting to a court of equity.

7. **SCIRE FACIAS** is rather a continuance or renewal of a former action than an original action. It is a judicial writ founded on some matter of record, as a recognizance, judgment, &c., on which it lies to obtain execution, or for other purposes, as to repeal letters patent, hear errors, &c. But, because the defendant may plead thereto, it is considered in law as an action; and therefore a release of all actions is a good bar to a scire facias.

If execution be not sued out within a year and a day after judgment obtained in any action, it is necessary to have a scire facias to revive the judgment. It lies as of course within ten years after the judgment; after that period there must be a motion, which is granted as of course; but after fifteen years, it must be on a rule to show cause.

So if the plaintiff or defendant die within a year and a day after judgment obtained, there cannot be execution taken out without a scire facias by or against the executors or administrators.

Scire facias may be sued out against the bail in an action, where the principal has not paid the debt or damages recovered, nor rendered himself to prison. But it is in general more advisable to proceed against the bail by action of debt on the recognizance; because in this action no costs are allowed, unless they appear and plead, or join in demurrer, and the plaintiff may recover damages for the detention of the debt, which he cannot do in scire facias.

8. **TRESPASS VI ET ARMIS**, or **TRESPASS** properly so called, lies to recover damages for immediate wrongs accompanied with force; as to the person, by menaces, assault, battery, wounding, mayhem, or false imprisonment; to real property, as houses, lands, fisheries, or water-courses; or to personal property, by destroying, damaging, taking away, detaining, or converting cattle or goods.

Though the action of trespass lies only for injuries committed with force or violence, yet this violence may be either *actual* or *implied*; and the law will imply violence, though none is used, where the injury is of a direct and immediate kind, and committed on the person, or to tangible and corporeal property of the plaintiff. Of actual violence an assault and battery is an instance; of implied, a peaceable but wrongful entry upon the plaintiff's land.

But this action cannot be sustained where the wrong complained of was a mere nonfeasance, as for not carrying away tithes &c.; or where the matter affected is not tangible, and therefore cannot be immediately injured by *force*, as reputation, health, &c.; or where the right affected is incorporeal, as a right of common or way &c.; or where the plaintiff's interest is in reversion, and not in possession; or where the injury was not immediate but consequential. In all which cases, as we shall presently see, an action on the case, and not trespass, is the proper remedy.

Trespass is the only remedy for a menace to the plaintiff attended with consequent damages, and for an illegal assault, battery, and wounding, or imprisonment, when not under colour of process. It lies also where the battery, imprisonment, &c. were in the first instance lawful, but the party by an unnecessary degree of violence becomes a trespasser *ab initio*, and for a wrongful imprisonment after the process is determined, or for an assault after an acquittal for a felonious assault.

So it lies for an injury to *relative* rights occasioned by force, as for menacing tenants, servants, &c., and for beating, wounding, and imprisoning a wife or servant, whereby the landlord, husband, or master sustains a loss; though the injury, loss of service, &c. be consequential only and not immediate. And it lies for criminal conversation, as for seducing away a wife or servant, or for debauching the latter; in which cases force is implied, the wife or servant being considered as having no power to consent.

Trespass is a concurrent remedy with trover for most illegal takings. Thus, even in the case of a distress for rent, where there has been an illegal taking, as for distraining when no rent was due, or taking implements of trade or beasts of husbandry when there was a sufficiency of other property, or a horse while his rider was upon him. So if an outer door be broken open to make a distress, trespass lies; for the statute 11 Geo. II. c. 19, which enacts, that a party distraining for rent shall not be deemed a trespasser *ab initio*, only relates to irregularities after a legal taking.

This action sometimes lies where there has been no wrongful intent; as if a sheriff, or a messenger on behalf of the assignees of a bankrupt, by mistake take the goods of a wrong person; but not in the case of a levy under an execution after a secret act of bankruptcy, when trover only can be supported.

So trespass lies for any immediate injury to personal property occasioned by actual or implied force, though the wrong-doer might not take away or dispose of the chattel, as for shooting or beating a dog or other live animal, or for hunting or chasing sheep &c.

Trespass is the proper remedy to recover damages for an illegal entry upon, or an immediate injury to, *real property corporeal* in the possession of the plaintiff. With respect to the nature of the property, it must in general be something tangible and fixed, as a house, room, out-house or other buildings, or land; and the act of trespass is complete by the wrongful entry in a messuage or tenement of another, although the defendant does not continue in possession. So every unjustifiable entry into the land of another is a trespass, for which trespass *quare clausum fregit* is sustainable, whether the same be in-

closed or set apart by a visible and material fence, or by an ideal invisible boundary existing only in contemplation of law, as where one man's land adjoins to another in the same field. For the term *close* is technical, and signifies the interest in the soil, and not merely a close or inclosure in the common acceptance of the term.

Trespass may also be maintained for an injury to the plaintiff's land covered with water; but if the plaintiff's interest be merely in the water, case is the only remedy.

Though the original entry were lawful, yet by a subsequent abuse of an authority *in law* to enter, as to distrain &c. (except for rent or poor's rates), the party may become a trespasser *ab initio*. If an officer neglect to remove goods attached within a reasonable time, and continue in possession, his entry becomes a trespass *ab initio*. So in the case of distress for rent, if the party remain in possession more than five days, or turn the plaintiff or his family out of possession. But in case of an authority *in fact* to enter, an abuse of such authority will in general subject the party to this action.

As to the application of the action of trespass to injuries committed *under colour of a legal proceeding*:—In general, no action can be supported for any act, however *erroneous*, if expressly sanctioned by the judgment or direction of one of the superior courts at Westminster, or even by an inferior magistrate acting within the scope of his jurisdiction. And no action will lie against a judge or justice of the peace for what he does judicially, if he has not exceeded his jurisdiction, however erroneous his decision or malicious his motives. But when in inferior courts the error in the proceeding is such as to render it an *excess* of jurisdiction, trespass may be supported for any thing done under it. And in case of error by a *ministerial* officer, this action may be supported, if the injury were immediate and committed with force.

When the court has *no jurisdiction* over the subject matter, trespass is the proper form of action against all the parties for any act which, independently of the process, would be remediable by this action, or by trover if goods had been taken.

Trespass is also the proper remedy where an inferior court has jurisdiction, but is bound to observe certain forms in its proceedings, from which it deviates, whereby the proceedings are rendered *coram non judice*.

So where the proceeding is *defective*, as being irregular or void, trespass against the attorney and plaintiff is in general the proper form of action; and where a judgment has been set aside for irregularity, this is the appropriate remedy for any act done under it. But it lies not for arresting a person privileged; but case is the only remedy.

Where the process is *misapplied*, as if A or his goods are taken upon a process against B, trespass is in general the only remedy; or if there is a misnomer in the process, though it was executed on the person or goods of the party against whom it was in fact issued.

When the process of a court is *abused*, trespass against the sheriff and his officer is the proper action, if the conduct of the officer was in the first instance illegal, as if the officer arrest out of the sheriff's bailiwick, or if he break open an outer door, &c. So though the conduct of the officer was in the first instance lawful, but he abused his

authority and thereby became a trespasser *ab initio*. But, in general when the act complained of is a mere nonfeasance, as if a sheriff magistrate, &c. improperly refuse bail, or to act when they ought, an action on the case is the proper remedy.

No person who acts upon a *regular writ* or warrant can be liable to this action, however malicious his conduct; but case for the malicious motive and proceeding is the only form of action. But when an officer proceeds *without warrant* and without foundation, upon his own apprehension, though there was probable cause, trespass is the proper form of action against him. And when he has proceeded without warrant on the information of another, trespass is also the proper form of action against the informer, if the information turn out unfounded.

To entitle a party to maintain trespass for an injury to a personal chattel, he must, at the time when the act was committed, either have had the *actual possession* in him of the thing which is the object of the trespass, or a *constructive possession* in respect of the immediate right being actually vested in him; it being an established principle of law, that the general property in personal chattels *prima facie* draws to it the possession. As if a man give A his goods, which are at York, and before A has obtained possession, a stranger take them, yet A shall have trespass, because by the gift the property is in A, to which the law annexes the possession. And this rule by relation is applicable to executors and administrators, who may support trespass on this constructive possession for an injury to the personal property of the deceased before probate or administration. But in the case of property in possession of a bailee, if the general owner has parted voluntarily with his possession, and the bailee has a right to use the thing, the inference of possession is rebutted, and the right of possession being only in reversion, the general owner cannot support trespass, but only an action on the case, for an injury done by a stranger while the bailee's right continues. As where A had let his house ready furnished to B, it was held that A could not maintain trespass against the sheriff for taking the furniture under an execution against B, though notice was given that the goods belonged to A; because this action is founded on a tort done to the possession, which was not in A at the time of the seizure. But a person having an actual, though perhaps an illegal possession, may support trespass against any person except the rightful owner.

As to the possession required to support this action, there is a material distinction between *personal* and *real* property. For although, as we have seen, with respect to the former, the general property draws to it the possession sufficiently to enable the owner to support trespass, though he may never have been in the actual possession of it, yet in the case of land and other real property, this rule of *constructive possession* does not hold; and unless the plaintiff had the *actual possession*, by himself or his servant, at the time when the injury was committed, he cannot support this action. Thus, before entry and actual possession, a person cannot maintain trespass, though he have the freehold *in lan*; as a parson before induction, an heir or a devisee against an abator, or a lessee for years, before entry. But a disseisee may have this action against the disseisor for the injury done by the disseisin, at which time the plaintiff was seised of the land; though he cannot have it for any

act committed after the disseisin until he has acquired possession by re-entry, and then he may maintain it for any intermediate damage done ; for after his re-entry the law, by a kind of *jus postliminii*, supposes the freehold to have all along continued in him.

A landlord cannot, during a subsisting lease, support trespass ; but the action of trespass must be in the name of the tenant, or the landlord may proceed in case as a reversioner ; unless the injury was committed to trees or other property excepted in the lease, or the trees were carried away, when the latter may support trespass for cutting, injuring, or carrying away the same. The mere occupation of a lodge or other premises by a gamekeeper or other servant, he not paying rent, is considered as the possession of the employer, and the latter may declare as on his own possession.

Any possession is sufficient against a wrong-doer, or a person who cannot make out a title *prima facie* entitling him to the possession. Therefore a person in possession under an illegal lease may maintain this action ; and a tenant for years, a lessee at will, and a tenant at sufferance, may support this action against a stranger, or even against his landlord, unless a right of entry be expressly or impliedly reserved.

A person having a mere *incorporeal* right, as of common of pasture, turbary, or estovers, cannot support trespass for treading down or damaging the grass, for he is not to be considered as in possession of the land. But whenever there is an *exclusive* right, trespass may be supported, though the party has not the absolute right to the soil or the whole property therein ; as if a person have an exclusive right to cut turf and peat, he may support trespass *quare clausum fregit* and for cutting the turf. So, however temporary the plaintiff's interest may be, and although it be only in the profits of the soil, as where a person contracted with the owner of a close for the purchase merely of a growing crop of grass there, it was decided that he had such an exclusive possession, though for a limited purpose only, that he might maintain trespass *quare clausum fregit* against any person entering the close and taking the grass, even with the assent of the owner. So if a meadow be divided annually among certain parishioners by lot, each individual, after the portions are allotted, is capable of maintaining an action of trespass, for every one has a separate and exclusive interest in his share for the time. But a party having a right to a seat in a pew has not such an exclusive possession as to enable him to maintain trespass against a stranger, the possession of the church being in the parson.

Trespass will not lie for a loss or injury occasioned by a bailee's negligence, because it does not lie for a mere nonfeasance. And generally it will not lie against a bailee having possession coupled with an interest, for abusing a chattel, because an interest and the right of possession continue in the bailee. But if the thing be *destroyed*, his interest is then determined, and trespass will lie ; as if the bailee of sheep to feed his land, or of oxen to plough it, kill or destroy them. So when a tenant at will cuts down trees, his interest is thereby determined, and trespass would lie. But against a lessee for years, case in the nature of waste would be the proper remedy for the cutting, unless the trees were excepted in the lease ; though if he afterwards take the trees away, trespass or trover will lie.

The proper remedy by one joint-tenant or tenant in common against another for committing waste to the land or other property, as by cutting down trees unfit to be cut down, is an action on the case as for a misfeasance; but if one tenant in common disturb another in the possession, trespass *quare clausum fregit* may be supported.

The declaration in this action should contain a concise statement of the injury complained of, and allege that such injury was committed *vi et armis* and *contra pacem*.

The general issue is Not guilty; which, by the New Rules (Hil. T. 4 W. IV.), "in actions of trespass *quare clausum fregit*, shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially. In actions of trespass *de bonis asportatis*, the plea of Not guilty shall operate as a denial of the defendant having committed the trespass alleged by taking or damaging the goods mentioned therein, but not to the plaintiff's property therein."

The verdict and judgment are for damages assessed by the jury, and for the costs.

To prevent trifling and malicious actions for words, for assault and battery, and for trespass, by the 43 Eliz. c. 6. and 22 & 23 Car. II. c. 9, where the jury gave less than 40s. damages, the plaintiff was allowed no more costs than damages, unless the judge certified that an actual battery (and not an assault only) was proved, or that in trespass the freehold or title of the land came chiefly in question. But now, by the 3 & 4 Vict. c. 24, the act of the 43 Eliz. so far as it relates to costs in actions of trespass or trespass on the case, and so much of the 22 & 23 Car. II. as relates to costs in personal actions, are repealed; and it is enacted, that if the plaintiff in any action of trespass or of trespass on the case shall recover, by the verdict of a jury, less damages than 40s., he shall not be entitled to recover any costs whatsoever, whether it shall be given upon any issue tried, or judgment be passed by default, unless the judge certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance, or that the trespass or grievance was wilful and malicious. Provided, that nothing herein shall extend to deprive any plaintiff of costs in any action brought for a trespass over any lands &c., or for entering into any dwellings, out-buildings, or premises, in respect of which notice not to trespass thereon had been previously served by or on behalf of the owner or occupier, or left at the last reputed or known place of abode of the defendant.

9. CASE.—Actions on the case are founded on the common law or upon acts of parliament. They lie generally to recover damages for torts or wrongs not committed with force, actual or implied; or where the injury was not immediate but consequential; or where the matter affected is not tangible, as to health or reputation, or to real property incorporeal; or where the plaintiff's interest in the property is only in reversion; in all which cases, as we have seen, trespass is not sustain-

able. And this action is not confined to injuries merely *ex delicto*, but is a concurrent remedy with assumpsit for many breaches of contract, which are not for the payment of money merely. Indeed, at one time the action of assumpsit itself was considered to be an action on the case; but at present when an action on the case is mentioned, it is usually understood to mean an action in form *ex delicto*.

This action originated in the power given by the Statute of Westminster II. (13 Edw. I. c. 24) to the clerks of the Chancery to frame new writs *in consimili casu* with writs already known. Under this power they framed many writs for different injuries which were considered to bear a certain analogy to trespass. These new writs accordingly received the appellation of writs of *trespass on the case*, as being founded on the particular circumstances of the case thus requiring a remedy, and to distinguish them from the old writ of trespass; and the injuries themselves, which are the subject of such writs, were not called *trespasses*, but had the general name of *torts*, wrongs or grievances. The writs thus invented *pro re natâ* in various forms, according to the nature of the different wrongs which called them forth, began to be viewed as constituting a new genus or form of action, which took its place among the more ancient actions of debt, covenant, trespass, &c. by the name of *trespass on the case*. Such being the nature and origin of this action, it comprises, of course, many different species.

We shall first consider this action as applicable to injuries where the right affected is not tangible, and consequently cannot be affected by force, as reputation; the injuries to which are always remediable by an action on the case, as for verbal slander, and libels.

Actions for Slander.—To prevent the perjury of witnesses and a multiplicity of frivolous suits, the action for slanderous words is laid under two very just restraints by stat. 21 James I. c. 16. For, first, the action must be commenced within two years next after the words spoken; and secondly, if the damages recovered be under 40s., the plaintiff is entitled to no more costs than damages. But it has been adjudged that neither of these clauses extends to cases where *special damage* in consequence of the slander published is stated in the declaration and proved at the trial. As to costs, however, see 3 & 4 Vict. c. 24, recited *ante*, under the head *Trespass*.

Words for which this action may be supported are either such as are in themselves actionable, that is, from which the law implies an injury, or such as become so in consequence of some special damage resulting from their having been uttered.

Words are *actionable in themselves* which may either endanger a man in law, as by imputing to him some crime liable to punishment, as to say that a man has poisoned another, or is perjured; or which may exclude him from society, as to charge him with having an infectious disease; or which may impair or hurt his trade or livelihood, as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave. Thus, an action will lie for accusing a clergyman of incontinence &c., for which he may be deprived; or a barrister, attorney, or artist, of inability, inattention, or want of integrity; or a person in trade, of fraudulent or dishonourable conduct, or of being in insolvent circumstances, as for saying of one who carries on the business of a corn

vender, "You are a rogue and a swindling rascal; you delivered me 100 bushels of oats worse 6d. a bushel than I bargained for." In all these cases the words are actionable without proof of special damage, because they have a direct tendency to injure the party accused.

But with regard to words that do not thus apparently and upon the face of them import such defamation as must, as an inseparable consequence, prove injurious to the plaintiff, he must show some *special* loss or damage arising from the calumny; as if one man slanders the title of another, by propagating such injurious reports as if true would deprive him of his estate, whereby he loses an opportunity of selling it; or if, in consequence of words spoken, the plaintiff is deprived of any substantial benefit, as to say of a woman, she is a whore, whereby she loses her marriage, or the benefit arising from the hospitality of friends, this is a sufficient temporal damage whereon to maintain an action.

In neither case, however, is the plaintiff at liberty to give evidence of any special loss or injury he may have sustained from the calumny, unless it be specifically set out in the declaration.

Mere scurrility, or opprobrious words which neither in themselves convey and are not in fact attended with any injurious effects, as saying to another, "You are a swindler," will not sustain an action. So neither will an imputation of the mere defect or want of moral virtue, moral duties, or religious obligation.

Words spoken in derogation of a peer, a judge, or other great officer of the crown, which are called *scandalum magnatum*, are held to be still more heinous; and though they are such as would not be actionable in the case of a common person, yet in this case they amount to a serious offence. Words also tending to scandalize a magistrate or person in a public trust are deemed more criminal than in the case of a private man.

Actions for Libels.—A libel consists in a malicious defamation, expressed either in printing or writing, or by signs, pictures, &c. And as the essence of a libel consists in its being propagated, it is essential that it should be published.

As there is an obvious difference between the malignity and injurious consequences of slanderous words spoken or written, there are many words which if spoken would not be actionable, that are so if disseminated in the form of a libel. Whatever renders a person ridiculous, or lowers him in the estimation and opinion of the world, amounts to a libel, though the same expressions if spoken would not have been a defamation. Hence the word "swindler," if spoken of another, unless it be spoken in reference to his trade or profession, is not actionable; but if it be published in the way of libel, it is so.

A printed or written article may be libellous, though the slander is not directly charged, but only in an oblique and ironical manner. In conformity with this rule it has been decided, that a defamatory paper expressing the initials, or only one or two letters of a person's name, but in such a manner as obviously and clearly to allude to the plaintiff, is as properly a libel as if it had expressed the name at length.

An action may be supported for a libel reflecting on the memory of the dead; but it must be alleged in the declaration, and proved to the satisfaction of the jury, that the author intended by the publication to

bring dishonour and contempt on the relations and descendants of the deceased.

A fair and impartial comment on a literary production, detecting its mistakes, and thereby exposing the author to ridicule, will not be deemed a libel. But if it exceed the limits of candid criticism, by attacking the character of the writer unconnected with his work, travelling into collateral matter, and introducing facts not stated in the publication, accompanied with injurious observations upon the character of the author, it would be otherwise.

It is a recognized rule of law, that no proceedings in a regular course of justice will make a complaint a libel. Hence it has been determined that no false or scandalous matter contained in a petition to either house of parliament, or in articles of the peace exhibited to justices of the peace, are libellous.

It is not the subject of an action to publish an accurate and correct account of the proceedings of parliament or of courts of justice; and it has been held that an action could not be supported, however injurious such publication might be to the character of an individual. But this doctrine must be received subject to certain limitations; for it cannot be admitted that the publication of every matter which transpires in a court of law, however truly represented, is, under all circumstances, and with whatever motives published, justifiable. And the rule does not apply to the publication of part of a trial before it is finally concluded; for that might enable the friends of the parties to pervert the justice of the court by the fabrication of evidence or other improper conduct. And it has been held libellous to publish a highly coloured account of judicial proceedings mixed with the reporter's own observations and conclusions upon what passed in court, and which contained an insinuation that the plaintiff had been guilty of perjury.

By the 6 & 7 Vic. c. 96 provision is made for the better protection of private character from libellous attacks, for more effectually securing the liberty of the press, and for the better preventing of abuses in the exercise of such liberty. This act has, however, been slightly altered by the 8 & 9 Vic. 95.

Actions for a False and Malicious Prosecution.—For concerting a false and malicious prosecution the law gave a specific remedy by a writ of *conspiracy*; in which the defendant, on conviction, was liable to imprisonment as well as to render damages to the party aggrieved, the proceeding in that respect resembling the action of *scandalum magnatum*. Conspiracy, however, implies a plurality of persons, and the writ therefore could not be brought against a single defendant. But an action on the case for a false and malicious prosecution may be commenced against one or more; and the other proceeding is now almost wholly antiquated.

There is a material distinction between a civil suit and a criminal malicious prosecution; as the former, subject to some exceptions, is not actionable, although the plaintiff had no probable demand, because it is a claim of right, and he has found pledges to prosecute, is actionable *pro falso clamore*, and is liable to costs.

But an action will lie for maliciously arresting and holding a party

to bail, either where there is no debt due, or where the party is held to bail for a larger sum than what is really owing; though in a similar case it was decided that this action cannot be supported for arresting the plaintiff without any cause of action, if he be not held to *excessive* bail.

An action will lie for maliciously suing out a commission of bankrupt which is afterwards superseded; and this notwithstanding the specific remedy provided under the bankrupt laws.

Where there was an original good cause of action, but the plaintiff sued in a court which he knew had no cognizance of the suit, as, for instance, in a spiritual court for a matter not of ecclesiastical cognizance, this action will lie. So for maliciously obtaining and executing a warrant to search a house for contraband goods, when none such are found.

This action will not lie to recover damages against the lessor of the plaintiff in a vexatious ejectment; nor by a superior against an inferior officer, for a malicious prosecution before a court-martial.

When a man is unjustly and with malice indicted of a crime which proves injurious to his reputation, though the indictment be insufficient, or the bill ignored, yet this action is maintainable, because the mischief is complete and effected by the ignominy incident to a criminal prosecution. And it is now holden, that an action will lie as well for the damage by expense, as by the incidental slander or imprisonment, notwithstanding the indictment was insufficient to support the charge. Hence it has been adjudged that a husband *alone* may support an action for the malicious prosecution of his wife, the expences of which have been defrayed by him.

In order to support an action for a malicious criminal prosecution, the four following circumstances should occur: 1. Want of probable cause for instituting such proceeding; 2. Falsehood in the original accusation; 3. Malice in the prosecution; 4. Damage to the accused, which, we have seen, may be either to his person by imprisonment, to his reputation by the scandal, or to his property by the expence. The complete concurrence of these requisites must be correctly stated in the declaration; and it should further show, in the most distinct manner, that the original prosecution is at an end, and that the party was acquitted.

The plaintiff must produce and prove a copy of the acquittal on record, which, in a prosecution for a misdemeanor, he is entitled to as a matter of right without any previous application to the court. But in the case of felony, if the trial were at the Old Bailey, a copy of the indictment and acquittal cannot regularly be obtained without an order from the court; and it is the usual practice on the circuits, to apply to the court for a copy at the time of trial.

The defendant must also prove that the defendant was the prosecutor of the indictment; and, as malice is necessary to support the action, it is essential to produce either direct evidence of malice, or circumstances from which it may be inferred, and which will conduce clearly to demonstrate the want of probable cause.

The other injuries remediable under this form of action may be considered as they relate—1. To the person; 2. To personal property; and 3. To real property.

1. *Injuries to the Person.*¹—Case is the proper remedy for any injury to the *absolute* rights of persons, not immediate but *consequential*; as for keeping mischievous animals, having notice of their propensity; or for any special damage arising from a public nuisance. But if the injury were *immediate*, as if the defendant incited his dog to bite another, or let loose a dangerous animal; or if, in the act of throwing a log into a public street, it hurt the plaintiff, the action should be trespass.

Whenever an injury to a person is occasioned by the *regular process* of a court of competent jurisdiction, even though maliciously adopted, case is the proper remedy, and trespass is not sustainable; as for a malicious arrest, or for the malicious prosecution of a criminal charge before a magistrate or otherwise. If, on the other hand, the proceeding were *irregular*, the remedy in general must be trespass. Therefore when a justice of the peace maliciously and irregularly granted a warrant against a person for felony without any information upon oath, it was decided that the remedy against the justice should have been trespass, and not case.

If the proceeding be instituted in a court having no jurisdiction, and be malicious and unfounded, either case or trespass may be supported.

So although case may be supported for maliciously suing out a commission of bankruptcy, yet an action of trespass is also sustainable, because if the plaintiff were not subject to the bankrupt laws, the commissioners had no jurisdiction, in which case trespass is always sustainable, if in other respects the injury were forcible and immediate.

Case is also the only remedy against sheriffs, justices, or other officers, acting *ministerially* and not judicially, as for refusing bail, &c.

Case lies against surgeons, agents, &c. for improper treatment, or for want of skill or care; though *assumpsit* is also sustainable.

Actions for injuries to the *relative* rights of persons, as for seducing a wife or daughter, enticing away or harbouring apprentices or servants, are properly in case; and though it is now usual and proper to declare in trespass for criminal conversation with a wife, or for debauching a daughter, yet as the consequent loss of society or service is the ground of action, the plaintiff is at liberty to declare in case.

2. *Injuries to Personal Property.*—For injuries committed to personal property not committed with force, or not immediate, or where the plaintiff's right is in reversion, case is the proper remedy. It lies against attorneys or other agents for neglect in the conduct of a cause, or for not accounting for moneys, &c.; though it is more usual to declare against them in *assumpsit*. And though, as we have seen, *assumpsit* is the most usual remedy for neglect against bailees, as against carriers, wharfingers, and others having the care or use of personal property, yet case is frequently a preferable remedy.

Formerly case was the usual remedy for a false warranty or other misrepresentation on the sale of goods; but of late it is more usual to declare in *assumpsit*, so as to join the count for money had and received. But if there has been any actual fraud or misrepresentation independent of written contract, case is the preferable form of action; and it is also the appropriate remedy for fraudulently representing a person

¹ By the 9 & 10 Vic. c. 93 provision is made for giving compensation to the families of persons who may be killed by accident.

fit to be trusted, or for other deceit, where there has been no contract between the parties.

Though trespass may be supported against a person for accidentally driving his carriage against another's, yet for the negligent driving of a servant the master can only be sued in case; and even in the former instance, if the injury were really attributed to the negligence and not to the wilful act of the driver, case might be supported. And it is clearly the proper remedy for an injury occasioned by negligence in navigating ships.

Case is the proper remedy in most instances of irregularity in the taking or sale or disposal of a distress, where the party was not a trespasser *ab initio*. It also lies for the rescue or pound-breach of cattle or goods distrained, or for the rescue of a person arrested.

This action lies against sheriffs &c. for escapes, for not arresting, or not levying under a writ of execution, for a false return, or for not taking a replevin bond, or for taking insufficient pledges, or for not assigning a bail bond. But for an escape on final process it is most advisable to declare in debt if the caption can be clearly proved, because then the jury must give a verdict for the entire demand.

Case is the only remedy for injuries to any personal property in reversion, in which case neither trespass nor trover can be supported. So it lies for infringing the copyright of books, prints, music, &c., and of patents. It also lies for not delivering letters &c., and against a witness for not obeying a subpoena.

3. *Injuries to Real Property*.—Where the injury was immediate, and committed to real property *corporeal* in the possession of the plaintiff, the remedy, we have seen, is trespass. But for a mere non-feasance, as not carrying away tithes, or where the injury was not immediate but consequential, or where the plaintiff's property is in reversion, the action should be in case.

An action on the case is the general remedy for *nuisances*. It lies for obstructing light or air through ancient windows by any erection on the adjoining land; and the action may be brought in the name of the tenant in possession, or of the person entitled to the immediate reversion. So it lies for any other nuisance to houses or lands in possession, or to a decoy; and for injuries to watercourses, where the plaintiff is not the owner of the soil, but is merely entitled to the use of the water; and, in general, case is the proper remedy for *continuing* a nuisance.

Case may be brought by a reversioner against his tenant or a stranger for *waste*, by cutting down trees or any other act injurious to the reversion; though the remedy by the tenant against a stranger would be trespass. And though, as we have seen, *assumpsit* is the usual remedy against a tenant for not cultivating land according to the course of good husbandry, or for not repairing, &c., yet for wilful waste, and particularly where there has been any conversion of the trees or other property, case may be frequently preferable.

It lies upon the custom of the realm against the personal representatives of a rector &c., at the suit of the successor, for dilapidations.

As trespass cannot be supported where the matter affected is not substantial, or the estate therein is *incorporeal*, case is the proper re-

remedy for disturbance of common, of pasture, turbary, or estovers. So it lies for obstructing a private way, or the plaintiff's right to use a pew in a church, and for the disturbance, obstruction, or other injuries to offices, franchises, ferries, markets, tolls, &c.

Whenever a *statute* prohibits an injury to an individual, or enacts that he shall recover a penalty or damage for such injury, though it be silent as to the form of the remedy, this action may be supported. But no action can be supported by a common informer unless he is expressly authorized to sue.

The form of the *declaration* depends on the particular circumstances on which the action is founded, and consequently there is a greater variety in this than in any other form of action.

The *plea* in this action is usually the general issue, Not guilty; and under it (except in an action for slander, and a few other instances) any matter might be given in evidence but the Statute of Limitations. But now, by the New Rules (4 Hil. T. 4 W. IV.) it is ordered, that—

“In actions on the case, the plea of Not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea. All other pleas in denial shall take issue on some particular matter of fact in the declaration:

“*Ex. gr.* In an action on the case for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of Not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

“In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods.

“In an action for slander of the plaintiff in his office, profession, or trade, the plea of Not guilty will operate to the same extent precisely as at present, in denial of speaking the words, of speaking them maliciously and in the sense imputed, and with reference to the plaintiff's office, profession, or trade; but it will not operate as a denial of the fact of the plaintiff's holding the office, or being of the profession or trade alleged.

“In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

“In this form of action against a carrier, the plea of Not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant as a carrier for hire, or of the purpose for which they were received.

“All matters in confession and avoidance shall be pleaded specially, as in actions of assumpsit.”

The *judgment* is, that the plaintiff recover a sum of money, ascertained by a jury, for his damages sustained by the committing of the grievances complained of, and full costs of suit. As to costs, where the damages given are under 40s., see *ante*, under the head *Trespas*.

10. **TROVER.**—The action of trover and conversion was, in its origin, an action of trespass on the case for recovery of damages against a person who had *found* goods, and refused to deliver them on demand to the owner, but *converted* them to his own use. The circumstance of the defendant not being able to wage his law in this action, and the less degree of certainty requisite in describing the goods, gave it so considerable an advantage over detinue, that, by fiction of law, actions of trover were at length permitted to be brought against any person who had in his possession, by any means whatever, the personal property of another, and sold or used it without the consent of the owner, or refused to deliver it when demanded.

This action is for the recovery of damages to the value of the thing converted, and not for the thing itself, which can only be recovered by an action of detinue or replevin. The form of action supposes that the defendant might have come lawfully by the property; and if he did not, yet by bringing this action the plaintiff waives the trespass. No damages are recoverable for the act of taking; but the gist of the injury lies in the conversion. The fact of the finding is immaterial, and not traversable.

This action is, from its nature, exclusively confined to the conversion of personal chattels, and is not applicable to the redress of injuries to land or other real property, even though a part be severed from the freehold; unless after the severance there be also an asportation, as in the case of an unlawful removal and conversion of coals or trees, when trover may be supported. But it is not sustainable by an incoming tenant to recover the value of the away-going crops taken by the outgoing tenant.

Trover will lie for money, though it be not in a bag or otherwise distinguishable, because the thing itself is not sought to be recovered in this action, but only damages for the conversion. Where money has been paid by a debtor in contemplation of his bankruptcy, by way of fraudulent preference to a particular creditor, the assignees should proceed for the recovery thereof in trover. And trover is preferable to an action of assumpsit when the defendant has converted the produce of a bill &c. and afterwards become bankrupt and obtained his certificate, because to this action the certificate will afford no defence. But trover does not lie for money had and received generally.

Trover will not lie for goods sold to a party, but not set apart by the vendor, for it is sustainable only for specific articles.

To entitle the plaintiff to recover in this action, two things are necessary: 1st, Property in the plaintiff; 2dly. A wrongful conversion by the defendant.

1. *As to the Property in the Plaintiff.*—The plaintiff must, at the time of the conversion, have had both a right of possession and a right of property in the chattel, either general or special. The same rules hold as to *constructive* possession in the case of a general or absolute owner, which we have already noticed under the actions of detinue and trespass. Therefore, where a party has delivered goods to a carrier or other bailee who has not the right to withhold possession from the general owner, he may maintain trover for a conversion by a stranger; for the owner has still the possession in law against the wrong-doer.

and the carrier or other bailee is considered only as his servant. So an executor or administrator is, by legal construction, possessed of the goods of his testator or intestate from the time of his death.

A person having a special property in the goods may maintain trover against a stranger who takes them out of his actual possession, as a sheriff, a carrier, a factor, a consignee, pawnee, or trustee, or an agister of cattle, or a gratuitous bailee, or an executor de son tort, or any other person who is responsible over to his principal. But not a mere servant. In general also a special property is sufficient to support trover against a stranger who has no better title; and the bare possession of goods, whether lawfully obtained or not, is *prima facie* evidence of property.

In the case of a general as well as special property, the action may in most cases be brought either by the general or special owner; but judgment obtained by one is a bar to an action by the other.

It is not requisite, in the case of special property, where the party has likewise an interest in the goods, that it should have been accompanied by actual possession; for a factor to whom goods have been consigned, and who has never received them, may support an action of trover.

2. *As to the Conversion.*—Where the defendant had a lawful possession of the goods, as either by finding or delivery, the plaintiff must show a demand and refusal to make a conversion. But if the possession were tortious, as if the defendant took away the plaintiff's goods, then the very taking is an act of conversion. Nor is it necessary that the property should be converted by the defendant to his own use; for trover may be supported against a servant or agent or other person who unlawfully appropriates a chattel to the benefit or use of another.

One joint-tenant or tenant in common or parcener cannot support trover against his co-tenant, unless the latter have *destroyed* or *sold* the chattel.

The *declaration* in this action states that the plaintiff was possessed of the goods "as of his own property," and that they came to the possession of the defendant by *finding*; and as conversion is the gist of the action, it must necessarily be stated in the declaration.

The usual *plea* is the general issue, Not guilty.

The *judgment* is for damages and full costs, to which the plaintiff is entitled, though he recover less than 40s. damages, unless the judge certify under the statute of Elizabeth.

11. **REPLEVIN** is an action founded on a distress alleged to be wrongfully made on the goods and chattels of the plaintiff. This action, though entertained in the superior courts, is not *commenced* there; and it may, by virtue of the 9 & 10 Vic. c. 95 (New County Court Act) be brought in any of the County Courts established under that act, in the form of a *plaint*, without writ.

Where goods have been distrained, the party making *plaint* to the sheriff may have them *replevied*, that is, re-delivered to him, upon giving security to prosecute an action against the distrainer for the purpose of trying the legality of the distress, and, if the right be determined against him, to return the goods. The action so prosecuted is called an action of replevin, and is commenced in the county court, from whence either party may remove it into the Queen's Bench or

Common Pleas by writ of *recordari facias loquelam*, or *accedas ad curiam*.

The action of replevin here described is by *plaint* to the sheriff, which is the only kind now known in practice; though there was anciently another species of replevin, in which a writ issued out of Chancery, directed to the sheriff.

It has been held that a writ of replevin may be had, and an action of replevin brought, upon other kinds of illegal taking besides that by way of distress; but in no other case is the proceeding now known in practice.

Replevin cannot be sustained where the plaintiff has not either the actual or immediate right of possession; but a party so situated must proceed by a special action on the case.

A replevin only lies for the taking of a personal chattel, and such things as are by law capable of being distrained, and not for an injury to things affixed to the freehold, or for things which are merely *feræ naturæ*.

To render the delivery of distresses more expeditious, it is enacted by 1 P. & M. c. 12, that the sheriff shall appoint at least four deputies in each county for the sole purpose of making replevins.

The statute Westm. II. (15 Edw. I. c. 2.) requires the sheriff, before he delivers the distress, to take from the plaintiff not only pledges for the prosecution of the suit (which were required at common law), but also for the return of the beasts if restitution be awarded.

And the 11 Geo. II. c. 19 requires, "that the sheriff or other officer having authority to grant replevin shall, in every replevin of a *distress for rent*, take in their own name, from the plaintiff and two responsible persons, a bond in double the value of the goods distrained, conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, provided a restitution be awarded." This statute also empowers the sheriff or other officer, on request, to assign such bond to the avowant, or person making cognizance; and on a bond so taken and assigned, if forfeited, an action may be brought in the name of the assignee.

The sheriff is obliged to grant replevins in all cases allowed by law; and the officer who takes the goods by virtue of a replevin is not liable to an action of trespass, unless the party in whose possession the goods are claims property therein. In all cases of misbehaviour by the sheriff or other officer in relation to replevins, they are subject to the controul of the superior courts, and punishable by attachment.

The sheriff may hold plea in his county court of replevin by *plaint*, whatever be the value of the subject matter in dispute. But if the taking is in right of the crown, or anything touching the freehold comes in question, or ancient demesne is pleaded, or the distrainer claims property in the goods, the sheriff's power to re-deliver is thereby suspended, and the plaintiff must sue out a writ *de proprietate probandâ*, in which the sheriff is to try by an inquest in whom the property anterior to the distress was legally vested. And if on such inquest it be found to be in the distrainer, the sheriff can proceed no further, but must return the claim of property to one of the superior courts, to be there finally determined.

The *declaration* in replevin should be certain and particular in setting forth the number, kind, and qualities of the things distrained, for otherwise the sheriff cannot tell how to make deliverance of the same; yet it is now settled that certainty to a general intent is sufficient, especially if the objection be not taken till after verdict. The venue is *local*, and the place material and traversable.

The party who made the distress is the defendant in replevin; and after the plaintiff has declared (which if he do not voluntarily, the defendant may rule him to do), the defendant makes an avowry (whence he is called the *avowant*), avowing the taking of the goods and chattels, but justifying the act on the ground of so much rent being in arrears, or that they were cattle damage feasant in the defendant's close, or as the case may be. If, however, the party made defendant be the bailiff of the person having a right to distrain, instead of an avowry it is called a *cognizance*, because in it he acknowledges (instead of avows) the taking, and justifies as bailiff of the other. The avowry or cognizance is in the nature of a declaration, and gives the avowant such an interest in the suit that he may, without any default of the plaintiff, proceed to trial after issue is joined. Both parties, therefore, may be said to be actors in this suit.

The plaintiff's answer to the avowry or cognizance is called a *plea in bar*; and then follow *replication*, *rejoinder*, &c., the ordinary name of each pleading in this action being thus postponed by one step.

To remove the innumerable difficulties which formerly occurred in avowries, from the circumstance of the common law requiring the defendant to set forth his title, the 11 Geo. II. c. 19 enacts, "That any person distraining for rent may, in replevin, avow or make recognizance generally, namely, that plaintiff held under a certain grant or demise at a specified rent during the period the rent distrained for was incurred, which rent was then and still remains due, without further stating the right or title of the landlord; and if the defendant prevail, he shall recover double costs of suit." But this act does not extend to avowries for heriot custom, or for a rent charge. In these and other instances therefore to which the act does not apply, it is necessary for the avowant to show in every particular a complete title to distrain.

If the plaintiff be non-prossed for want of declaration, plea in bar, or any other proceeding before issue joined, the defendant will be entitled, if the distress were for rent, to take an assignment of the replevin bond from the sheriff, on which he may bring actions against the obligors, and recover the amount of the rent and costs. If, however, the cause be tried, the bond is not assignable; but the damages sustained by the avowant are assessed by the jury; on which he either proceeds to execution, or obtains a writ of *retorno habendo*.

II. REAL AND MIXED ACTIONS, as already observed, are now reduced to the four following: *writ of right of dower*, *dower*, *quare impedit*, and *ejectment*.

1. WRIT OF RIGHT OF DOWER applies to the particular case where a widow claims the specific recovery of the residue of her dower, part of it having been already received by her from the tenant himself, consisting of lands &c. situate in the same town &c. in which she claims the residue. This is a very unusual form of action.

2. **DOWER** (OR **DOWER UNDE NIHIL HABET**) lies for a widow claiming the specific recovery of her dower, no part of it having yet been assigned to her.

3. **QUARE IMPEDIT** is the remedy by which, when the right of a party to a benefice is obstructed, he recovers the presentation; and is the form of action now constantly adopted to try a disputed title to an advowson.

4. **EJECTMENT** is now, and has long been, the usual remedy for the specific recovery of real property. At a very early period real and mixed actions began to fall into neglect, in consequence of their being more dilatory and intricate in their forms of proceeding than personal actions, and of their being cognizable only in the Common Pleas. In lieu of these, recourse was had to certain personal actions, which, though they did not claim the specific recovery of land, were yet attended with incidents that indirectly produced that effect. Of these the principal, and that which is alone retained in modern practice, was the action of ejectment, in which damages were claimed by a tenant of a term of years complaining of a forcible ejection or ouster from the land demised. In favour of this remedy the courts determined that the plaintiff was entitled not only to recover the damages claimed, but also possession of the land itself for the term of years of which he had been ousted. This remedy was afterwards rendered more extensive by the invention of a fictitious system of proceeding, which enabled claimants of lands in almost every instance, upon whatever title they relied (whether a term of years or a freehold) to bring their cases ostensibly within the scope of this remedy. This fictitious method, being favoured by the courts, passed into regular practice; and the consequence is, that ejectment has long been the usual remedy for the specific recovery of real property. Whenever the case is such that the claimant has in him the *right of entry*, the fiction on which an ejectment rests is held to be allowable; and as in every case of lawful claim to land there is now a right of entry, unless the circumstances are such that an action of writ of right of dower, dower, or *quare impedit* is applicable, it follows that under all other circumstances an action of ejectment may be brought; and whenever it may be brought, it forms (since the late abolition of real and mixed actions in general) the only remedy.

This action also affords a remedy to landlords for the ejection of their tenants for nonpayment of rent, or when they hold over after the expiration of their term or of legal notice to quit. But as the proceedings in ejectment by landlords against their tenants are in some respects different from those where a title is to be tried, it will be necessary to consider them separately.

The ancient proceedings in ejectment were commenced by the claimant taking possession of the estate by a formal entry on the soil; and, being then in actual possession, he there, upon the land, sealed and delivered a lease for years to some third person or lessee, and, having thus given him entry, left him in possession of the premises. The lessee continued upon the land until the prior tenant, or he who had the previous possession, entered thereon afresh and ousted him, or till some other person, either by agreement or accident, came upon the land and dispossessed or ejected him. But as much trouble and formality were found

to attend the actual making of the lease, entry, and ouster, a more convenient method was introduced, and which is now the uniform practice, though it entirely depends on one connected chain of legal fictions. No actual lease or entry is made by the plaintiff, or ouster committed by the defendant; but all are purely fictitious, for the sole purpose of investigating the title.

To this end the action is brought by and against two fictitious personages (John Doe and Richard Roe). The declaration states, that a lease for a term of years was made by him who claims the estate to the plaintiff (John Doe), and that the plaintiff in consequence entered thereon and had possession; that afterwards the defendant (Richard Roe), who is called the casual ejector, afterwards entered thereon and ousted him, for which ouster or expulsion the plaintiff brings this action. But although the nominal plaintiff and defendant are fictitious persons, it is absolutely necessary that the party claiming title should be named, which is done, as above shown, by stating a supposed lease from him to the plaintiff, and he is therefore called the lessor of the plaintiff. The action is commenced by delivering this declaration to the tenant in possession of the premises; and to it is subscribed a notice, in the form of a letter from the fictitious defendant, addressed to the tenant in possession, apprising him of the nature and object of the proceeding, and that as he (the casual ejector) has no title at all to the premises, and shall make no defence, advising him (the tenant) to appear on the first day of the next term, if the property is in London or Middlesex, or in the next term generally if situated elsewhere, and procure himself by rule of court to be made defendant in his stead, otherwise judgment will be signed against him for default, and the tenant will be turned out of possession.

This declaration should be served before the first day of the term upon the tenant, or at his dwelling-house upon his wife. And, to prevent fraudulent recoveries of the possession by collusion with the tenant of the land, all tenants are obliged by 11 Geo. II. c. 19, on pain of forfeiting three years rent, to give notice to their landlords when served with a declaration in ejectment. And any landlord may, by leave of the court, be made a co-defendant to the action in case the tenant himself appears to it; or, under certain circumstances, as we shall presently see, he may become sole defendant; or, with the tenant's consent, he may defend the action in his name, indemnifying him as to the costs.

If the tenant applies to be made defendant, it is, as a matter of course, allowed him, upon the express condition that he enter into a rule of court to confess, at the trial, three of the four requisites essential to the maintenance of the plaintiff's case, namely, the lease of the lessor, the entry of the plaintiff, and the ouster by the tenant himself, so that the trial will then stand upon the merits of the title only, unincumbered with any collateral matter. By the terms of the consent rule each party undertakes to pay costs, if awarded against him.

If the tenant in possession do not in due time enter into the common rule to confess lease, entry, and ouster, then, upon affidavit of the service of the declaration, the plaintiff may move in the same term for judgment against the casual ejector. If the premises lie in London or Middlesex, it should be made in the earlier part of the term; and in country causes the motion for judgment should in all cases be made in

the term. In the Common Pleas, in town causes, the motion should be made in one week after the first day of Michaelmas or Easter term, and within four days of the end of the other terms. If the service was perfect, the rule for judgment is *nisi*, that is, unless the tenant appear and plead to issue, judgment shall be entered against the casual ejector; in other cases, where the service is out of the regular way, or it is not quite clear that the declaration has ever come to the tenant's knowledge, it is a rule to show cause.

The rule for judgment against the casual ejector having been obtained, the tenant must, within four days after the end of the term, appear and enter into the common consent rule; otherwise judgment may be signed against the casual ejector, and a writ of possession immediately issued.

But as the tenant in possession cannot be compelled to appear and enter into the common rule to become defendant instead of the casual ejector, so his landlord alone could not enter into such rule, and be made sole defendant. In order to remedy this inconvenience, the court was authorized by 11 Geo. II. c. 19, to suffer the landlord to make himself defendant with the tenant if he shall appear; or, if the tenant refuse or neglect to appear, judgment shall be signed against the casual ejector, and then the landlord shall be permitted to appear by himself, and execution be stayed on the judgment against the casual ejector till further order. Thus, where the landlord is permitted to defend without the tenant, judgment is always first signed against the casual ejector, to enable the plaintiff, if he obtains a verdict, to get possession of the premises, which he could not do by virtue of a judgment against a person out of possession.

If, however, the tenant or the landlord, or both, enter into the common consent rule, their names are entered on the record as the real defendant or defendants, the name of the casual ejector is no longer used, and the cause proceeds to issue as in other cases.

If the defendant appear at the trial, the title is immediately gone into, and the jury return their verdict as in other cases. Sometimes a special verdict or a special case is ordered to be argued before the court, in which case the proceedings are precisely as in other actions.

The *damages* in this action are merely nominal; and it is usual to remit them, in order to recover a real compensation in an action of trespass for the mesne profits.

If the defendant do not appear, or appearing will not confess the lease, entry, and ouster, according to his undertaking in the consent rule, the plaintiff will be nonsuited on account of such default of the defendant; but as the cause of the nonsuit will be entered on the record, the plaintiff will be entitled to his judgment against the casual ejector, under which a writ of *habere facias possessionem* issues to the sheriff to put him in possession. The taxation of costs will then be under the rule of court. No writ of execution can issue for them; but a copy of the rule and master's allocatur must be served upon the defendant. An affidavit of such service and demand being made, and of the defendant's refusal to pay, the court will, on motion, grant an attachment against him, upon which he will be arrested by the sheriff, and cannot be discharged until he has paid all the costs.

These are now the usual and regular proceedings in an action of ejectment where there is a tenant in possession of the premises, and the action is brought for the purpose of trying the title to the property. And as possession vests in the person enjoying it a right against every man who cannot show a better title, the party who would change the possession must establish a superior right. It is therefore a prevailing rule, that the plaintiff must recover on the strength of his own title, and not upon the insufficiency of the title of the defendant. The lessor of the nominal plaintiff must also have a strict *legal* right, a mere equitable interest not being sufficient to support this action.

But if the premises the possession of which the plaintiff seeks to recover are vacant, the ancient mode of proceeding must still be adhered to (except the ejectment is brought for nonpayment of rent, of which we shall speak presently), and the several circumstances of lease, entry, and ouster (which in the case just described were mere fictions) must now form actual parts of the proceeding. Suppose A to be the person claiming possession of the premises: he must enter upon them, and then and there seal and deliver a lease to B (any person who may be fixed upon for the purpose); A then delivers possession to B, and leaves him upon the premises, who must remain there until C (some other person fixed upon by the parties as the casual ejector) comes and forcibly expels him from them. Then A's attorney delivers to C, while he remains on the premises, a declaration in ejectment.

These proceedings must be taken before the first day of the term in which judgment is to be moved for. The declaration is the same as in other cases, except that real persons are made parties instead of nominal or fictitious ones. The notice at the foot of the declaration varies somewhat in form, and is directed to the defendant.

In the Queen's Bench an affidavit is afterwards made, by some person who saw A seal the lease, of that fact, and of B's entry and subsequent expulsion by C, and of the delivery of the declaration to him; but it is otherwise in the Common Pleas.

If the person claiming title be prevented, by sickness or residing at a distance, from personally taking possession of the premises and sealing a lease, he may execute a power of attorney authorizing any other person to do so in his name.

It seems no defence can be made to an ejectment of this nature, for the court will not admit any person claiming title to defend. If, therefore, there be any adverse claimant of the premises, his remedy is to bring another ejectment.

Upon the affidavit above mentioned, a rule for judgment may be had, and, after four days from the end of the term, a writ of possession, which the sheriff will execute by delivering possession of the premises.

Ejectments by landlords against their tenants for nonpayment of rent are regulated by the 4 Geo. II. c. 28; and for holding over after the expiration of their term, or after regular notice to quit, by the 1 Geo. IV. c. 87. The 11 Geo. IV. & 1 Wm. IV. c. 70 also contains some provisions for expediting the proceedings in such actions under particular circumstances, and for the immediate execution of the writ of possession under the judge's certificate.

Possession of tenements, where the rent is under 50*l.*, may now be more readily obtained by plaint in the County Court.—9 & 10 Vic. c. 95.

CHAPTER IX.

Of the Inferior Courts of Law,

AND PARTICULARLY OF

THE NEW COUNTY COURTS.

BEFORE the recent establishment of the New County Courts, the inferior courts of law consisted principally of

1. The Courts Baron
2. The Hundred or Wapentake Courts.
3. The County Courts.
4. Peculiar Local Courts of limited jurisdiction, existing by prescription or grant, such as the PALACE COURT.
5. The Courts of particular Boroughs.
6. Courts established by many modern Acts of Parliament, comprising Courts of Request or Conscience.

The two last classes, however, may now be considered as nearly extinct, being generally replaced by the New County Courts; and as to the first three, so far as relates to the recovery of debts and the other purposes within the jurisdiction of the new courts, their functions are for the most part superseded by the latter, though they may still continue to be holden for certain purposes, as is particularly provided with respect to the county court by the act under which the new courts are established. A very few words, therefore, respecting these inferior courts will be sufficient, before proceeding to the principal subject of this chapter,—the New County Courts.

The COURT BARON is a court incident to every manor in the kingdom, to be holden by the steward within the manor. This court baron is of two natures. The one is a customary court, appertaining entirely to the copyholders, in which their estates are transferred by surrender and admittance, and other matters transacted relative to their tenures only. The other is a court of common law; and is called the court of the barons (by which name the freeholders were sometimes anciently called), as it is held before the freeholders who owe suit and service to the manor, the steward being rather the registrar than the judge. This court was formerly held every three weeks; and its most important business then was, to determine, by writ of right, controversies relating to the right of lands within the manor. It may hold pleas of any personal actions, as of debt, trespass on the case, or the like, where the debt or damages do not amount to forty shillings. The proceedings on a writ of right were removable into the county court by a precept from the sheriff called a *toit*; and the proceedings in all other actions may be removed into the superior courts by the king's writs of *pone*, or *accedas ad curiam*, according to the nature of the suit. Also, after judgment given, a writ of *false judgment* lies to the courts at Westminster to rehear

and review the cause, and not a writ of *error*, for this is not a court of record; and therefore, in all these writs of removal, the first direction given is, to cause the plaint to be recorded, *recordari facias loquelam*.

The HUNDRED COURT is only a larger court baron, being held for all the inhabitants of a particular hundred, instead of a manor. The free suitors are here also the judges, and the steward the registrar, as in the case of a court baron. This likewise is no court of record, resembling the former in all points, except that in point of territory it is of greater jurisdiction.

This court, as causes are equally liable to removal from hence as from the common court baron, and by the same writs, and may also be reviewed by writ of false judgment, is therefore fallen into equal disuse with regard to the trial of actions.

The COUNTY COURT is a court incident to the jurisdiction of the sheriff. The proceedings in it are according to the course of the common law and the practice of the superior courts. Before the recent act, it could hold pleas of debt or damages under the value of forty shillings, and, by virtue of a writ of *justicies*, of personal actions to any amount: this is a writ empowering the sheriff, for the sake of dispatch, to do the same justice in his county court as might otherwise be had at Westminster. Suits of replevin were also brought in this court, but the ordinary practice was to remove them to the superior courts.

It formerly also held pleas of many real actions; which actions were also removable into it from the court baron. But this jurisdiction, though not expressly taken away by any statute, had long become obsolete, even before the abolition of real actions by 3 & 4 Wm. IV.

In ancient times it appears to have had cognizance of pleas of the crown, indictments of felony, &c.; but this power was taken away by Magna Charta, c. 17, and 1 Edw. IV. c. 2; the former expressly providing, that "no sheriff shall hold pleas of the crown."

The freeholders of the county are the real judges in this court, the sheriff being the ministerial officer.

The great conflux of freeholders which is supposed always to attend at the county court, is the reason why all acts of parliament at the end of every session were wont to be there published by the sheriff; why all outlawries of absconding offenders are there proclaimed; and why all popular elections which the freeholders are to make, as formerly, of sheriffs and conservators of the peace, and still of coroners, verderors, and knights of the shire, must be made in full county court.

By the stat. 2 Edw. VI. c. 25, no county court shall be adjourned longer than for one month, consisting of twenty-eight days.

In ancient times, the county court was a court of great dignity and splendour; the bishop and the earl with the principal men of the shire sitting therein to administer justice, both in lay and ecclesiastical causes. But its dignity was much impaired when the bishop was prohibited, and the earl neglected, to attend it. And in modern times, as proceedings are removable into the superior courts by writ of *pone* or *recordari*, in the same manner as from hundred

courts and courts baron, and as the same writ of false judgment may be had, these have occasioned the same disuse of bringing actions therein; so that this court, though once an efficient and important court for the administration of justice, has fallen into a state of comparative inutility.

But other causes co-operated to this end besides the facility of removing actions from thence. The act for the establishment of the new courts, after reciting that the county court is a court of ancient jurisdiction having cognizance of all personal actions to any amount by virtue of a writ of justices, declares that "the proceedings therein are *dilatory* and *expensive*." And these and other defects, not only of the county court but of most of the courts above enumerated, have been so ably set forth by the Common-Law Commissioners, in their Fifth Report, that we shall make no apology for transferring some of their observations to our pages.

Referring to the county courts, the Commissioners observe, that the limitation of jurisdiction in point of amount; the annual change of the officers who preside in these courts; the want of competent juries; the lengthened pleadings, heavy costs, unnecessary delay, and a vicious system of practice, attended with enormous abuse and oppression committed by bailiffs in the execution of process by improper agents, render these courts inefficient for the administration of justice, and the subject of general complaint.

Another inconvenience consists in the distance to which parties and witnesses are frequently obliged to travel, where the county is large, and the court is held at one place for the whole county. In some counties, the average time which intervenes between the first process and final judgment is about five months, and the average expence of recovering a debt to the amount of 40s. is 6*l.* on each side; and the costs of a trial by *justices* amount to 7*l.* or 8*l.* on each side, exclusive of the costs of witnesses.

Another just cause of complaint is founded on the use of pleadings, which in point of length and expence fall little short of those used in the superior courts, but with this disadvantage, that the proceedings are open to all the formal and clerical objections which by many wholesome statutes have been excluded from the superior courts.

The want of sufficient means to compel the attendance of witnesses, and of executing judgment on goods fraudulently removed into another county to avoid execution, are defects incident to all inferior courts of limited jurisdiction.

The *Hundred Courts* and *Courts Baron* are, like the county courts, limited in personal suits to causes of action under 40s. All these labour under the same or even greater defects than the county court, especially such as arise from a narrow extent of jurisdiction. Incompetent juries, an ill-regulated course of pleading, and the practice of allowing costs wholly disproportioned to the cause of action, and which frequently amount to 7*l.* or 8*l.* on each side, though no greater sum than 40s. can be recovered, render these courts inoperative for any useful purpose.

BOROUGH COURTS.—The courts of different boroughs, by grant or prescription, frequently possess jurisdiction to an unlimited amount,

and several of these are stated to be of public convenience. But their general utility is much fettered by their local limits; and, for want of officers competent to preside, many of them have fallen into disuse.

The Lord Mayor's Court and Sheriffs' Court, in the city of London, are less useful than they otherwise would be, in consequence of the practice being confined to a few privileged attorneys.

The costs of borough courts are excessive, the plaintiff's costs not unfrequently amounting to from 10*l.* to 14*l.*

COURTS OF REQUESTS AND OF CONSCIENCE.—Numerous courts under this description have from time to time been yielded to the importunities of different classes of persons in populous districts, from a necessity for a cheap and speedy method of enforcing small claims. But, the Commissioners observe, from whose Report we have been quoting, they are objectionable in their very nature; too much being left to the discretion of those who decide the cause, who ought to be persons of considerable ability and learning, but consist, in general, of commissioners whose pursuits in life can give no assurance of their possessing these qualities. In some instances the jurisdiction of courts of requests occasions injustice, by depriving a plaintiff of his costs in case he sues elsewhere than in the court of requests, the defendant being resident there, even although the cause of action occurred elsewhere, and for want of process to compel the attendance of witnesses at the court of requests, he could not have recovered there.

Upon the whole, the Commissioners observe, regarded as a system, the several classes of inferior and local courts exhibit great inconsistencies and discrepancies; and it would be highly desirable that they should be re-constructed upon a simple and uniform model.

The jurisdiction of the ancient courts is usually limited to debts under 40*s.*; the modern courts of requests, in many instances, possess jurisdiction to the amount of 5*l.* The modern courts are established on a basis of the most rigid economy, by limiting the costs to a few shillings, whilst the costs of the courts which cannot hold pleas to the amount of 40*s.* are allowed to amount to many pounds. In suits to the extent of 5*l.* in the modern courts, all professional assistance is usually excluded; in a suit for 30*s.* in the county court, hundred court, or court baron, professional assistance is not only permitted, but allowed for in costs.

In courts of request to the extent of 5*l.* or upwards, the inquiry is generally conducted by examination of the parties themselves, without any written specification of the claim on the one side, or of the defence on the other; in other courts, and in respect of smaller claims, pleadings are deemed to be as essential as in the superior courts.

The existence of so many different courts of concurrent jurisdiction, founded on principles and adopting modes of procedure so widely different, is an evil which requires a remedy. The difference in the modes of procedure is so striking as to render it impossible that all should be consistent with sound policy, and conducive to justice.

THE PALACE COURT.—This court is unaffected by the establishment of the new courts, and it is also exempt from the animadversions of the Commissioners, who, on the contrary, speak of it in terms of approval. The Palace Court, they observe, has long been

found to be a very useful and effectual court for the trial of causes below the amount of 20*l.*. Its jurisdiction is unlimited in amount; yet as the cause, when damages are laid to the amount of 20*l.*, may be removed into the superior courts at Westminster without giving security for the costs, causes are usually removed in such cases into a superior court.

The amount of the plaintiff's costs, independently of witnesses, where the cause is tried, is from 8*l.* to 10*l.*; of the defendant's, from 6*l.* to 8*l.* The whole of such costs is allowed to the plaintiff on taxation, so that when he succeeds, he receives the net amount of the debt or damages, without any deduction for extra costs.

This court is held in general once a week throughout the year.

The average length of time intervening between the commencement of the suit and final judgment is about five weeks.

The judge who presides is appointed by the crown, and for many years a barrister has officiated as deputy judge.

The pleadings are such as are in use in the superior courts; but special pleas are not common, and demurrers are seldom if ever filed, except for the purpose of delay.

The jurisdiction of this court, however, is limited to the distance of twelve miles, and no execution can be had against the person or property of a debtor beyond that distance.

THE NEW COUNTY COURTS.

Under the provisions of the 9 & 10 Vic. c. 95, local courts have been established throughout England and Wales for the more easy recovery of small debts and demands not exceeding twenty pounds, generally known as the **NEW COUNTY COURTS**, each being held as a branch of the county court within a certain district assigned to it. The act was passed on the 25th August, 1846; and her majesty in council was empowered to order it to be put in force as and when it might be deemed expedient,—to divide counties, or parts of counties, into districts, that a court might be holden for the recovery of debts and demands in each,—to declare by what name, and in what places, the county court should be so holden,—and to alter such districts from time to time as it may seem fit; with a proviso, however, that no court should be established under the act in the city of London. Accordingly, the act was brought into operation, and the new courts were established, by orders of council, on the 17th March, 1847; the several counties of England and Wales having been divided into districts, and the towns and places appointed in which the courts are holden. According to a provision of the act, also, (sec. 78) rules of practice for regulating the proceedings of the courts, with the necessary forms, have been framed by the judges of the superior courts; which rules will be found amalgamated with the several clauses of the act with which they are connected, in the following analysis.

GENERAL JURISDICTION AND POWERS.

The courts held under this act have all the jurisdiction and power of the county court for the recovery of debts and demands, as

altered by this act, throughout the district for which they are holden; and they are declared to be courts of record.¹ (Sec. 3.)

But for all purposes except those within the jurisdiction of these courts, the county court is still to be holden as if this act had not been passed, and may be held simultaneously therewith. (Sec. 4.)

Exemptions and Privileges.—No court is to be established under this act in the city of London. And nothing herein is to affect the rights and privileges of the universities of Oxford and Cambridge, nor the courts of the lord warden or vice-warden of the Stannaries of Cornwall, though this provision is not to prevent the establishment of a court under this act within the Stannaries. (Sec. 140, 141.) But, otherwise, no privilege of exemption from the jurisdiction of these courts is allowed to any person. (Sec. 67.)

JUDGES AND OFFICERS.

JUDGE.—The lord chancellor is empowered to appoint fit persons to be judges of these courts; each of whom must be either a barrister at law of seven years standing, or have practised as a barrister and special pleader for at least seven years, or a barrister or attorney-at-law who had been appointed to preside in or hold a court under former acts, or the person filling the office of judge of the county court, or the county clerk, at the time of the passing of this act.

Every attorney appointed judge in a court under this act, and who is the partner of any other attorney, must dissolve such partnership, or vacate the office of judge within twelve calendar months after his appointment: and he is further prohibited, either by himself or partner, from acting as town clerk, or clerk of the peace of any county, city, or borough, or as clerk to any bench of justices, or any board of guardians of the poor, or of any vestry or local or parochial board of trustees or commissioners, or of any public company or corporation whatever; neither may he be, directly or indirectly, concerned as an attorney in any court of law or equity. (Sec. 9.)

No judge may practise as a barrister within the district of his court, except such barristers as are already appointed to be judges for courts in Bath, Bristol, Liverpool, Manchester, Sheffield, Ecclethall, and Middlesex, and now practising in chambers as conveyancing counsel. (Sec. 17.)

But a judge may act as a justice of peace for the county, if in the commission, though without the qualification by estate (sec. 21); and he may perform all such duties pertaining to any cause in the Court of Chancery, as the lord chancellor may by any general order from time to time direct. (Sec. 22.)

Judges may be removed for inability or misbehaviour by the lord chancellor, or by the chancellor of the duchy of Lancaster when the district is within that duchy. (Sec. 18.) And the same authorities may remove a judge from one district to another, and fill up vacancies. (Sec. 16, 19.)

¹ This is an important feature in the constitution of these courts. The county court itself not being a court of record, the judge has no power of punishing contempts, except those committed in the pre-

sence of the court. Neither can he assess a fine, that being a power belonging only to a court of record; for which reason the county court could hold no plea of trespass *vs et armis*, nor even enforce a subpoena.

In case of illness or unavoidable absence, a judge may appoint a *deputy*, who must have practised as a barrister-at-law for at least three years, or as an attorney in a superior court of law for ten years, but not then residing or practising in the district of the court. Or the judge may appoint a deputy to act for him for any time not exceeding two calendar months in any consecutive period of twelve months. In both cases, the appointment must have the sanction of the lord chancellor, or of the chancellor for the duchy of Lancaster, as the case may be. (Sec. 20.)

TREASURER.—The treasurer is appointed by the Lords of the Treasury. Persons already acting as such to small-debt courts to have the first appointment when such courts are holden under this act. (Sec. 23.)

All fees and fines levied by the court are to be accounted for to the treasurer (sec. 41), who is to audit and settle the clerk's accounts (sec. 42), and render his own to the Audit Board. (Sec. 43, 45.) The Lords of the Treasury to direct the application of balances. (Sec. 44.)

The treasurer, with the sanction of the secretary of state, may provide a court house and offices; for which purpose he is empowered to borrow money. (Sec. 48, 50, 51.)

CLERK OF THE COURT.—The clerk of the court is appointed by the judge, subject to the approval of the lord chancellor; who for populous districts may direct two persons to be appointed, to execute the office jointly. In cases requiring it, such *assistant clerks* as are necessary are to be provided and paid by the clerk. (Sec. 24.)

With the sanction of the judge, the clerk may appoint a *deputy* to act for him during illness or unavoidable absence. (Sec. 26.)

The duties of the clerk are, to issue summonses, warrants, precepts, and writs of execution; to register the orders and judgments of the court; and to keep an account of proceedings of the court, and of all moneys paid into or out of court. (Sec. 27.) He is to make an entry in a book of all complaints, summonses, orders, judgments, executions, and returns thereto, of all fines, and other proceedings of the court; which entries, or copies thereof under seal of the court and signed by the clerk, are to be received as evidence in all courts. (Sec. 111.)

In case of proceedings not provided for by the forms in the schedule, the clerk is to issue necessary process, framed, as nearly as the case may allow, after the forms prescribed in the schedule. (Rule 51.)

Once in every year, the clerk must send to the Audit Board an account of all sums paid by him to the treasurer. (Sec. 46.) When audited, the accounts are to be transmitted to the Treasury, and afterwards treated as other declared accounts. (Sec. 47.)

In the month of March in every year, the clerk is to make out a correct list of all moneys belonging to suitors which have remained unclaimed for five years prior to the first day of the preceding January, and a copy of such list is to be exhibited, during court hours, in some conspicuous place in the court house. All moneys paid into court, and remaining unclaimed for six years, are to be applied to the general fund of the court. But the time during which the party who might have claimed it shall be a minor, or a married woman, or of unsound mind, or beyond seas, shall not be reckoned in estimating such period of six years. (Sec. 112.)

The care of the court-house is placed in the hands of the clerk, who may appoint and dismiss servants, make contracts or otherwise provide for repairing and furnishing, cleaning, lighting, and warming the court-house and offices, and for supplying law and office books and stationery, and also defray all incidental expenses not otherwise provided for. (Sec. 55).

He is to keep the several books, and in the form in the schedule; and every entry therein is to have a number prefixed, corresponding with the number of the plaint to which it refers. (Rules 40, 41.)

He is to have an office at each place where the court is held; which office shall be open daily, and the office hours shall be from ten o'clock in the morning until four in the afternoon. (Rules 42, 44.)

All matters or things required to be done by the clerk of the court may be done by himself or his assistant clerks. (Rule 43.)

HIGH BAILIFF.—The high bailiff is appointed by the judge, who may also remove him. Every high bailiff may appoint or dismiss his assistants, who may also be dismissed by the judge. (Sec. 31). The present high bailiffs of Westminster and Southwark are to have the execution of all process issuing out of any of the district courts within their respective jurisdictions. (Sec. 32.)

The duties of the high bailiff are, to attend every sitting of the court to serve all the summonses and orders; and to execute all the warrants, precepts, and writs of the court. Every high bailiff is responsible for the actions and defaults of his assistants. (Sec. 33).

Persons assaulting a high bailiff or his assistants in the execution of their duty, or making or attempting to make a rescue of any goods taken in execution, incur a penalty of 5*l.*, and may be taken into custody without a warrant. (Sec. 114.)

Any bailiff who, through neglect or by connivance, shall lose the opportunity of levying an execution, shall pay such damage as the plaintiff may thereby sustain. (Sec. 115).

At every court, or at such other times as the judge shall require, the high bailiff shall deliver a statement, or return, of what shall have been done since his last return under every process which he shall have been required to execute. (Rule 45.)

Eight days before the holding of the court, the high bailiff shall deliver to the clerk a list of all summonses which have been served; who shall forthwith stick up such list in his office. (Rule 46.)

Every high bailiff required to execute any warrant issuing out of any other court, shall make a return to such last-mentioned court forthwith on the execution thereof; and if he have not executed such warrant, shall return the same at the expiration of two calendar months from the date thereof. (Rule 47.)

Every bailiff receiving any money by virtue of any process of the court of which he is bailiff, shall, within three days afterwards, pay over the same to the clerk of the court. (Rule 48.)

If any high bailiff have received any money under any process issuing out of any other court, he shall, within three days from the receipt thereof, pay it over to the high bailiff of such last-mentioned court, retaining the fees for execution thereof. (Rule 49.)

The offices of clerk, treasurer, and bailiff, are to be kept distinct. (Sec. 28.) And neither of these officers must, either directly or indirectly, act as attorneys in the court to which they belong. (Sec. 29.) A penalty of twenty pounds attaches to a breach of either of these regulations. (Sec. 30.)

Treasurers, clerks, and high bailiffs, to give security to the Lords of the Treasury for the due performance of their offices, and for duly accounting for all moneys passing through their hands. (Sec. 36.)

If any bailiff, clerk, or officer of the court, be convicted of any extortion or misconduct, the judge may order him to repay the money extorted, with costs; and also, if he see fit, impose such fine, not exceeding ten pounds for each offence, as he may deem adequate. (Sec. 116.) Officers taking fees besides those allowed are, upon proof thereof, rendered for ever incapable of serving or being employed under this act, and are also liable for damages. (Sec. 117.)

WHAT ACTIONS TO BE BROUGHT IN THESE COURTS.

The jurisdiction of these courts extends to all pleas of personal actions, in which the debt or damage claimed does not exceed twenty pounds, whether on balance of account or otherwise; and all such actions may be holden without writ, and are to be heard and determined in a summary way according to the provisions of this act.

But these courts have no cognizance of any action of ejectment, or in which the title to any hereditament, or to any toll, fair, market, or franchise, shall be in question; or in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed; or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction, or for breach of promise of marriage. (Sec. 58.)

All actions and proceedings which before the passing of this act might have been brought in a superior court, where the plaintiff dwells more than twenty miles from the defendant, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court within which defendant dwells or carries on business, may be still brought in a superior court; as may also any action in which an officer of the county court may be a party, except in respect of claims to goods taken in execution of process of the court. (Sec. 128.) But in all other cases, where an action is brought in a superior court, and a verdict is found for the plaintiff for less than twenty pounds if the action be founded on contract, or for less than five pounds if founded on tort,¹ the plaintiff shall be allowed no costs; and if a verdict be not found for plaintiff, the defendant shall be entitled to his costs as between attorney and client. And if any person bring a suit in a superior court in respect of any grievance committed by any officer of these courts under process of the court, and shall not obtain greater damages than twenty pounds, he shall not be entitled to costs; unless, in either of the preceding cases, the judge certify that the action was fit to be brought in such superior court. (Sect. 128, 129, 139.)

¹ An action founded on *tort* is an action for damages for a wrong or injury, in contradistinction to actions for debt or on promise, which are said to be founded on *contract*.

No division may be made of any cause of action for the purpose of bringing two or more suits;¹ but if the cause of action amount to more than twenty pounds, plaintiff may abandon the excess, and recover for twenty pounds in these courts, and the adjudication shall be in full discharge of the whole demand. (Sec. 63.)

Minors may sue in these courts for wages. (Sec. 64.)

Unliquidated balances of partnership accounts, and distributive shares under an intestacy, or of any legacy under a will, not exceeding twenty pounds in amount, may be sued for in these courts. (Sec. 65.)

Where two or more persons are jointly responsible for a debt sued for in these courts, service of process upon one of them shall be sufficient, and judgment may be obtained, and execution ordered against him, although the other parties jointly liable may not be within the jurisdiction of the court. And the person against whom such judgment may have been obtained may recover contribution towards his expences from the party or parties who were jointly liable with himself. (Sec. 68.)

An executor or administrator may sue and be sued in these courts, in like manner as if he were a party in his own right. (Sec. 66.)

Where a judgment has been given for or against a person deceased, his executors or administrators may sue or be sued upon the judgment. (Rule 28.)

It appears that actions for assault may be brought in these courts, if the damages be laid at not more than twenty pounds.

No privilege, except as already stated, is allowed to any person to exempt him from the jurisdiction of these courts (Sec. 67)

ENTERING A PLAINT.

All suits are to be commenced by plaint; and every plaint must be entered at the office of the clerk of the court, according to a prescribed form. (Rule 1.)

On the application of any person desirous of bringing a suit under this act, the clerk shall enter in a book a *plaint*, stating the names and the last known places of abode of the parties, with the substance of the action intended. Every one of such plaints to be numbered in every year according to the order in which it is entered. Thereupon a *summons*, stating the substance of the action, and having the number of the plaint on the margin thereof, shall be issued under the seal of the court, and be served on the defendant, so many days before the holding of the court at which the cause shall be tried as shall be directed by the rules for regulating the practice of the court, (*i.e.*, ten clear days, rule 6.) Delivery of such summons to the defendant, or in such other manner as shall be specified

¹ A most important decision has been recently given on this clause of the act by Mr. Palmer, the judge of the Bristol County Court, which promises to open a much wider field of operation for these courts than had been at all previously contemplated. It would appear from this decision, that every order for and delivery of goods is held to form a separate cause of action, and that a trader or other creditor may divide his

demand into as many parts as there are causes of action, consequently if a tradesman has owing to him from an individual 100*l.*, or any larger sum, for a number of separate orders, he may bring as many actions as there have been separate orders or causes of action, each being under twenty pounds, however large the aggregate amount of the whole may be.

in the rules of practice, shall be deemed good service; and no misnomer or inaccurate description of person or place in any such plaint or summons shall vitiate the same, so that the person or place be described so as to be commonly known. (Sec. 59.)

On entering the plaint, the plaintiff shall, if the sum sought to be recovered exceed five pounds, deliver at the office of the clerk as many copies of a *statement of particulars* of his demand, or cause of action, as there are defendants, with an additional copy to file. Provided, that in all cases the judge, in his discretion, and on such terms as he may think fit, may adjourn the cause, at the hearing, for the delivery of a statement of particulars, or further particulars.—(Rule 2.)

At the time of entering the plaint, the clerk of the court shall give to the plaintiff a *note* according to the form in the schedule; and no money shall be paid out of court to the plaintiff unless on production of such note, or by order of the judge. (Rule 3.)

The clerk must annex to each summons a copy of the particulars of the plaintiff's demand, furnished to him pursuant to Rule 2, sealed with the seal of the court. (Rule 5.)

SERVICE OF SUMMONS.

The summons may issue in any district wherein the defendant or defendants shall reside or carry on business at the time of the action brought; or, by leave of the court for the district in which the defendant, or one of the defendants, may have dwelt or carried on business at some time within the previous six months, or in which the cause of action arose, the summons may issue in either of such last-mentioned courts.¹ (Sec. 60.)

The summons must be according to the form prescribed, and dated as of the day on which the plaint is entered. (Rule 4.) And no evidence will be allowed, on the trial, of any demand or cause of action except such as is stated in the summons. (Sec. 75.)

Every summons must be served ten clear days before the holding of the court at which it shall be returnable. (Rule 6.)

The service must be either personal, or by delivery to some person at the place of abode or business of the defendant. (Rule 7.)

¹ An objection which has been often urged against the establishment of local courts is the inconvenience to which wholesale dealers having customers in various parts of the country would be put by the necessity of having to sue in the courts where their debtors reside. This objection has been partly met by the 128th section of the act, which, as we have seen, provides, that where the defendant resides at a greater distance than twenty miles from the plaintiff, or where the cause of action did not arise wholly or in some material point within the jurisdiction of the court in whose district the defendant dwells or carries on his business, the plaintiff may, if he choose, bring his action in one of the superior courts, without being disallowed his costs, as in other cases where the debt is under twenty pounds and is such as could have been reco-

vered in a court held under this act. This, however, is a course not likely to be often followed, on account of the increased expense of suing in a superior court, except where the creditor is sure of the ability of his debtor to reimburse him in case of his being successful in his action. Another mode of meeting this difficulty, however, has been opened to such creditors by a recent decision of the Bristol County Court, which will be available in many cases. The learned judge of that court has ruled, that where the goods forming the subject of demand have been forwarded to the debtor by a carrier, the creditor is entitled to sue for the debt in the county court of the place from which the goods were so forwarded, and to have the same advantages as if the defendant were residing within the district of such court.

Process required to be served out of the district of the court from which it is issued, may be served by the bailiff of any other court. (Sec. 61.) And such service may be proved by affidavit made before a judge of a county court, or a master extraordinary in chancery, for which no greater fee than one shilling shall be taken. (Sec. 62.)

Where a defendant is living or serving on board of any ship or vessel, or residing or quartered in any barracks, and serving her majesty as a soldier or marine, it shall be sufficient service to deliver the summons to the senior officer on board, or to the person who may at the time have charge of such ship or vessel, or to the adjutant of the corps, or any officer or serjeant of the company to which such soldier or marine shall belong or be attached. (Rule 8.)

Where a defendant shall be working in any mine or other works carried on under ground, and the bailiff shall not be able to serve him with a summons as hereinbefore directed, it shall be sufficient service to deliver the summons to the engine-man, banks-man, or other person in charge of such mine or works. (Rule 9.)

Where defendant, by keeping his house or place of abode closed, or by violence or threats, prevents any bailiff from serving the summons as hereinbefore directed, affixing it on the door of such house or place of abode, or otherwise serving it as nearly as may be according to the mode hereinbefore directed, shall be deemed good service. (Rule 10.)

In all cases where a summons to appear shall not have been served personally, and defendant shall not appear at the return day, it must be proved to the satisfaction of the judge, that the service of such summons has come to the knowledge of the defendant ten clear days before the said return day. (Rule 11.)

Where any summons has not been served as directed, the judge may, in his discretion, in order to save the Statute of Limitations, direct another summons, or successive summonses, to be issued, bearing the same date and number as the first summons. (Rule 12.)

The rules as to the service of summonses to appear to a plaint are applicable to the service of all summonses, judgments, orders, notices, and processes, issuing under the authority of this act, unless otherwise thereby directed. (Rule 14.)

No summons, notice, order, or other process, shall be served on Sunday, Christmas-day, or Good Friday; but such days shall be counted in the computation of the time required by these rules, unless any of such days be the last day of such time, in which case it shall be excluded from such computation. (Rule 50.)

All summonses and other process of the court are to be under seal; a forgery of which is felony. (Sec. 57.)

The bailiff who serves a summons shall indorse on a copy of such summons the time and manner of the service thereof, and shall produce such copy, so indorsed, at the court at which such summons shall be returnable; and such copy shall be filed by the clerk of the court. (Rule 13.)

PAYMENT OF MONEY INTO COURT.

Defendant may pay into court such sum of money as he may think a full satisfaction for the demand of plaintiff, together with all

costs up to the time of such payment. Where the defendant pays money into court, he must do so five clear days before the return of the summons. (Rule 15.) Notice of such payment is then to be communicated by the clerk of the court to the plaintiff; and if plaintiff proceed with the action, and recover no further sum than has been paid into court, defendant shall be reimbursed all costs incurred by him in consequence of such continuation of the suit. (Sec. 82.)

When defendant has paid money into court, if plaintiff elect to accept it in full satisfaction of his claim, he must give a written notice to that effect to the clerk of the court, and also to the defendant, which must be served upon the latter personally, or left at his place of abode or business, three clear days before the return of the summons, and then the action will be discontinued, and all liability to further costs will cease. But in default of such notice, the suit will proceed; and if plaintiff does not appear at the hearing, he will be liable to pay defendant such costs as he may incur in appearing to try the cause, or such other sum as the judge may order. (Rule 16.)

SET-OFF AND OTHER SPECIAL DEFENCES.

Defendant cannot set off any demand claimed by him from plaintiff, or set up by way of defence and claim the benefit of infancy, coverture, or any statute of limitation, or discharge under any statute relating to bankrupts or insolvent debtors, without consent of plaintiff, unless such notice thereof as shall be directed by the practice of the court shall have been given. (Sec. 76.)

If defendant desire to set off any debt or demand alleged to be due to him by the plaintiff, he must give notice thereof in writing to the clerk of the court, and deliver to such clerk two copies of a *statement of the particulars* of such set-off, five clear days before the return of the summons. (Rule 17.)

The clerk of the court shall give to plaintiff a notice of such set-off, according to the prescribed form, together with one of the copies of such particulars of set-off, sealed with the seal of the court. But if such notice shall not have been given, the judge may adjourn the hearing of the cause, to enable defendant to give the required notice. (Rule 18.)

Where defendant intends to rely on the special defence of infancy, coverture, the statute of limitations, or his discharge under any statute relating to bankrupts, or any act for the relief of insolvent debtors, he shall give notice thereof in writing to the clerk of the court, five clear days before the day on which the summons is returnable; or where such notice shall not have been given, the judge may adjourn the hearing of the cause, to enable the defendant to give it. (Rule 19.)

JURY, COUNSEL, ATTORNEY, WITNESSES, &c.

JURY.—In suits for more than five pounds, either plaintiff or defendant may demand a jury; and in suits under five pounds, the judge may, at his discretion, on the request of either party, grant a jury. The parties requiring such jury must pay to the clerk of the court five shillings, to be accounted for as costs in the suit.

Notice of the party's intention to require a jury must be given to the clerk of the court, who will give notice of such demand to the opposite party. (Sec. 70, 71.)

Every notice of a demand of a jury, where the demand exceeds five pounds, must be made to the clerk *two* clear days before the return of the summons. (Rule 20.)

Five jurors are sufficient to try a cause; and the parties to such cause are entitled to their lawful challenges against any or all the five, as in the superior courts. The jury must give an unanimous verdict. Being once sworn, they need not be re-sworn for each trial. (Sec. 73.)

Jurors are to be selected from the lists of persons liable to serve made out by the sheriffs of counties, or in Westminster and Southwark by the high bailiff, and delivered to the clerk of the county court. Persons neglecting to attend when summoned, to be fined, at the discretion of the judge, not more than five pounds for each default. Delivery of the summons at the person's usual place of abode or business, is good service; but no person can be called on to serve more than twice within one year, nor any person who may have served in any court, civil or criminal, within six months before the delivery of such notice. (Sec. 72.)

COUNSEL, ATTORNEYS, &c.—No counsel is allowed in these courts, but by leave of the judge. No attorney is entitled to any fee unless the debt exceed forty shillings; nor to more than ten shillings for fees and costs if the debt be not more than five pounds; nor to more than fifteen shillings in any case. No person not being an attorney admitted to one of the superior courts of record may receive any fee for appearing or acting on behalf of any other person in these courts. A barrister's fee, for acting as counsel in a cause, is limited to one pound three shillings and sixpence. The expence of attorney or barrister is not allowed on taxation of costs, in the case of a plaintiff, where less than five pounds is recovered; nor, in case of a defendant, where less than five pounds is claimed; nor in any case, without an order of the judge. (Sec. 91.)

WITNESSES.—Parties to suits under this act, their wives, and all other persons, may be examined upon oath or solemn affirmation, (sec. 83); and every person giving false evidence is to be deemed guilty of perjury. (Sec. 84.)

Any number of witnesses may be summoned; and the summonses are to be served by one of the bailiffs of the court, with or without directions for the production of books and papers. (Sec. 85.)

But although any number of witnesses may be summoned, the judge in each case orders what number of witnesses is to be allowed on taxation of costs, the allowance for whose attendance shall be according to the scale in the schedule, unless otherwise ordered, but in no case to exceed such scale. (Rule 35.)

A witness refusing or neglecting, without adequate excuse to be allowed by the court, to appear, or, appearing, to produce books, papers, &c., or to give evidence, may be fined, not exceeding 10*l.*: and part, or the whole of such fine, after deducting costs, may be applied, at the discretion of the judge, towards indemnifying the party injured by such neglect or refusal. (Sec. 86.)

THE TRIAL, AND JUDGMENT.

The judge shall hold a court at least once in every calendar month; and notice of the days on which the court will be held, must be exhibited in some conspicuous place in the court-house, and in the clerk's office. (Sec. 56.)

On the day named in the summons, after the plaintiff has made his plaint, and the defendant replied thereto, the judge is to try the cause in a summary way, and give judgment, without further pleading or formal joinder of issue.

No evidence shall be given by the plaintiff on the trial, of any demand or cause of action, except such as shall be stated in the summons. (Sec. 74, 75.)

The judge may determine all questions of fact or of law; except when plaintiff or defendant demand a jury. (Sec. 69—71.)

If plaintiff fail to appear at the trial, the cause is to be struck off the list of causes. If he appear, and cannot give satisfactory proof of his demand, he may be nonsuited, or judgment may be awarded to defendant; and in either case, if defendant be present, and do not admit the demand, the judge may award him a sum for his trouble and attendance. But though plaintiff may not appear, if defendant, or some one duly authorized from him, appear, and admit the cause of action to the full amount claimed, and pay the fees, the court may give judgment as if plaintiff had appeared. (Sec. 79.)

If defendant shall not appear, or sufficiently excuse his absence, the judge may proceed to the hearing of the cause on the part of the plaintiff only; and judgment thereon shall be as valid as if both parties had attended. But the judge may, at the same or any subsequent court, set aside such judgment, and grant a new trial, upon such terms in respect of costs, as he may see fit. (Sec. 80.)

The judge may grant time to parties, in the prosecution or defence of a suit; or he may adjourn the hearing of it. (Sec. 81.)

The judge, with consent of both parties, may refer the suit to arbitration, on such terms as he may deem proper. (Sec. 77.)

The judge may make order for the payment by instalments, of any debt or claim proved before him and the costs, at such times, and in such proportion, as he may deem meet. (Sec. 92.) Such instalments shall be payable at the office of the clerk of the court at such periods as the court shall order; and if no order be made, then the first shall become due at the expiration of one calendar month from the day of making the order, and every successive instalment at like periods of a calendar month from the day of the previous instalment becoming due. (Rule 23.)

Every order and judgment of the court (except as herein provided) is final between the parties. But the judge has power to nonsuit the plaintiff, when satisfactory proof is not given by which plaintiff or defendant may be entitled to the judgment of the court; and he may, if he think fit, in every case whatever, order a new trial, and stay proceedings in the mean time. (Sec. 89.)

No plaint shall be removed into a superior court, if the claim do not exceed 5*l*., and then only by leave of a judge of such superior court, and subject to such conditions as he may prescribe. (Sec. 90.)

No application for a new trial, or to set aside any proceedings, shall be made subsequently to the court at which such trial or other proceeding shall have been had, unless the party making such application shall have given a written notice thereof to the clerk of the court at his office, and to the other party, serving the same personally on such party, or leaving the same at his usual place of abode or business, seven clear days before the time of holding the court at which such application shall be made. (Rule 21.)

When money is paid into court under any execution &c., and the party paying it gives notice to the clerk of his intention to apply to the court to have the execution &c. set aside; the clerk shall retain the money till such application be determined. (Rule 22.)

Judgments against Executors or Administrators.—The ordinary judgment against executors or administrators shall be, to pay the debt or damages and costs, to be levied out of the goods of the deceased in their hands; and as to the costs, if there are no such goods, then to be levied out of their own goods. (Rule 29.)

Where the defence is, that executors or administrators have fully administered, if it be adjudged by the court that they have assets not administered, then a like judgment shall go as in the above case, but only as to the goods of the deceased to the amount proved to be in their hands, and of assets *quando acciderint* as to the residue; the judgment as to costs shall be, that they be levied *de bonis testatoris si &c., et si non, de bonis propriis*. (Rule 30.)

If the sole defence by executors or administrators be, that they have fully administered, and the judgment of the court is for the defendants, it shall be, that the amount found to be due be paid and levied out of the assets of the deceased *quando acciderint*, and the costs shall be in the discretion of the judge. (Rule 31.)

Where judgment has been given against executors and administrators, that the amount be levied upon assets of the deceased *quando acciderint*, the plaintiff may at any time proceed by plaint against them, suggesting that assets have come to their hands, and the court shall proceed and give judgment thereon, if for the plaintiff, as in Rule 29, and if for the defendants, they shall be entitled to their costs. (Rule 32.)

Where judgment has been given that the debt (or damages) and costs be levied *de bonis testatoris*, and the plaintiff complains that the defendants have been guilty of a *devastavit*, inasmuch as no goods of the deceased are forthcoming to satisfy the execution issued, then a summons may be taken out in the form prescribed, and thereupon, as in ordinary cases, the court shall proceed to the hearing and judgment; and if judgment be given against such executors or administrators, then it shall be, that they pay the debt or damages and costs, to be levied *de bonis testatoris si &c., et si non, de bonis propriis*. (Rule 33.)

Where, in an action against executors or administrators, the defence is, that they are not executors or administrators, or it is founded on some matter or thing arising since the death of the testator or intestate (*ex. gr.*, a release to the defendants), if the judgment of the court be against them, it shall be, that the debt or

damages, and costs, be levied and paid *de bonis testatoris si ꝑc., et si non, de bonis propriis*. (Rule 34.)

Costs.—The costs of any action or proceeding not herein otherwise provided for are to be apportioned between the parties at the discretion of the judge; or, in default of any special direction, shall abide the event of the action; and in both cases execution may issue for their recovery as for any debt adjudged in the same court. (Sec. 88).

All costs are to be taxed by the clerk of the court. (Rule 86).

EXECUTION.

In case of default or failure of payment of any sum ordered by the judge, the clerk of the court, at the request of the party prosecuting such order, may issue a warrant of execution to the high bailiff of the court, who is thereby empowered to levy, by distress and sale of the goods of such party wheresoever found within the district of the court, such sum of money as may be so ordered. (Sec. 94.)

If the judge have made an order for payment of the debt by instalments, execution upon such order shall not issue until after default made of the payment of some instalment; and then it may issue for the whole money and costs remaining unpaid, or such portion thereof as the judge may order. (Sec. 95).

The judge may suspend execution, on being satisfied, by the oath or affirmation of any person, or otherwise, that defendant is unable, from sickness or other sufficient cause, to pay the debt or damages recovered against him. (Sec. 105.) But no execution can be stayed by any writ of error, or supersedeas thereon. (Sec. 108.)

In case of cross judgments, execution is to be taken out by that party only who may have obtained judgment for the larger sum, and for so much only as shall remain after deducting the smaller sum; satisfaction must be entered for the remainder as well as for the smaller sum; and where both sums are equal, satisfaction must be entered upon both judgments. (Sec. 93.)

Execution on a judgment is not to issue by or against any person not a party to such suit, without a plaint and summons upon the judgment, the proceedings in which shall be the same as in ordinary cases. (Rule 27.)

Any goods and chattels of a person against whom execution is issued may be taken, excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of five pounds. All moneys, bank notes, cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money, belonging to any such person, may be taken in execution. And the high bailiff may hold any cheques, bills of exchange, or other securities for money, as security for the amount directed to be levied, for the benefit of plaintiff, who may sue in the name of defendant, or of any person in whose name defendant might have sued, for recovery of the sums made thereby payable. (Sec. 96, 97.)

But no sale of goods taken in execution may be made until after five clear days following the day on which the goods were so taken, unless the goods be of a perishable nature, or upon request in writing of the owner; and, until the time of sale, the goods are to be kept by the

bailiff in some fit place, or remain in custody of a fit person, approved by the high bailiff, to be put into possession of them by the bailiff. The high bailiff appoints persons for keeping possession, with sworn brokers and appraisers for selling or valuing goods taken in execution, taking security of them for the faithful performance of their duties without injury or oppression; who may be dismissed by the judge or the high bailiff. No goods taken in execution under this act may be sold except by a broker or appraiser so appointed; whose fees are fixed at sixpence in the pound on the value of the goods distrained, for the appraisement thereof, whether by one broker or more than one, over and above the stamp duty, and a farther sum of one shilling in the pound on the net produce of the sale for advertisements, catalogues, sale and commission, and delivery of goods. (Sec. 106.)

Upon the warrant of execution is to be indorsed the sum of money and costs adjudged, with the increased costs allowed for execution; and if, before the actual sale of the goods, the owner pay to the clerk of the court, or to the bailiff holding the warrant, such sum of money and costs, or such part thereof as the person entitled thereto shall agree to accept in full of his debt and costs, the execution will be superseded. In like manner, if any person imprisoned under this act shall pay the debt and costs, he is to be discharged from custody. (Sec. 109, 110.)

If a warrant of execution against the goods, or an order of commitment against the person be issued, and the goods or the party be removed out of the jurisdiction of the court, the high bailiff may send such warrant or order to the clerk of any other court within the jurisdiction of which such party or his goods may then be, with a warrant thereto annexed, requiring execution of the same; and the high bailiff of such last-mentioned district is required to act as if the original warrant or order had been directed to him from his own court. (Sec. 104.)

No warrant of execution or commitment can be executed after two months from its date. (Rule 37.)

Landlord's Lien for Rent.—So much of 8 Anne, c. 17, "for the better security of rents, and to prevent frauds by tenants," as relates to the liability of goods taken in execution, is not to apply to goods so taken under process of any court holden under this act; but the landlord is entitled, by writing under his hand, or the hand of his agent, delivered to the officer making the levy, to claim any rent due to him, not exceeding the rent of four weeks where the tenement is let by the week, and not exceeding the rent accruing due in two terms of payment where it is let for any other term less than a year, and not exceeding in any case the rent of one year. And the officer making the levy may distrain as well for the rent so claimed with the costs of such additional distress, as for the amount for which the warrant of execution is issued under this act, but shall not proceed to sell within five days next after such distress taken. If replevin be made, such of the goods must be sold under the execution as will satisfy the debt and costs for which the warrant is issued and the costs of sale, and the overplus (if any), with the residue of the goods, shall be returned, as in other cases of distress for rent and replevin. For every such additional distress for rent, the high bailiff is entitled to have, as costs of the distress, instead

of the fees allowed by this act, the fees allowed by 57 Geo. III. c. 93. (Sec. 107.)

Adverse Claims. — If any claim be made to any goods taken in execution under this act, or to the proceeds or value thereof, by any landlord for rent, or by any person not being the party against whom such process may have issued, the clerk of the court, on the application of the officer charged with the execution of such process, shall summon before the court the party issuing the process and the party making the claim; and any action which may have been brought in any of the superior courts of record, or in any local court, in respect of such claim, shall be thereby stayed, and any judge of the court in which such action may have been brought may order the party bringing such action to pay all the costs of proceeding therein after the issue of such summons from the county court. And the judge of the county court shall adjudicate upon such claim, and make such order between the parties in respect thereof as he may deem fit. (Sec. 118.)

Such summonses shall be served in such time and manner as are hereinbefore directed for a summons to appear to a plaintiff, and the claimant shall be deemed the plaintiff, and the execution creditor the defendant; and the claimant shall, five clear days before the day on which the summonses are returnable, deliver to the said officer, or leave at the office of the clerk of the court, a particular of any goods or chattels alleged to be the property of the claimant, and the grounds of his claim, or, in case of a claim for rent, of the amount thereof, and for what period the same is claimed to be due. (Rule 39.)

COMMITMENT FOR FRAUD.

There is no execution against the person from these courts, such executions having been abolished, in all cases where the debt or damages do not exceed twenty pounds exclusive of costs, by the 7 & 8 Vic. c. 96. There is a power of commitment in certain cases, the same as was originally given by the 8 & 9 Vic. c. 127, in consequence of the alleged hardship inflicted on creditors by the former act, and which is intended as a criminal punishment for fraudulent debtors, but not in execution of the judgment, nor operating as a satisfaction of the debt. This power may be exercised at the hearing of the cause; the judge being empowered, immediately after judgment, if fraud or other circumstances calling for the exercise of the power be alleged against the defendant, to call him up at once for examination if he be present, and inquire into the transaction, and if such fraud &c. be proved, to commit him to prison for forty days. This method of proceeding, though warranted by the act, will not, it is presumed, be often resorted to. If, however, after judgment, the defendant makes default in payment, he may be served with another summons, calling upon him to appear and be examined by the judge, when this power of commitment will be put in force in cases calling for its exercise.

It shall be lawful for any person who has obtained an unsatisfied judgment or order in any court held by virtue of this act, for the payment of any debt or damages or costs, to obtain a summons from the county court within the district of which the delinquent

party resides, or carries on his business; which summons must be served upon him personally, requiring him to appear at such time and place, and to answer such matters, as are named in the summons. And he may be then and there examined upon oath touching his estate and effects; the circumstances under which he contracted the debt or incurred the damages or liability which is the subject of the action in which judgment has been obtained against him; as to the means and expectation he then had, and as to the property and means he still hath, of discharging the same; and as to the disposal he may have made of any of his property: The costs of such summons, and of all proceedings thereon, are to be deemed costs in the cause. And if the party summoned do not attend, or if he refuse to be sworn, or to disclose or answer any of the matters relative to which he may be questioned; or if it shall appear to the judge that he, if defendant, has obtained credit from the plaintiff under false pretences, or by means of fraud, or breach of trust, or has contracted the debt without a reasonable expectation of means to repay or discharge the same, or shall have made any transfer of property, or removed or concealed the same, with intent to defraud his creditors; or that, since judgment obtained against him, he has had means sufficient to pay the debt or damages or costs so recovered against him; the judge may commit him to prison for a period not exceeding forty days. (Sec. 98, 99.)

The judge before whom any such summons shall be heard may rescind or alter any order that may have been previously made against the defendant, and make a further order. (Sec. 100.)

Every summons for a party to appear pursuant to the 98th section must be served not less than three clear days before the required appearance; but service of such summons at any time before the time appointed for the appearance of such party may be deemed by the judge to be good service, if it be proved that such party was about to remove out of the jurisdiction of the court. (Rule 38.)

If, on the hearing of any cause, judgment be given against the defendant, the judge has the same power of examining defendant and plaintiff and other parties, and of committing defendant to prison, as he would have if plaintiff had obtained a summons for that purpose after judgment obtained. (Sec. 101.)

When any order of commitment is made, the clerk of the court issues a warrant of commitment to one of the bailiffs, who is thereby empowered to take the body of the person against whom such order is made. And no protection, order, or certificate, granted by any court, whether of bankruptcy or for the relief of insolvent debtors, is available to discharge the party from such commitment. (Sec. 102.)

No such imprisonment under this act shall operate as a satisfaction or extinguishment of the debt, nor protect the defendant from being again summoned and imprisoned for any new fraud or other default; nor does it deprive plaintiff of his right to sue out execution against the goods of such defendant. (Sec. 103.)

But the party imprisoned may be discharged on payment of debt and costs, upon certificate of such payment signed by the clerk of the court, by leave of the judge. (Sec. 110.)

ACTIONS OF REPLEVIN.

All actions of replevin in cases of distress for rent in arrear or *damage faisant*, which shall be brought in the county court, shall be brought in a court held under this act, without writ. (Sec. 119.) And the plaint must be entered in the court holden under this act for the district in which the distress was taken. (Sec. 120.)

On entering a plaint in replevin, the plaintiff must specify, in a statement of particulars, the cattle, or goods and chattels, taken under the distress of which he complains. (Rule 25.) And the action shall be tried in a summary way, as other actions in the courts held under this act; and the judgment therein, in ordinary cases, whether for plaintiff or defendant, shall be according to the prescribed forms, or to the like effect. (Rule 26.)

But if the damage be more than twenty pounds, either party, on becoming bound with two sufficient sureties, to the clerk of the court in which the action is brought, in such sum as the judge may order, to prosecute the suit without delay, may remove the suit into any court competent to try it. (Sec. 121.)

RECOVERING POSSESSION OF TENEMENTS.

The possession of tenements not exceeding in rent fifty pounds a year may be recovered, by plaint in these courts, against tenants whose tenancy has been determined by legal notice to quit. And if the tenant, or other party in possession, neglect or refuse to deliver up possession on being summoned by the court so to do, the judge may issue his warrant to the bailiff, authorizing him, within a period of not less than seven nor more than ten clear days from the date thereof, to enter, with force if needful, upon the premises, with adequate assistance, and give possession to the landlord or his agent. (Sec. 122.)

Such summons may be served either personally, or by leaving it with some person being in and apparently residing at the place of abode of the party holding over. But if the party holding over cannot be found, or his place of abode be unknown, or admission cannot be obtained for serving the summons, the posting of it in some conspicuous part of the premises held over is deemed good service. (Sec. 123.)

Should the party suing out process have no lawful title to the premises held over, he is liable to an action of trespass, which the tenant or occupier may institute against him; but the judge or clerk of the court by whom the warrant was issued, and the bailiff or other person by whom it was executed or the summons affixed, are not liable to be called in question for what has been done. (Sec. 122, 124.) But where the landlord has a lawful title to the premises, he shall not be deemed a trespasser by reason of any irregularity in the mode of obtaining possession; and if the party aggrieved bring an action for special damage, he must prove such damage, or the defendant will be entitled to a verdict; and if damage be proved, but assessed by the jury at no more than five shillings, the plaintiff is entitled to no more costs than damages, unless the judge certify that full costs ought to be allowed. (Sec. 125.)

If the person suing out a warrant for recovering possession be not

at the time lawfully entitled to possession of the premises, the suing out of such warrant is a trespass on his part against the tenant or occupier, although no entry be made; and such tenant or occupier may bring an action of trespass against him; and if he obtain a verdict, the operation of the warrant is superseded. (Sec. 126.)

BONDS.

Every bond given on the removal of an action out of the county court, or upon staying the execution of a warrant of possession as aforesaid, or on moving for a new trial, or to set aside a verdict, judgment, or nonsuit, is to be made to the opposite party at his cost, being approved by the judge, and attested under the seal of the court; and if such bond be forfeited, or the judge before whom the proceedings are had do not certify upon the record in court that the condition of the bond has been fulfilled, the party to whom the bond is made may recover in an action of debt. But the court in which such action is brought may, by a rule of court, give such relief to the parties liable upon such bond as may be just and reasonable, and such rule shall have the nature and effect of a defeasance to the bond. (Sec. 127.)

CONTEMPTS, FINES, PENALTIES, &c.

CONTEMPTS.—If any person shall wilfully insult the judge, or any bailiff, clerk, or officer, during his attendance in court, or in going to or returning therefrom, or shall wilfully interrupt the proceedings, or otherwise misbehave in court, it shall be lawful for any bailiff or officer, by the order of the judge, to take such offender into custody, and detain him until the rising of the court; and the judge may, by his warrant, commit such offender to prison for seven days, or impose a fine not exceeding five pounds, and in default of payment commit the offender for not exceeding seven days, unless the fine be sooner paid. (Sec. 113.)

Fines imposed by the court may be enforced upon the order of the judge in like manner as a debt adjudged in the court. (Sec. 87.)

All penalties, fines, and forfeitures, not otherwise ordered to be recovered, are to be levied, with costs, by distress and sale of the goods of the offending party, by warrant under the hand of any justice. (Sec. 130.) If not paid forthwith upon conviction, the justice may order the offender to be detained in custody until return can be made to the warrant of distress, unless sufficient security be given. (Sec. 131.) And if, upon return of the warrant, it appear that no sufficient distress can be had, the justice may commit him to the common gaol or house of correction for not exceeding three months, unless the penalty &c. be sooner paid. (Sec. 132.)

Penalties, forfeitures, and fines, when recovered, are to be paid to the clerk of the court, and applied in aid of the general fund. (Sec. 133.)

No order, verdict, judgment, or other proceeding, to be quashed or vacated for want of form. (Sec. 134—136.)

No distress to be deemed unlawful, nor the party making it a trespasser, on account of any defect or want of form in the proceedings; nor shall the party distraining be deemed a trespasser from the beginning on account of any irregularity afterwards committed; but

the person aggrieved by such irregularity may recover full satisfaction for the special damage in an action upon the case. (Sec. 137.)

All actions &c. against any person for any thing done in pursuance of this act must be brought within three calendar months, and laid in the county where the fact was committed, and notice in writing given to defendant at least one month before commencement; and plaintiff cannot recover if tender of sufficient amends be made before the bringing of the action, nor if, after action brought, a sum of money sufficient to pay the demand with costs shall have been paid into court. (Sec. 138.)

FEES.

A Table of Fees is to be exhibited in some conspicuous part of the court house. The fees are to be paid in the first instance by the party on whose behalf the proceeding is had; and may be enforced, by order of the judge, as any debt or damages. They may be varied from time to time at the option of the secretary of state, with consent of the Treasury, but not to exceed the present amount. (Sec. 37.)

Where necessary, towards a fund for providing a court-house and offices, the clerk may demand from every plaintiff the sum of sixpence when the debt or damages claimed shall exceed twenty shillings and not exceed forty shillings; and if exceeding forty shillings, one twentieth part thereof, neglecting any sum less than sixpence in estimating such twentieth part. (Sec. 52.)

Table of Fees

	AMOUNT OF DEMAND							
	Not exceeding 20s.	Exceeding 20s. and not exceeding 40s.	Exceeding 40s. and not exceeding £5.	Exceeding £5. and not exceeding £10.	Exceeds £10.			
					Found on Contract		Found on Tort.	
JUDGE'S FEES.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
Every Summons	0 3	0 6	1 0	2 0	3 0	3 0	3 0	3 0
Every Hearing without a Jury	1 0	1 6	2 6	7 6	10 0	15 0	15 0	20 0
Every Hearing or Trial with a Jury	2 0	3 0	5 0	10 0	15 0	20 0	20 0	20 0
Every Order or Judgment, or Application for an Order	0 3	0 6	1 0	2 0	3 0	3 0	3 0	3 0
CLERK'S FEES.								
Entering every Plaint and issuing the Sum- mons thereon	0 3	0 6	1 0	2 0	3 0	3 0	3 6	3 6
Every Subpoena, when required	0 3	0 6	0 9	1 0	1 6	1 6	1 6	1 6
Every Hearing, Trial, or Nonsuit without a Jury	0 4	0 6	1 0	1 6	2 0	3 6	3 6	3 6
Adjournment of any Cause	0 3	0 4	0 6	1 0	2 0	2 0	2 0	2 0
Entering and giving Notice of Special Defence Swearing every Witness for Plaintiff or De- fendant	0 3	0 6	1 0	1 6	2 0	2 0	2 0	2 0
Entering and Drawing up every Judgment and Order, and Copy thereof	0 2	0 2	0 3	0 4	0 6	1 0	1 0	1 0
Payment of Money in or out of Court, whe- ther or not by instalments at different times, including notice thereof, and taking Receipt Paying Money into Court, and entering the same in books, and Notice thereof, or of Sum in full satisfaction having been paid into court, each instalment or payment...	0 3	0 6	1 0	1 6	2 6	3 0	3 0	3 0
	0 2	0 4	0 6	...	...	...	...	...
	...	...	...	0 6	0 8	1 0	1 0	1 0

	AMOUNT OF DEMAND					
	Not exceeding 20s.	Exceeding 20s. and not exceeding 40s.	Exceeding 40s. and not exceeding £5.	Exceeding £5 and not exceeding £10.	Exceeding £10. founded on contract	Exceeding £10. founded on Tort
CLERK'S FEES (continued)—	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>	<i>s. d.</i>
Payment of Money out of Court, and taking Receipt, exclusive of Stamp.....	...	...	...	0 9	1 0	1 6
Every Search in the Books	0 2	0 2	0 4	0 6	1 0	1 0
Issuing every Warrant, Attachment, or Execution	0 6	0 6	1 0	1 6	2 6	3 0
Supersedeas of Execution, or Certificate of Payment, or Withdrawal of Cause.	0 3	0 6	0 6	1 0	1 6	2 0
Warrant of Commitment for an insult or misbehaviour in court	1 0	1 0	1 0	1 0	1 0	1 0
Entering and giving Notice of Jury being required	0 6	0 9	1 0	1 6	2 0	2 6
Issuing Summons for Jury	0 6	0 9	1 0	1 6	2 0	2 6
Swearing Jury	0 6	0 8	0 10	1 0	1 6	1 6
Every Hearing, Trial, or Nonsuit with a Jury Taking Recognizance or Security for Costs..	...	..	...	2 0	2 6	3 0
Inquiring into sufficiency of Sureties proposed, and taking Bond on Removal of Plaintiff, or grant of New Trial, or other occasion ..	2 6	2 6	2 6	2 6	2 6	2 6
Taxing Costs .....	..	...	...	1 0	2 0	3 0
HIGH BAILIFF'S FEES.						
Calling every Cause	0 2	0 3	0 4	0 6	1 0	1 6
Affidavit of Service of Summons out of the jurisdiction	0 2	0 3	0 6	0 0	1 6	2 0
Serving every Summons, Order, or Subpoena, within one mile of court house	0 3	0 4	0 6	1 0	1 0	1 6
If above one mile, extra for every other mile Execution of every Warrant, Precept, or Attachment against the Goods or Body, within one mile of the court house	1 6	2 6	3 6	4 0	5 0	7 0
If above one mile, extra for every other mile	0 3	0 3	0 4	0 6	0 6	0 6
If Two officers be necessary in the judgment of the Court, then extra, within one mile	1 0	1 6	2 0	2 0	2 6	3 0
If above one mile, extra for every other mile	0 3	0 3	0 4	0 6	0 6	0 6
Keeping Possession of Goods till Sale, per day, not exceeding five days.....	1 0	1 6	2 0	2 0	2 6	3 0
Carrying every Delinquent to prison, including all Expenses and Assistants, per mile.	1 0	1 0	1 0	1 0	1 0	1 0
Issuing Warrant to Clerk of another Court	1 0	1 6	2 0	2 6	3 0	3 6

N.B.—Where the plaintiff recovers less than his claim, so as to reduce the scale of costs, the plaintiff to pay the difference

N.B.—The several fees payable on proceedings in replevin to be regulated on the same scale, by the amount distrained for; and on proceedings for the recovery of tenements, by the yearly rent or value of the tenement sought to be recovered.

Allowances to Witnesses.

	£.	s.	d.
Gentlemen, Merchants, Bankers, and Professional Men.....	0	7	6
Tradesmen, Auctioneers, Accountants, Clerks, and Yeomen.....	0	5	0
Journeymen, Labourers, and the like.....	0	2	0
Travelling Expenses, per mile, one way.....	0	0	6

CHAPTER X.

Of Courts of Equity.

WE have already seen, that the powers possessed by the courts of common law are inadequate to the full investigation and decision of all subjects which may come before them; and it is to supply these defects that courts of equity have exerted their jurisdiction. Thus, a court of equity will, and it alone can in many cases, remove impediments to the fair decision of a question in other courts, as by preventing a party from setting up some mere formal legal defence, as an outstanding term of years, or pleading the Statute of Limitations. A court of equity will provide for the safety of property pending a litigation, if it be in danger of being dissipated or destroyed by those to whose care it has been entrusted. It will put a bound to vexatious and oppressive litigation, and prevent an unnecessary multiplicity of suits. It will compel a discovery of evidence, which may enable other courts to form their judgments. It will preserve testimony when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation. These and many other objects can alone be obtained in a court of equity.

There were, until lately, two superior courts of equity (that is, courts of general, in opposition to courts of local or peculiar jurisdiction) namely, the High Court of Chancery, and the Equity Side of the Court of Exchequer. But by the 5 & 6 Vict. c. 5, the equity jurisdiction of the latter court was abolished, and all suits and matters depending in it were removed to the Court of Chancery, which is therefore now the only superior, as it was always the principal and most important court of equity.

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THE LORD CHANCELLOR is created by the mere delivery of the great seal into his custody: and thereby becomes, without writ or patent, an officer of the greatest weight and power of any in the kingdom, and superior in point of precedency to every temporal lord. He is a privy councillor, speaker of the House of Lords, and patron of all the livings under a certain yearly value in the queen's books. To him belongs the appointment of all justices of the peace throughout the kingdom. He is visitor in right of the crown of all hospitals and colleges of royal foundation, and the general guardian of all infants, idiots, and lunatics.

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	AMOUNT OF DEMAND					
	Not exceeding 20s.	Exceeding 20s. and not exceeding 40s.	Exceeding 40s. and not exceeding £5.	Exceeding £5. and not exceeding £10.	Exceeding £10. Founded on Contract.	Exceeding £10. Founded on Tort.
CLERK'S FEES (continued)—	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
Payment of Money out of Court, and taking Receipt, exclusive of Stamp.....	...	...	...	0 9	1 0	1 6
Every Search in the Books	0 2	0 2	0 4	0 6	1 0	1 0
Issuing every Warrant, Attachment, or Execution	0 6	0 6	1 0	1 6	2 6	3 0
Supersedeas of Execution, or Certificate of Payment, or Withdrawal of Cause.....	0 3	0 6	0 6	1 0	1 6	2 0
Warrant of Commitment for an insult or misbehaviour in court	1 0	1 0	1 0	1 0	1 0	1 0
Entering and giving Notice of Jury being required ...	0 6	0 9	1 0	1 6	2 0	2 6
Issuing Summons for Jury	0 6	0 9	1 0	1 6	2 0	2 6
Swearing Jury	0 6	0 8	0 10	1 0	1 6	1 6
Every Hearing, Trial, or Nonsuit with a Jury Taking Recognizance or Security for Costs...	1 0	1 6	2 0	3 0	5 0	7 6
Inquiring into sufficiency of Sureties proposed, and taking Bond on Removal of Plaintiff, or grant of New Trial, or other occasion...	...	..	...	2 0	2 6	3 0
Taxing Costs	2 6	2 6	2 6	2 6	2 6	2 6
	...	...	...	1 0	2 0	3 0
HIGH BAILIFF'S FEES.						
Calling every Cause	0 2	0 3	0 4	0 6	1 0	1 6
Affidavit of Service of Summons out of the jurisdiction	0 2	0 3	0 6	0 0	1 6	2 0
Serving every Summons, Order, or Subpoena, within one mile of court house	0 3	0 4	0 6	1 10	1 0	1 6
If above one mile, extra for every other mile	0 2	0 2	0 3	0 4	0 4	...
Execution of every Warrant, Precept, or Attachment against the Goods or Body, within one mile of the court house	1 6	2 6	3 6	4 0	5 0	7 0
If above one mile, extra for every other mile	0 3	0 3	0 4	0 6	0 6	0 6
If Two officers be necessary in the judgment of the Court, then extra, within one mile.	1 0	1 6	2 0	2 0	2 6	3 0
If above one mile, extra for every other mile	0 3	0 3	0 4	0 6	0 6	0 6
Keeping Possession of Goods till Sale, per day, not exceeding five days.....	1 0	1 6	2 0	2 0	2 6	3 0
Carrying every Delinquent to prison, including all Expenses and Assistants, per mile.	1 0	1 0	1 0	1 0	1 0	1 0
Issuing Warrant to Clerk of another Court	1 0	1 6	2 0	2 6	3 0	3 6

N.B.—Where the plaintiff recovers less than his claim, so as to reduce the scale of costs, the plaintiff to pay the difference

N.B.—The several fees payable on proceedings in replevin to be regulated on the same scale, by the amount distrained for; and on proceedings for the recovery of tenements, by the yearly rent or value of the tenement sought to be recovered.

Allowances to Witnesses.

	£.	s.	d.
Gentlemen, Merchants, Bankers, and Professional Men.....	0	7	6
Tradesmen, Auctioneers, Accountants, Clerks, and Yeomen.....	0	5	0
Journeyman, Labourers, and the like.....	0	2	0
Travelling Expenses, per mile, one way.....	0	0	0

CHAPTER X.

Of Courts of Equity.

WE have already seen, that the powers possessed by the courts of common law are inadequate to the full investigation and decision of all subjects which may come before them; and it is to supply these defects that courts of equity have exerted their jurisdiction. Thus, a court of equity will, and it alone can in many cases, remove impediments to the fair decision of a question in other courts, as by preventing a party from setting up some mere formal legal defence, as an outstanding term of years, or pleading the Statute of Limitations. A court of equity will provide for the safety of property pending a litigation, if it be in danger of being dissipated or destroyed by those to whose care it has been entrusted. It will put a bound to vexatious and oppressive litigation, and prevent an unnecessary multiplicity of suits. It will compel a discovery of evidence, which may enable other courts to form their judgments. It will preserve testimony when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation. These and many other objects can alone be obtained in a court of equity.

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The **MASTER OF THE ROLLS** is a very ancient judicial officer. He has a separate jurisdiction distinct from the lord chancellor. He is chief of the masters in chancery, and chief clerk of the Petty Bag Office.

His appointment is by letters patent, formerly at the king's pleasure, but now always for life. He takes precedence next to the lord chancellor, and before the vice-chancellors and all the other judges.

The office of VICE-CHANCELLOR is but of recent creation. The Vice-Chancellor of England was created by the act of parliament the 53 Geo. III. c. 24; and by an act passed in the 5th year of the reign of her present majesty, c. 5, two additional vice-chancellors were appointed. The duties of the vice-chancellors are to assist the lord chancellor in the hearing and determining of causes depending in the Court of Chancery, either as a court of law or equity; for which purpose they are empowered to sit for the lord chancellor in his absence, or in a separate court of their own, at the same time that the lord chancellor is sitting. The vice-chancellor of England has rank and precedence next to the master of the rolls; the two additional vice-chancellors take rank and precedence next to the lord chief baron of the Court of Exchequer.

In term time, the lord chancellor, master of the rolls, and vice-chancellors sit in their respective courts in Westminster Hall; but, out of term, the lord chancellor and the vice-chancellors sit at Lincoln's Inn, and the master of the rolls, at the Rolls Court, Chancery Lane.

Masters in Chancery.—There are twelve *Masters in Ordinary* of the Court of Chancery, besides the Master of the Rolls. They are appointed by the crown; and their duty is to execute the orders of the court, upon references made to them by the court, and, by reports or certificates in writing, to certify in what manner they have executed such orders. The matters referred to the masters are of course various: the most usual are, to examine into the regularity of pleadings; to take the accounts of executors, administrators, trustees, receivers, &c.; to inquire into the claims of creditors, legatees, and next of kin; to inquire for the heirs or next of kin of persons dying intestate; to approve of guardians of infants, and of allowances out of their property for their maintenance.

It was also, until recently, part of their duty to ascertain the heirs at law and next of kin of lunatics, to approve of the committees of their persons and estates, and of the proper allowances for their support and maintenance, and to examine and pass the accounts of such committees; and also to tax solicitors' bills of costs. But now, under certain orders which have been made by the lord chancellor, in pursuance of the act 5 & 6 Vict. c. 84, all such matters and inquiries relating to lunatics or their property, which were previously referred to the masters, are (except certain inquiries under the 1 Wm. IV. c. 60, relating to conveyances of estates by trustees and mortgagees, and except where the lord chancellor shall otherwise direct) referred to certain officers appointed by that act, styled "Commissioners in Lunacy;"¹ and all solicitors' bills of costs are now taxed by certain officers appointed by the 5 & 6 Vict. c. 103, styled "Taxing Masters."

Masters Extraordinary are appointed by the lord chancellor. Their duty is to take affidavits in the country in matters depending in or relating to the Court of Chancery, and the acknowledgments of deeds to be enrolled in the said court. They may do any act incident to their office at any place distant not less than ten miles from the Hall in Lincoln's Inn.

¹ Now styled "Masters in Lunacy."—8 & 9 Vic. c. 100.

The *Accountant General* is appointed by the lord chancellor. His duties are to perform all matters relating to the payment of the suitors' moneys and effects into the Bank, taking out the same, keeping the accounts with the Bank, and all other matters relating thereto, according to the orders of the court. All moneys belonging to the suitors of the court, and which the court orders to be invested in the funds, are invested by the accountant general, and stand in his name in the books of the Bank: he is, in fact, the broker of the Court of Chancery.

Six Clerks.—By the act 5 & 6 Vict. c. 103, the offices of six clerks, sworn clerks, and waiting clerks, were abolished; and all such duties as were previously performed by them with reference to the filing, custody of, and copying bills, answers, and other pleadings, and all other duties formerly performed by them in relation to suits and matters in equity (except as solicitors, attorneys, or agents), are now performed by officers called "Clerks of Records and Writs." The duties which were performed by them as attorneys or solicitors, with reference to making out writs, entering appearances, &c., are now performed by solicitors, where the parties sue or defend by a solicitor; or by the parties themselves, when they sue or defend in person.

There are ten *Registrars* of the Court of Chancery, appointed by the lord chancellor; their duties are to attend the courts when sitting; to take minutes; and draw up the decrees and orders pronounced by the court.

Having thus taken a brief view of the constitution of the Court of Chancery, and the duties of its principal officers, we proceed to notice the subjects of its jurisdiction.

In the Court of Chancery there are two distinct tribunals: the one *ordinary*, proceeding according to the maxims of the common law, and styled the Petty Bag side; the other *extraordinary*, being the court of equity, which has now become the court of the greatest judicial consequence.

The jurisdiction of the CHANCELLOR AND THE COURT OF CHANCERY has been usually arranged under four principal heads; viz. 1. The common-law jurisdiction; 2. The equitable jurisdiction; 3. The statutory jurisdiction; and 4. The specially delegated jurisdiction. All these four branches of jurisdiction may be delegated, when the chancellor thinks fit, to either of the vice-chancellors.

1. *The Common-Law Jurisdiction of the Chancellor* principally relates to litigation between private parties by action in the Petty-Bag office; a court, or rather office, in which all personal actions by or against any officer of the Court of Chancery in respect of his service or attendance ought in strictness to be brought. Here, too, the chancellor has jurisdiction to hold pleas of *scire facias* to repeal letters patent, traverses of office, *scire facias* on recognizances, executions upon statutes, &c. If a demurrer be joined upon the pleadings in this court, the chancellor may give judgment; but if an issue of fact be joined, the record must be delivered to the Court of Queen's Bench, and there tried. It is said, the Court of Chancery will not allow writs of error in the Queen's Bench upon judgments in the Petty Bag.

This court has been called the *officina justitiæ*; for out of it are issued all original writs that pass under the great seal, such as writs *de ventre inspiciendo*, *supplicavit*, all commissions of charitable uses,

idiotey, lunacy, and the like. These writs, relating to the business of the subject, and the returns to them, were originally kept in a hamper (*in hanaperio*), and the others, relating to such matters wherein the crown is mediately or immediately concerned, were preserved in a little sack or bag (*in parvâ bagâ*); whence hath arisen the distinction of the Hanaper Office and Petty Bag Office. The office of Clerk of the Hanaper was abolished by the 3 & 4 Wm. IV. c. 111, and that of Comptroller of the Hanaper, by the 5 & 6 Vict. c. 103.

The issuing of writs of *supplicavit*, particularly on behalf of married women and against peers, to obtain sureties to keep the peace, is a useful branch of the common law jurisdiction of the chancellor.

A writ of *habeas corpus*, returnable before the chancellor, especially in vacation, when the judges may be on the circuit, is an important jurisdiction, and thereby at all times relief can be instantly obtained from unjust imprisonment.

Writs of *certiorari*, and writs enjoining an inferior court not to exercise a wrongfully assumed jurisdiction, termed writs of *prohibition*, may also be issued by the chancellor. If a prohibition is improperly granted, the Court of Chancery will grant a *supersedeas*, but in any event the inferior court must obey the writ. The Court of Chancery is considered as always open; therefore it is that writs issue out of it in vacation as well as in term time.

The chancellor also, *virtute officii*, has jurisdiction to issue various original writs and writs of error to other courts, authorizing or commanding them to act, as, amongst others, the writ *de ventre inspiciendo* on behalf of an heir, &c.

2. *The Equity Jurisdiction of the Chancellor and Court of Chancery* is the most extensive and useful in the realm. It is entirely *civil*, and in a very few instances only exercised in criminal proceedings.

The cases upon which courts of equity are most frequently called upon to adjudicate have been classed under the following heads: 1. Accident or mistake; 2. Fraud; and 3. Breaches of trust and confidence.

Accident or Mistake.—When an instrument on which a title is founded, as a bond, is lost, the court will lend its aid to supply the defect occasioned by the loss, and will give the same remedy that a court of common law would have given if the accident had not happened. The origin of the Court of Chancery interfering in these cases was the rule which formerly existed at law, that a party could not proceed in an action upon a deed without *profert* or production of it, which in the case of a lost deed was obviously impossible. The rule of law has ceased; but the Court of Chancery still retains its jurisdiction. If an instrument has been destroyed, or is improperly suppressed or withheld from the party claiming under it, the Court of Chancery will relieve; and, in truth, it will generally lend its aid whenever by any accident a party is prevented from asserting his right in the courts of ordinary jurisdiction. So in cases where the remedy afforded by the courts of common law is incomplete, the Court of Chancery will interfere, and, if possible, give a complete remedy. Upon this principle the Court of Chancery acts in cases where a person, to whom title deeds or writings belong, files a bill against a party for the delivering up of the deeds and writings, suggesting by the bill that they are in the defendant's custody or power; but the party filing

the bill must make an affidavit, that the deeds in question are not in his custody, and that he does not know where they are if they are not in the hands of the defendant. Where parties by contract have given a right, but have not provided a sufficient remedy, a court of equity will interfere; as where parties meaning to make a good conveyance of an estate which they have contracted to sell, have made use of an imperfect instrument, as a bargain and sale without enrolment, the court of equity will interfere, and hold the conveyance, though made by the imperfect instrument, good and valid. The court considers the intention to make a good conveyance to be shown by the imperfect instrument, and acts upon such intention.

In the case of a negotiable instrument, as a bill of exchange or promissory note, which may possibly have been received *bonâ fide* by a new party after the loss, so as to expose the acceptor or indorser to the possibility of another claim, or at least of litigation, a court of equity still retains the sole and exclusive jurisdiction, on indemnity tendered and bill filed, to compel payment.

So, although we have seen that in some cases *mistakes*, or at least *ambiguities*, may be explained and remedied at law, yet in general it is advisable for the party desirous to rectify them to file a bill in equity; as if a note be drawn by mistake as joint only, instead of joint and several. And in general, in case of a mistake in a deed, recourse to a suit in equity is advisable, where not only mistakes in the deed itself may be rectified, but the execution of a proper deed compelled.

Speaking generally, ignorance or mistake of *law* will not be relieved against, as every person is presumed to know the law; but ignorance or mistake of *fact* will, but not on the mere *supposition* that parties are ignorant of the legal effect of their acts. And it has been decided, that if a party, with knowledge of the facts of a case, but in ignorance of the law, pays over to another claiming it as a right, money which he was not compellable to pay, he cannot, upon discovering what his legal right was, recover back the money. Neither will relief be given in equity against errors in judgment. In general, agreements relating to real or personal estate, if founded on mistake, will be set aside in equity. Where both parties have been acting under a mistake, and the fact out of which the mistake arose was doubtful, and was unknown to both parties, equity will give relief.

Matters of *account* of various descriptions, as between mortgagor and mortgagee, principal and agent, partner and partner, unless the partnership is illegal; matters relating to *tithes*; and various other matters of account, are subjects over which, as they are frequently complex and not readily ascertainable before a jury, but are better investigated in a master's office, this court always exercised at least concurrent jurisdiction, provided there is not a balance agreed. In matters of account between partners, the most convenient remedy is in equity, the courts of common law being, from their constitution, unfit tribunals for such subjects.

Dealings between a tradesman and his customer may be the subject of an account in equity; but in all cases there must be mutual demands, not merely one payment and one receipt; and the subject of account must not be matter of set-off at law.

Accounts may in some cases be taken between landlord and tenant.

Fraud is one of the most fertile sources of litigation in the Court of Chancery; and the jurisdiction of the court on this head is most extensive. Under this head, cases of oppression, where a man has taken advantage of the situation of another to obtain from him an unreasonable contract, have been relieved against, as is generally the case in sales by expectant heirs of their expectancies, and sales of reversionary interests. The court, with a view to prevent fraud, looks with a jealous eye upon transactions, either of gift or purchase, by a party who stands in a fiduciary relation to the giver or seller. The rule may perhaps be shortly stated thus: that if an attorney or solicitor, guardian or trustee, takes a gift from or makes a bargain with his client, ward, or cestuique trust, he must prove that he dealt with him exactly as he would have done with a stranger, taking no advantage of his influence or knowledge, or the transaction will be impeachable, and liable to be set aside on the ground of fraud. So a purchase made by a trustee of the trust estate, or by the assignees or commissioners of a bankrupt's estate, unless the leave of the court is obtained, is invalid. The same rule is extended to the committees of lunatics, and to principal and steward, or agent. But fraud in obtaining a will of *real* property is cognizable only at law, and must always be sent out of a court of equity to be tried at law by a jury.

Fraud in obtaining a contract even under seal, when established in evidence, vitiates it both at law and in equity, and may be pleaded in bar to an action on such deed. But where both parties have acted fraudulently, as where deeds have been executed in order to create a colourable qualification under the game laws, or a vote at an election, or to induce a parent to consent to a marriage, a court of equity will not interfere.

A bill for an *injunction* to *restrain or control proceedings in other courts*, is an important jurisdiction of courts of equity. An injunction is generally granted to restrain fraud and injustice; but the granting of it is discretionary, and it can only be obtained against a party to the suit. It must be specially prayed for in the bill on which it is sought. When to an action there is no legal but only an equitable defence, a bill for an injunction is absolutely necessary; and the bill must be filed as early as possible after the proceeding at law has commenced; for if there be any delay, it may be too late to obtain relief. A bill of this nature is also essential when a legal right of action has been improperly exercised, as if repeated actions for breaches of covenant or non-payment of rent have been vexatiously instituted by a landlord against his tenant. If an attorney or solicitor proceed in an action at law for his bill of costs pending or immediately after taxation of his bill, and before the costs of the taxation have been ascertained, he may be restrained by bill and injunction.

When a bill for an injunction is filed after arrest at law, no injunction will be granted without bringing the principal sum into court, except there appear in the defendant's answer, or by written evidence, plain matter tending to discharge the debt in equity; and after a verdict at law for the plaintiff, an injunction cannot in any case be obtained without bringing the amount of the verdict into court.

Somewhat analogous is the equitable jurisdiction of preventing a

defendant at law from setting up some formal legal defence, when the so doing would prevent the just investigation of a legal right, as from setting up an outstanding term, which, though vested in some trustee to attend the inheritance, might otherwise constitute an impediment to the fair decision of the question between the parties. So also a defendant at law may be prevented from pleading the statute of limitations. In cases of waste, or of apprehended mischief or nuisance, the court will interfere by injunction.

The court will sometimes prevent injury by interposing before any actual injury has been suffered, by a bill called a bill *quia timet*.

Bills of *peace*, formerly frequent, were sustainable, not between two individuals only, but where numerous parties or separate rights were interested. The object of a bill of peace is generally a perpetual injunction to prevent a vexatious repetition of suits; they are frequent in disputes between lords of manors and their tenants.

Bills for relief against *forfeitures*, as those occasioned by non-payment of rent or other sums of money, may also be here arranged.

A bill of *interpleader* (which is proceeded upon on principles similar to those by which the courts of common law are guided in the case of *bailment*) is resorted to where two or more persons claim the same thing by different titles, and another person claiming no right in the subject is ignorant to which of the contending parties he ought to deliver the subject, and is in danger of being sued by both. The object is, to compel the claimants to settle their rights, or interplead, and that in the meantime the party in whose hands the subject matter is may be protected. Thus, a captain of a ship, or any agent or party holding goods or money not for his own use, may file a bill of interpleader, where parties claim adversely under bills of lading, &c. But the defendant must not set up any claim on his own account, and must not in any respect have been a wrong-doer. A party filing a bill of interpleader is entitled to his costs, unless there has been collusion; and that there has not been such collusion he must annex an affidavit to his bill. In some cases, even since the recent act 1 Wm. IV. c. 58, affording relief at law, it may still be necessary to resort to a court of equity; as if the action be not in the form mentioned in the act, or any of the claimants are out of the kingdom.

Courts of law have not (except in the case of summary motions and affidavits in answer) any power to compel a defendant to discover any facts or evidence in favour of the plaintiff, or to compel the plaintiff to admit any facts favourable to a defence, but a court of equity has exclusive jurisdiction in this respect. It therefore becomes frequently necessary to file a bill merely for a *discovery of facts* in aid of the relief at law, and without praying relief in equity, because the facts, when discovered, will disclose and establish a legal right of action, or a legal ground of defence. Where courts of equity and law have concurrent jurisdiction, and in all cases where the remedy or the defence is peculiarly in equity, the bill may also pray relief. The rule in equity, that a party is not bound to disclose his own case, is confined to mere matter of title and criminal acts, and does not extend to matters of account.

The lessor of the plaintiff in an action of ejectment may in some cases, as where he claims in part under the same title as that of the

defendant, file a bill of discovery to ascertain the grounds upon which the defendant claims; and on the other hand a defendant at law in such action may file a similar bill to discover on what grounds the lessor of the plaintiff is proceeding at law. Thus any person in possession of an estate, as tenant or otherwise, may file a bill for a discovery of the title of a party bringing an action of ejectment against him, even though he is himself a wrong-doer against every body.

Bills for *assignment of dower* also are proceeded upon in equity.

Bills for *partition* or apportionment between joint tenants or tenants in common were always sustainable in equity; and, since the abolition of the writ of partition at law by the 3 & 4 Wm. IV. c. 27, § 36, such bills are the only mode of effecting a division.

Bills for *contribution between sureties*, we have seen, may, in the event of the insolvency of one or more of the sureties, be preferable to an action.

Bills to establish a *modus* are also cognizable in equity.

When specialty creditors have exhausted the personal assets, simple contract creditors, and even legatees, may, to the extent of the personal assets so applied, stand in their place, and the only remedy for this is by bill to marshal the assets. So bills to secure property in litigation in other courts can only be filed in this court.

Bills to compel the lord of a manor to hold a court, or admit a copyholder, are sustainable; though a mandamus is in general preferable.

If the testimony of witnesses is in danger of being lost before the matter to which it relates can be made the subject of judicial investigation, it is competent to the party who is desirous that such evidence should be preserved to apply to the court for its assistance, which the court will grant upon a bill being filed, termed a *bill to perpetuate testimony*.

The care of *infants* and their property is also a subject of equitable jurisdiction; but it is never exercised except when the infant has property, and then, incidentally, the person as well as property will be protected. This jurisdiction over a ward extends beyond the age of twenty-one, and until all the objects of the guardianship have been fulfilled. In many respects property belonging to infants, *femes covert*, idiots, lunatics, persons of unsound mind, and persons out of the jurisdiction of the court of chancery, is guarded by the 1 Wm. IV. c. 65.

Another branch of equitable jurisdiction is the enforcing *specific performance of agreements* for the sale and purchase of estates. We have already seen that equity will decree the specific delivery of certain chattels, as *heir looms* or *title-deeds*, specific bequests, and other articles.

The jurisdiction over *trusts* and *trustees* (including *executors*) constitutes the last head of the division of equitable jurisdiction, and is a principal and exclusive branch. It includes not only express trusts created by deed or will, but also those which are implied from the circumstance of the party having accepted some office, as that of executor or administrator, and the incident jurisdiction over *legacies*, with the power over trustees of different descriptions.

A cestuique trust, or person beneficially but not legally interested, can in no case sue his trustees at law for any misconduct, but must file

a bill in equity when the trustees have been guilty of any abuse of the trust. So if trustees refuse to act when they ought, the course is to file a bill to compel them; though it is usual at law, if it be necessary to proceed in ejectment on their demise, to tender them an adequate indemnity, and then to proceed in their names; after which, if the proceeding be proper, and they attempt to impede the recovery, equity would subject them to costs, and perhaps other loss.

To avoid circuity of remedy by previous resort to an ecclesiastical court, courts of equity exercise complete jurisdiction, as well by enforcing the discovery of assets as by decreeing payment of *legacies*, on the ground that the executor is in the nature of a trustee for the parties beneficially interested. If a legacy is payable out of the personal estate, it is governed by the rules of the civil law; but if charged upon real estate, the rules of the common law prevail. When a legacy is bequeathed to a married woman, courts of equity exercise an exclusive jurisdiction, because the ecclesiastical court cannot impose any terms, or compel the husband to make an adequate provision or settlement on his wife, which the Court of Chancery can oblige him to do before he will be permitted to receive the legacy. So where a father has instituted a suit in a spiritual court for an infant's legacy, the Court of Chancery will grant an injunction, to prevent the money from getting into the father's power.

In order to secure a just and equal distribution of assets, and prevent an executor from preferring one creditor to another of equal degree, when there are not assets to pay all, one creditor should file a bill on behalf of himself and others against the executor or administrator, requiring him to account and distribute equally; and when an executor is pressed by some creditors more than others, he should get a friendly creditor to file such a bill.

There is a great advantage in favour of a creditor, legatee, or next of kin proceeding in a court of equity by bill against an executor or administrator, rather than in the ecclesiastical court; because in the former the fund may be secured in court, and the executor's account and oath are not conclusive. A legatee instituting such a suit will be entitled to costs out of the estate.

3. *The Statutory Jurisdiction* of this court is that which remains to it in bankruptcy, and under the statutes relating to charitable uses, arbitrations, friendly societies, and a few others.

4. Its *Delegated Jurisdiction* is that relating to idiots and lunatics.

The PROCEEDINGS in Chancery and other courts of equity are, like those of the common law courts, either formal or summary.

1. *FORMAL SUITS* are instituted by filing a bill, and compelling the defendant's appearance by *subpœna*. But as it is our intention to devote a separate chapter to the detail of the proceedings in formal suits, it is unnecessary to pursue the subject any farther in this place.

2. *SUMMARY* applications are usually by *motion*, supported by affidavits; upon which both parties are heard, and an order made. But what can be done on motion may also, in general, be effected by *petition*. In general, on all applications for payment of money, or where a detailed statement is requisite to attain the object, a petition is preferred. All applications for special injunctions during the long vacation are made

on petition. No original affidavit can be read in court ; but it must be previously filed, and an office copy produced in court on the hearing of the motion or petition. When a summary or particular jurisdiction is given by statute, the precise course of proceeding there directed must be pursued, the same as we have seen is essential in courts of law.

It seems that a party entitled to proceed by motion in a court of equity under the various statutes authorizing a summary application, is not thereby precluded from filing a bill to obtain the same object, if, with a view to saving his right of appeal, or for other reasons, it should be considered the more advisable course.

With respect to the jurisdiction of a court of equity to interfere in cases of *annuities*, the 53 Geo. III. c. 141, § 1, enacts, that if there be not a proper memorial as thereby required, the deed, bond, instrument, or other assurance shall be null and void to all intents and purposes, but the statute is silent as to the court to be proceeded in ; and the 6th section, authorizing summary proceedings, only names "the court in which the action is brought." But still equity, by its general jurisdiction, has power to decree, that annuity deeds, when void, shall be delivered up to be cancelled, and a re-conveyance executed. The 5th section of the 53 Geo. III. c. 141, gives a judge of the Queen's Bench or Common Pleas summary power to compel the production of the original annuity deeds, and their examination with a copy ; but no such power is extended to a judge in equity. A court of equity, therefore, cannot on *motion* order the delivery up of an annuity deed void for omission in the memorial, but the proceeding must be by bill.

A submission to *arbitration* may be made an order of a court of equity, and the award will then be enforced or set aside as in a court of law. But a court of equity will not interfere to stay proceedings at law upon an award where the submission has been made a rule of a common law court under the statute 9 & 10 Wm. III. c. 15.

Courts of equity exercise the same summary jurisdiction over *solicitors* which we have seen that courts of law exercise over attorneys. Even in a case of mere negligence, the Court of Chancery will compel a solicitor to deliver his bill of costs, and to deliver up all deeds and papers in his custody belonging to his client, although there be no cause depending ; and it will prevent a solicitor from abusing the confidence reposed in him, or from acting against his former client in a matter where, in consequence of his prior employment, he has acquired information which he could use against him. If a solicitor has been guilty of malpractice, a motion to strike him off the rolls may be made to the Court of Chancery. So if a solicitor falsely represent that an injunction has been obtained, he may be struck off the rolls ; and if a solicitor assist his client in obtaining a fraudulent release, he may be properly made a party in a suit to defeat it.¹

The Court of Chancery has not, or at least will not exercise directly any criminal jurisdiction, not even to prevent, much less to punish crime, unless perhaps to protect an infant, or where a party is suing in equity and also criminally for the same matter, in which case he may be compelled to abandon one or the other form of proceeding. Nor will it compel a discovery in aid of criminal proceedings. A court of equity,

¹ As to this subject, see *ante*, p. 286.

however, will take cognizance of a libel, if it relate to proceedings depending in the court.

This court has no jurisdiction over matters of prize, unless there be a trust. Nor will it entertain a bill to rescind the orders of the Court of Exchequer as a court of revenue, nor interfere in any matter which the Exchequer, as a court of revenue, is competent to decide.

The spiritual courts have exclusive cognizance of the rights and duties arising from the marriage state; courts of equity, therefore, have no jurisdiction upon a contract for separation. And though a court of equity has jurisdiction to decree the specific performance of an agreement between husband and wife for a separation and separate maintenance where a trustee is interposed, yet the legality of the marriage cannot be determined in a court of equity, but must be tried at law by a jury. So a court of equity will in some cases decree a wife alimony, though she have a sentence for it in a spiritual court; and the lord chancellor, the master of the rolls, or the vice-chancellor, will secure the payment of alimony allowed by the ecclesiastical court by a *ne exeat*. Where a ward of the court has been married, if the master should report that the marriage is invalid, a second marriage may be ordered by the court, although the statutes 58 Geo. III. c. 81, and 4 Geo. IV. c. 76, § 27, prohibit any suit in an ecclesiastical court to compel marriage.

Nor has this court any jurisdiction to determine on the *validity* of a will, whether of real or personal property, on the ground of fraud or otherwise. The validity of a devise of real property must be determined by a jury, and for this purpose the court will direct an issue to be tried, *devisavit vel non*; and the validity of a will of personality can be decided only in the ecclesiastical courts. But, pending litigation in the ecclesiastical court, a bill for an account and a receiver is sustainable. If a probate be obtained by fraud (over which chancery has peculiar cognizance), then the court will interfere by injunction, &c. So mistakes apparent on the face of a will may be rectified in equity, and ambiguities in technical terms may be explained by parol evidence of scientific persons. Courts of equity have exclusive jurisdiction over a devise of real estate to pay debts.

If it appear upon the face of a bill filed that the complainant's right as well as remedy are legal, or cognizable only in a court of law or admiralty, or in a court of prize, and not remediable in a court of equity, then the latter has no jurisdiction, and the defendant may demur to the bill. But where a court of equity has concurrent and equal jurisdiction, a bill there may be sustained. And although there might originally have been an objection to a bill filed in a court of equity for want of jurisdiction, and the matter might be properly triable at law, yet the defendant, by filing a cross bill, may give the court jurisdiction.

There are also cases of a defendant sued at law, where, although the facts might equally afford a defence at law, yet he may file a bill in equity for relief; as where a defendant has accepted a bill for the accommodation of the plaintiff. But where an injunction is prayed against proceedings at law on that ground, the court of equity will require the defendant at law to bring the alleged debt into the court of equity until the hearing of the cause, when, if a perpetual injunction be granted, the money will be refunded, with any interest made in the mean time.

CHAPTER XI.

Of the Proceedings in a Suit in Chancery.

I. OF FILING A BILL.

A suit in chancery is commenced by preferring a bill, in the nature of a petition, to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal. If the person holding the great seal is a party to the bill, or the seal is in the king's hands, then the bill must be addressed to the king himself in his court of chancery. If the rights of the crown, or of those who partake of its prerogatives, as idiots and lunatics, or whose rights are under its particular protection, as the objects of a public charity, are concerned, the matter is brought under the notice of the court, not by a bill as in other cases, but by a proceeding termed an *information* by the attorney-general, or, on a vacancy in that office, by the solicitor-general. This proceeding, however, differs but little from a bill, except in the style. Suits thus preferred to the Court of Chancery are termed suits by *English bill*.

Frame of a Bill.—A bill, which must in all cases be signed by counsel, usually consists of nine parts. The *first* part is the address to the person or persons holding the great seal. The *second* part consists of the names of the plaintiffs (or persons exhibiting the bill), their description and abode. The *third* part contains the plaintiff's case, and is called the *stating* part of the bill. In the *fourth* place is the general charge of confederacy, which must be omitted if the bill is exhibited against a peer. The *fifth* part consists of allegations of the pretences of the defendant (or person against whom the bill is exhibited), and the charges in evidence of them: this is called the *charging* part of the bill. The *sixth* part is intended to give jurisdiction of the suit to the court by a general averment that the acts complained of are contrary to equity, and that the parties have no remedy, or no complete remedy, without the assistance of the court. The *seventh* part prays that the parties complained of may answer all the matters contained in the bill, not only according to their positive knowledge of the facts stated, but also according to their remembrance, information, and belief: this is called the *interrogating* part. The *eighth* part is the prayer for relief, which of course varies according to the case made by the bill: to this is usually added a prayer for general relief, in order that if the plaintiff has mistaken the relief to which he is entitled, the court may yet, under the general prayer, afford him that relief to which he has a right. *Ninthly* and lastly, the bill prays that process may issue requiring the defendant to appear to and answer the bill; adding, in case any defendant has privilege of peerage or is a lord of parliament, a prayer for a letter of the person holding the great seal, termed a *letter missive*, requesting the defendant to appear to and answer the bill. If the attorney-general, as an officer of the crown, is a defendant, the bill does not pray

process against him, but that he may answer it upon being attended with a copy.

The bill, the form of which we have just considered, is termed an *original bill*, or a bill which relates to some matter not before litigated in the court by the same persons representing the same interests. These have been divided into bills praying relief, and bills not praying relief. Of the former kind are bills filed by legatees, to obtain payment of their legacies; bills to compel the specific performance of agreements; bills of injunction, to restrain or control proceedings in other courts; bills for dower; bills of interpleader, &c.

There are, however, various other kinds of bills besides an *original bill*. These may, for our present purpose, be classed under two heads: 1. Bills which are either an addition to an original bill, termed *supplemental bills*; or a continuance of an original bill, termed *bills of revivor*; or both an addition to and a continuance of an original bill, termed *bills of revivor and supplement*; and 2. Bills which are neither a continuance of nor an addition to the former bill, but in the nature of an original bill; as a bill exhibited by the defendant in a former bill against the plaintiff in the same bill, touching some matter in litigation in the first bill, and which is termed a *cross bill*; or a bill to examine and reverse a decree made upon a former bill, termed a *bill of review*.

By and against whom a Bill may be filed.—As a general rule, every person is entitled to exhibit a bill in chancery. In ordinary cases this is done by a party in his own name; but persons enjoying peculiar privileges, or labouring under certain disabilities, commence and prosecute proceedings in the names of others. Thus, as we have already seen, where the rights of the crown or of those who partake of its prerogatives or protection are concerned, the matter is brought under the notice of the court by an information of the attorney or solicitor general. If, however, the rights of the crown are not *immediately* concerned, the officer who exhibits the information depends upon the relation of some person named in the information, who is termed the *relator*, and is considered answerable to the court and the parties for the propriety of the proceedings and the costs of the suit. If the relator has an interest in the suit, his claim is incorporated in the information, and the proceeding is then termed an *information and bill*. The queen consort may inform by her attorney. A foreign state is entitled to the aid of the court; but it must sue in the name of some public officer who is entitled to represent the interests of the state, and upon whom process can be served.

Any person in possession of an estate, as tenant or otherwise, may file a bill of discovery of the title of the party bringing an action of ejectment against him.

A cestuique trust can in no case sue his trustee at law for any misconduct, but he may file a bill against him. So if trustees refuse to act when they ought, a bill may be filed to compel them.

When the interest of an *infant* renders it necessary to institute a suit, it is done by some person (usually his nearest relation) on his behalf, who is therefore termed his *prochein ami*, or next friend. This next friend must be a person of substance, because he is liable to the costs of

the suit, and which he will be made to pay if the suit has been improperly instituted. But if the infant, after attaining his majority, proceed in the suit, he will be liable to the whole costs. If the interest of the next friend is adverse to that of the infant, the court will remove him, and appoint a new next friend. The consent of an infant to a bill filed in his name is not necessary.

A *married woman* being under the protection of her husband, a suit respecting her rights is usually instituted by them jointly; but if the wife claims some right in opposition to that claimed by the husband, then the bill must be exhibited in her name by her next friend, in the same manner as in the case of an infant. But a bill cannot be filed in her name without her consent.

Idiots and lunatics sue by the committees of their estates; but if the interests of the committee clash with those of the idiot or lunatic, an information should be exhibited by the attorney-general on his behalf.

A party out of the jurisdiction of the court may file a bill in chancery; but in that case he must either give, to the clerk of records and writs in whose division the cause is, the security of solvent persons for the costs of the suit, or pay a sum of money into court;¹ and this extends even to the case where the plaintiff is a peer.

An alien enemy may sue under certain circumstances. See *Evans v. Richardson*, 3 Meriv. 469.

If a plaintiff misdescribe himself, or do not accurately or sufficiently state his place of residence, the court will, upon the application of the defendant, compel him to give security for the costs of the suit.

There is a certain class of persons (*viz.* paupers) who are allowed to prosecute and defend their rights in this court without incurring the same expence which falls upon suitors in general, by suing and defending *in formâ pauperis*. A party, in order to entitle himself to this privilege, must make an affidavit that he is not worth 5*l.*, his wearing apparel and the subject matter of the suit excepted. The privilege consists in the party being exempted from the payment of stamp duties, fees to counsel, and the general expences of the suit, and being liable only for the money paid out of pocket by the officers of the court for copying papers, &c. A next friend cannot sue *in formâ pauperis*. If a party suing *in formâ pauperis* be guilty of vexatious conduct in the suit, he will lose his privilege, and be (as it is termed) dispaupered.

Against whom a Bill may be filed.—A bill may be exhibited against any person or persons, or body politic or corporate, excepting only the king or queen. But to a bill filed against a married woman her husband must be a party, unless he is an exile, or has abjured the realm; and the committee of the estate of an idiot or lunatic must be made defendant with the person whose property is under his care. Where the rights of the crown are concerned, the attorney-general must be made a party to the bill. If a party whose rights are sought to be affected by a decree is out of the jurisdiction, the court will not allow the suit to proceed in his absence.

For what a Bill lies.—The matter in respect of which a bill may be exhibited has been already considered, when treating of the jurisdiction of the courts of equity. It only remains to be observed in this place,

¹ In *Cliffe v. Wilkinson* (4 Sim. 122), 120*l.* was the sum fixed.

that the Court of Chancery will not entertain a suit for any matter under the value of 20*l.*, or of 2*l.* a year, except in charity cases, or for the recovery of ancient quit rents.¹

Parties to a Suit.—The general rule upon this subject is, that *all persons* interested in the subject of the suit ought to be parties. This general rule, however, admits of several exceptions; as, if any person who ought to be a party is out of the jurisdiction of the court, that fact being stated in the bill and admitted by the defendant is in most cases a sufficient reason for not bringing him before the court. Again, where persons interested are very numerous, as in the case of public companies, the court has permitted a few to sue on behalf of themselves and others. So a few of a large number of persons may institute a suit on behalf of themselves and the rest for relief against acts injurious to their common rights. Some of the shareholders in a joint stock company may file a bill to have their deposits returned, without making all the other shareholders parties, if they are ignorant of their names. And, as already mentioned, one creditor or legatee may file a bill on behalf of himself and the other creditors or legatees. But in the case of a partnership, if a dissolution of the partnership be prayed by the bill, all the partners, however numerous, must be parties. So, if some of the shareholders in a joint stock company assign by deed their deposits to others, and appoint the latter their attorneys to recover the deposits, the assignees cannot sue on behalf of themselves and the assignors, but the latter, however numerous, must be parties to the suit. Where, however, the object is only to rescind a contract entered into by a company or partnership, and the shareholders or partners are numerous, a bill for this purpose may be filed by some of them on behalf of themselves and the others. The general rule above mentioned has also been relaxed in the case of several persons having a charge upon the same estate.² So if there be an estate for life with several remainders over in real estate, and it is not vested in trustees for sale, it is sufficient to make the person who has the first vested estate of inheritance a party to a suit instituted in relation to the property in which the several estates exist, without making all the remainder-men parties.

It is a settled rule of the court, that, in all suits to establish demands against the personal estate of a deceased person, the personal representative (*i. e.* the executor or administrator) of such person sufficiently represents the estate, and it is unnecessary to bring before the court any of the parties who are beneficially interested in it. Upon this principle, in all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees sufficiently represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits thereof, and it is not necessary to make the persons beneficially interested in such real estate, proceeds, or rents and profits, parties to the suit. And in suits to execute the trusts of a will, it is not necessary to make the heir at

¹ See Smith's Chan. Prac. vol. i. p. 52.

Farmer v. Curtis, 2 Sim. 466; Cottingham

² See Love v. Morgan, 2 B. C. C. 360; Bishop of Winchester v. Benvan. 11 Ves. 194;

v. Lord Shrewsbury, ib. 395.

law a party; but he must be made a party, if the will is to be established against him. And where a plaintiff makes a joint and several demand against several persons, as, for instance, in the case of a debt secured by a joint and several bond, he need not bring before the court all the persons liable to his demand, but he may proceed against one or more of the persons liable.

The plaintiff's solicitor should, before filing his bill, have the authority of all the persons named as plaintiffs to make them parties in that capacity; and such authority had better be in writing, although this is not absolutely requisite.

The party filing the bill may, when he files it, choose whether he will have it heard before the lord chancellor or the master of the rolls; and if he elect the former, he must at the same time determine before which of the vice-chancellors he will have it heard. This election once made is final; and when one order (except an order upon a motion of course) in the cause has been heard by any particular judge, all subsequent applications in the cause must be made to the same jurisdiction.

Any person who, according to the rules of the court, is able to sue or defend alone, may, if he thinks fit, sue or defend in person, without the intervention of a solicitor; but in such case he must cause to be indorsed upon every writ which he shall sue out, and upon every information, bill, or other proceeding which he shall leave with the clerks of records and writs to be filed, his name and place of residence, and also, if his residence be more than three miles from the Record and Writ Clerks office, another proper place, to be called his address for service, (which must not be more than three miles from the said office), where writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications may be left for him. If the party does not indorse such address for service, all writs, notices, and such other proceedings and written communications as above mentioned, as do not by the rules of the court require personal service, will be sufficiently served upon the party if served upon him personally or at his place of residence. But if such address for service shall have been indorsed, then all such writs and other proceedings as above mentioned will be sufficiently served upon such party if left for him at such address for service. If a party sues or defends by a solicitor, such solicitor must indorse, upon every writ he sues out, and upon every bill or other proceeding which he leaves with the clerks of records and writs to be filed, his name or firm, and place of business, and also, if his place of business is more than three miles distant from the Record and Writ Clerks office, another proper place, to be called his address for service, (which must not be more than three miles from the said office), where all writs and other proceedings may be left for him; and if such solicitor is only an agent, he must add to his own name or firm and place of business, the name or firm and place of business of the principal solicitor; and where no address for service is given, all writs and other proceedings not requiring personal service, and which were, previously to the passing of the 5 & 6 Vict. c. 103, served upon the sworn clerks or waiting clerks, will be deemed sufficiently served upon the party if served upon his solicitor at his place of business;

but if an address for service is given, then all writs and other proceedings will be deemed sufficiently served upon such party, if left for his solicitor at such address for service.

All writs and other proceedings must be served before eight o'clock in the evening, or else they will date as of the next day, excluding Sunday.

II. OF THE DEFENDANT'S APPEARANCE.

Service of Subpœna.—When the bill is filed, the first process is for the plaintiff's solicitor to sue out a *subpœna*, commanding the defendant within a certain time to cause an *appearance* to be entered; unless the plaintiff intends merely to serve him with an office copy of the bill (see *post*, p. 994), or files a traversing note (see *post*, p. 998).

There is a memorandum at the foot of the subpœna, as follows :—
“Appearances are to be entered at the Record and Writ Clerks Office, in Chancery-lane, London; and if you do not cause your appearance to be entered within the time limited by the above writ, the plaintiff will be at liberty to enter an appearance for you. And you will be subject to an attachment, and the other consequences of not answering the plaintiff's bill, if you do not put in your answer thereto within the time limited by the general orders of the court for that purpose.”

The service of the subpœna is effected by delivering a copy of the writ and indorsement thereon, at the same time producing the original writ to the person with whom the copy is left. The service need not be personal; leaving a copy of the writ and indorsement, in the manner above mentioned, with one of the servants or any of the family of the party, is sufficient.

When a party on whom a subpœna is to be served is out of the jurisdiction,¹ the court is authorized, by the 4 & 5 Wm. IV. c. 85, to prescribe the manner in which the subpœna shall be served; and after affidavit of such service, the court may order an appearance to be entered for the party, and proceed as effectually as if the same had been made within the jurisdiction of the court.

If the defendant, having been duly served with a subpœna to appear to and answer the bill, refuse or neglect to appear thereto, the plaintiff will be at liberty, after the expiration of eight days from such service, upon leave obtained from the court, to enter an appearance for the defendant, and thereupon such further proceedings may be had as if the defendant had actually appeared.

The plaintiff may serve any notice of motion, or other notice, or any petition, personally, or at the dwelling-house or office of any defendant who has been served with a subpœna to appear and answer, but who has not appeared.

The court will not now make an order for a messenger, or for the serjeant-at-arms, to take the body of the defendant, in order to compel him to appear to a bill; and no writ of attachment with proclamations, nor any writ of rebellion, is now issued for the purpose of compelling obedience to any process, order, or decree of the court.

¹ Ireland, Scotland, and the Isle of Man, are within the jurisdiction for the purpose of serving a subpœna.

If an infant defendant makes default in appearing, the court will, upon motion, appoint one of the solicitors of the court his guardian, by whom he may appear to the bill, if it is satisfied that the defendant is an infant, and that the subpœna to appear to the bill was duly served, and that notice was, after the expiration of the time for appearing to the bill, and at least six clear days before the hearing of the motion, served upon or left at the dwelling-house of the person with whom or under whose care such infant defendant was at the time of serving the subpœna, and that the subpœna was also served upon or left at the dwelling-house of the father or guardian (if any) of such infant, where the person with whom or under whose care the infant was at the time of such service is not the father or guardian of such infant, unless the court think fit to dispense with such last-mentioned service.

If the defendant is a peer, instead of a subpœna in the first instance, a *letter missive* is necessary, which is obtained by a petition to the lord chancellor after the bill is filed; and it is served on the defendant, either personally, or by leaving it at his dwelling-house, with an office copy of the bill, signed by one of the clerks of records and writs. If the party do not upon such service, appear to the bill, he is then served with a *subpœna*. And if he still neglect to appear, the plaintiff, on an affidavit of such service, may apply to the court for a sequestration *nisi*, which will be made absolute if no cause be shown against it within eight days after the defendant has had personal notice thereof. A *sequestration* is a writ directed to certain commissioners, directing them to seize all the personal estate of the defendant, and the profits of his real; and, upon the return of the writ, the court will appoint some person to enter an appearance for the defendant, and proceed thereon in the same manner as if he had actually appeared.

If the defendant is a member of the House of Commons, the same process must be had recourse to in order to compel his appearance, except that he is not entitled to a letter missive, but is served with a subpœna in the usual manner.

In the case of a corporation aggregate, as an attachment does not lie against it, a *distringas* is the first process. This writ is directed to the sheriff, commanding him to distrain the lands, goods, and chattels of the corporation. If this writ is not effectual, an *alias distringas*, and after that a *pluries distringas*, and then, if necessary, a sequestration, are severally issued. The sequestration will not be discharged until the corporation has done what is required, and paid the costs of the proceedings.

If a bill is filed against husband and wife, and the wife neglects to appear, the process is issued against the husband alone.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, the plaintiff need not, unless he please, require such party (not being an infant) to appear to and answer the bill; and if he does require such appearance, it is at the risk of costs. But he may serve such party (not being an infant) with a copy of the bill, omitting the interrogating part; and the bill should pray, that such party, on being served with a copy of the bill, may be bound by all the proceedings in the cause. A memorandum of such service must be entered at the Record and Writ Clerks Office. If

the defendant having been served with a copy of the bill, and a memorandum of such service being duly entered, shall not within the proper time enter an appearance, the plaintiff will be at liberty to proceed in the cause as if the party served were not a party thereto; and the party so served will be bound by all proceedings in the cause, in the same manner as if he had appeared to and answered the bill. But if a defendant who has been so served with a copy of the bill wishes to have the suit prosecuted in the usual way against him, he must enter his appearance in the ordinary way within the time limited by the orders of the court (*i. e.* if he is resident within twenty miles from London within four days, or if above that distance within eight days, from the day of service of the subpoena); and when such appearance has been entered, the plaintiff must proceed in the suit in precisely the same manner as if the defendant had appeared to the ordinary subpoena, but the defendant will be liable to pay the costs occasioned by such appearance. If a party who has been served with such a copy of the bill wishes to have notice of the proceedings in the suit, but not to have it otherwise prosecuted against himself, he may enter an appearance in this form:—“The defendant *A. B.* appears to the bill for the purpose of being served with notice of all proceedings therein.” He will then be entitled to be served with notice of all subsequent proceedings in the cause, and to appear thereon; but he must pay all costs occasioned by such appearance; and he must obtain the leave of the court before entering such appearance, if the ordinary time for appearing to the bill has expired.

If no account, payment, or conveyance, or other relief is sought against a party, but the plaintiff nevertheless requires such party to appear to and answer the bill, he will, unless the court order otherwise, have to pay to the defendant all costs incurred by him in appearing to and answering the bill, and in all proceedings consequential thereon.

III. OF COMPELLING AN ANSWER, AND TAKING A BILL *PRO CONFESSO*.

If the defendant has appeared to the bill, and omits to put in his answer within the proper time after such appearance (that is, eight weeks from the day of appearance, whether the cause be a town or country cause, unless he has obtained an order for further time to answer), the plaintiff is entitled to issue an attachment against him. This attachment is executed and returned in the same manner as an attachment for non-appearance.

If the sheriff attaches the defendant, but accepts bail, or keeps him in his own custody, the plaintiff should move for a messenger to bring the defendant to the bar of the court; and if, when there, he refuses to put in an answer, he will be committed to prison. Then, in order to get the bill taken *pro confesso* against the defendant, the plaintiff should move that a *habeas corpus cum causis* may issue, directed to the marshal of the Queen's Prison, to bring the defendant to the bar of the court; and upon the return of this writ, if the defendant shall not have put in his answer, the court will order the bill to be taken *pro confesso* (or as true) against the defendant.

If the sheriff returns, “I have attached the within-named *A. B.*,”

whose body remains in his majesty's gaol of — ;" or if the defendant is in prison, and the attachment is so returned, the plaintiff should, immediately upon being apprised of the fact of the defendant being in custody, move for a *habeas corpus cum causis*. Under this writ the plaintiff is brought to the bar of the court; and the plaintiff may then apply that the defendant (if he refuse to put in his answer) be sent to the Queen's Prison, and proceed to take the bill *pro confesso* against him, as in the case of a defendant brought up by a messenger and committed to the Queen's Prison.

If the sheriff returns *non est inventus*, the court will (upon the plaintiff complying with the forms mentioned in the 1 Wm. IV. c. 36,) order the serjeant-at-arms to apprehend the defendant and bring him to the bar of the court; and if the defendant is not taken and does not answer, the plaintiff may obtain an order for a sequestration, and take the bill *pro confesso*.

The proceedings above detailed are in conformity with the 1 Wm. IV. c. 36, which materially shortened the process of the court in cases of contempt. Under the old practice it was necessary, before the bill could have been taken *pro confesso*, for the plaintiff to move that the defendant be brought to the bar of the court by *habeas corpus*; then that he be committed; and if he still refused to answer, four successive writs, called a *habeas corpus*, an *alias habeas corpus*, a *pluries habeas corpus*, and an *alias pluries habeas corpus*, were issued against him.

The process consequent upon the sheriff's return *non est inventus* against a defendant for not answering, is now different from what it was as formerly established under the 1 Wm. IV. c. 36. According to the present practice of the court, upon a return of this kind, and upon affidavit made that due diligence has been used to ascertain where the defendant was at the time of issuing the writ, and that the person suing forth the writ verily believed at the time of suing forth the same that the defendant was in the county into which such writ was issued, the plaintiff is entitled to a writ of sequestration, in the same manner as he was previously entitled to such writ upon the like return made by the serjeant-at-arms. The plaintiff will then be in a situation immediately to obtain an order to take the bill *pro confesso* against the defendant.

The plaintiff must cause the defendant to be brought to the bar of the court within thirty days from his being taken into custody for contempt, or within ten days if in the custody of the serjeant-at-arms or of a messenger of the court; otherwise the defendant will be entitled to his discharge, and that without payment of the costs of the contempt, which will fall upon the plaintiff. If, however, the last of such thirty days or ten days respectively happen out of term, he may be brought up within the first four days of the next term.

If a defendant, upon being brought before the court for a contempt in not putting in his answer, swears that he is unable by reason of poverty to employ a solicitor to put in his answer, the court will refer it to a master to inquire into the truth of the allegation, and report thereon to the court.

The process necessary to be gone through in order to take a bill *pro confesso* has recently been very much curtailed. According to

the present practice of the court, where a defendant shall appear to a bill, but shall not put in his answer in proper time, and the plaintiff shall be unable (using due diligence) to procure a writ of attachment to be executed against such defendant by reason of his being out of the jurisdiction of the court, or being concealed, or for any other cause, such defendant will be deemed to have absconded to avoid the process of the court; and in cases where such defendant shall have appeared, the plaintiff may serve upon the defendant's solicitor if he defends by a solicitor, or upon the defendant himself if he defends in person, a motion to take the bill *pro confesso* against the defendant; and the court, if satisfied that the defendant is to be deemed to have absconded, and that no answer has been filed, may order the bill to be taken *pro confesso* against him. And in cases where an appearance has been entered by the plaintiff for the defendant, and he shall not afterwards appear, the plaintiff may give notice in the London Gazette of a motion to take the bill *pro confesso* against him; and the court, upon being satisfied that the defendant ought to be deemed to have absconded, and that notice of the motion has been duly inserted in the Gazette, may order the bill to be taken *pro confesso* against him.

In order to compel the answer of a peer or person having privilege of parliament, or to take the bill *pro confesso* against him, the plaintiff should obtain orders for a sequestration *nisi* and a sequestration absolute; and upon obtaining the last order, the plaintiff asks that the clerk of records and writs may attend at the hearing of the cause with the record of the plaintiff's bill, in order that the same may be taken *pro confesso* against the defendant. The cause is then set down for hearing, and the bill taken *pro confesso*.

In the case of an infant, steps similar to those already pointed out, in case of his not appearing to the bill, must be taken.

In the case of a corporation, the plaintiff proceeds as before stated in the case of non-appearance; and upon the return of the sequestration, the bill is taken *pro confesso*.

If the defendant is a person of unsound mind, not found so by inquiry, the plaintiff may either issue an attachment in the usual way, or procure the same to be returned specially, and, upon the certificate of a medical man, ask that one of the solicitors of the court may be appointed guardian to the defendant, and answer the bill and defend the suit on his behalf; or, without issuing an attachment, he may apply in the first instance to the court, upon a like affidavit, for the same purpose.

In the case of a feme covert, the process issues against the husband alone.

A defendant in custody for a contempt, either for not appearing or not answering, upon performing the act required of him and paying the costs of the proceedings occasioned by his conduct, clears his contempt, and is entitled to his immediate discharge.

No decree made under the 1 Wm. IV. c. 36, in any of the above-mentioned cases where the practice there pointed out is followed, will be binding upon any person who at the time of its being made was out of the realm or had absconded, if such person shall, within seven years after the making of the decree, return or become visible, and, upon being

served with an office copy of the decree, shall within six months petition for a rehearing of the cause. And the act will not make good any proceeding against any person beyond sea, unless it shall appear to the court that such person had been in England within two years next before the subpœna in the suit had issued against him.

By the practice of the court as it stood until very recently, a plaintiff had no power, in cases in which the defendant was obstinate, and refused after appearance to put in his answer, to proceed with the cause in any other manner than by procuring the bill to be taken *pro confesso* against him. But in many cases it may be desirable for the plaintiff, upon a defendant's neglect or refusal to answer, to proceed with the cause in the same manner in which he might have proceeded with it if the defendant had answered; and accordingly, by the practice as it now stands, if, after the expiration of the time allowed, the defendant shall not have pleaded, answered, or demurred, the plaintiff may file a note, called a *traversing note*, to the following effect:—"The plaintiff intends to proceed with his cause as if the defendant had filed an answer traversing the case made by the bill, and the plaintiff had replied to such answer and served a subpœna to rejoin," that is, as if the cause had been brought to issue in the ordinary way. Notice of this note having been filed should be served upon the solicitor of the defendant, if he defends by a solicitor, or upon the party himself if he defends in person. When the notice has been so served, the plaintiff may proceed to examine his witnesses, and give rules to pass publication, and set his cause down for hearing, just as he might have done if the cause had been brought to issue in the ordinary way; and after the notice has been so served, the defendant cannot, without special leave of the court, plead, answer, or demur to the bill.

IV. OF THE DEFENCE TO A BILL.

There are four ways in which a suit may be defended; *viz.* by demurrer, plea, answer, or disclaimer; and all or any of these modes of defence may be joined, provided each relates to a separate and distinct part of the bill.

1. *Of a Demurrer.*—Whenever any ground of defence is apparent on the bill itself, either from matter contained in it, or from defect in its frame, or in the case made by it, the proper mode of defence is by demurrer. By this the defendant demands the judgment of the court whether he shall be compelled to answer the bill or not.

The following appear to be the principal grounds for a demurrer: 1. That the subject of the suit is not within the jurisdiction of a court of equity. 2. That some other court of equity has the proper jurisdiction. 3. That the plaintiff is not entitled to sue alone by reason of some personal disability; as being an infant, married woman, idiot or lunatic. If a married woman wishes to demur *alone*, that is, separate from her husband, she must obtain an order for that purpose. 4. That the plaintiff has no interest in the subject, or no title to institute a suit concerning it. 5. That he has no right to call on the defendant concerning the subject of the suit. 6. That the defendant has not that interest in the subject which can make him liable to the claims of the plaintiff.

7. That the plaintiff is not entitled to the relief he prays. 8. That the bill is insufficient to answer the purposes of complete justice, or is otherwise defective in form, or for want of parties.

A demurrer may be either to the whole or to a part of the bill. If it is not to the whole bill, it should clearly express the particular parts demurred to. If a demurrer is to the whole bill, and is allowed or held by the court to show a sufficient reason why the defendant should not answer the bill, it generally puts an end to the suit; but the court will sometimes allow the demurrer, and at the same time give the plaintiff leave to amend his bill upon payment of costs. A party may put in separate demurrers to separate and distinct parts of a bill, for separate and distinct causes; but he cannot demur and plead, or demur and answer, to the same part of the bill.

A demurrer ought not to be argumentative. If it be what is termed a *speaking* demurrer; that is, if any *fact* is introduced which is necessary to support the demurrer, it will be overruled. If a demurrer has been filed, and, when it comes on to be heard, the counsel for the party demurring assign another cause of demurrer besides that in the demurrer filed, that is called a demurrer *ore tenus*.

Twelve days (that is, twelve office days) and no more are allowed, exclusive of the day of appearance, for putting in a *demurrer only* to an original, amended, or supplemental bill, or a bill of revivor; except in injunction causes, to which the defendant must demur within eight days after appearance. If the last day happens on a Sunday, the Sunday is not reckoned in the computation of the time.

A demurrer is drawn and signed by counsel, and, being engrossed on unstamped parchment, is filed by the defendant's solicitor. It need not be signed by the defendant, and is not put in upon oath.

Under the practice of the court as it stood until very recently, either the plaintiff or the defendant might set down the demurrer for argument. Generally this was done by the plaintiff; but there was no fixed time within which he was bound to set it down. This was frequently productive of great hardship to the demurring party, unless he availed himself of his privilege of setting it down. But now, if the plaintiff does not, within twelve days from the expiration of the time allowed the defendant for filing the demurrer, set it down for argument, the demurrer if to the whole bill will be held sufficient, and the plaintiff be considered to have submitted thereto; and where the demurrer is to part only of the bill, if the plaintiff does not set it down for argument within three weeks from the expiration of the time allowed for filing it, it will be held sufficient, and the plaintiff be considered as having submitted to it, and in both cases be liable to all the costs of the suit.

If the demurrer is allowed, the plaintiff pays to the defendant the taxed costs thereof; and if the demurrer is to the whole bill, the further taxed costs of the suit also, though this is in the discretion of the court. If the demurrer is overruled or not allowed, the defendant pays to the plaintiff the taxed costs occasioned thereby, unless the court order the contrary.

When a demurrer is disallowed, and the plaintiff requires an answer, he will be entitled to enforce it by the process already pointed out for that purpose.

Until recently, when a demurrer was over-ruled, the defendant had a right, indeed was compellable, to put in an answer to the bill, and thus had an opportunity of making an entirely new defence. But now, when a demurrer to the whole bill is over-ruled, the plaintiff, if he does not require an answer from the demurring party, may file a traversing note in the manner already pointed out, unless the court shall, on over-ruling the demurrer, give the defendant leave to plead, answer, or demur; and in such case, if the defendant shall not plead, answer, or demur within the time limited by the court, the plaintiff may, at the expiration of such time, file the note; and he may then proceed to examine his witnesses, file rules to pass publication, and proceed in the same manner to a hearing of the cause, as if the cause had been brought to issue in the ordinary way.

2. *Of a Plea.*—A plea has been described as a special answer, shewing or relying upon one or more things as a cause why the suit should be either dismissed, delayed, or barred.

Pleas are of three kinds; *viz.* 1. To the jurisdiction of the court; 2. To the person of the plaintiff or defendant; and 3. In bar of the suit.

In a *plea to the jurisdiction* of the court, it must be shewn what other court has jurisdiction.

A *plea to the person* of the plaintiff may shew that he is disabled to sue, as being outlawed, excommunicated, a popish recusant convict, or attainted in a præmunire or of treason or felony, an alien, or that the plaintiff is incapable of instituting a suit alone.

Pleas in bar are either of matters of record, as a decree or order of the court, by which the rights of the parties have been determined in another suit depending in the same or some other court of equity (though not necessarily between the same parties) for the same cause; or they are matters *in pais* only, as a stated account, award, release, will, conveyance, or a statute (as the Statute of Limitations or the Statute of Frauds) which may be a bar to the plaintiff's demand.

All the facts necessary to render a plea a complete equitable bar to the case made by the bill should be clearly, distinctly, and, generally speaking, *positively* averred.

A defendant may plead that the plaintiff is not the person he pretends to be: this is termed a *negative* plea. As, if a plaintiff sues as heir or administrator, it may be pleaded that he is not heir or administrator, and the defendant need not shew by his plea who is heir or administrator.

Generally speaking, a *double* plea, that is, where two defences are offered to the same matter, is bad.

If two persons have an equal claim to the protection of the court, a court of equity will not interfere on either side. If, therefore, a bill be filed against a purchaser of an estate by a person alleging a title to such estate, and praying that the purchase may be set aside, a plea by the purchaser that he purchased the estate for a valuable consideration without notice of the plaintiff's title, will be a good bar to the suit.

A defendant may also, by plea, protect himself from answering the bill if the so doing would subject him to any pains or penalties; but he must set forth in his plea by what means he would be so liable. But

if the plaintiff is competent to waive the pains and penalties, and does so by the bill, the defendant cannot plead such liability in bar to the suit.

If a bill be defective for want of parties, it may be taken advantage of by plea as well as by demurrer.

A plea may be either to the whole bill, or to part only. If it does not go to the whole bill, it must clearly express to what part of the bill it is meant to extend. If it is to a part of the bill only, and there is an answer to the rest, the latter is expressed to be an answer to so much of the bill as is not before pleaded to, and not as waiving the plea. Sometimes a plea is coupled with an answer, merely to support it. In this case the answer is stated to be made for that purpose, not as waiving the plea.

A plea may be amended; but a special application to the court is necessary for such purpose.

A defendant is allowed, after appearance, eight weeks to plead to an original bill; but to a bill for an injunction to stay proceedings at law, he must plead within eight days after appearance.

If the defendant live twenty miles from London, he may sue out a *dedimus* to take his plea, on giving two days notice in writing to the plaintiff's solicitor if he sues by a solicitor, or to the plaintiff himself if he sues in person, to give commissioners' names to see the same taken; and on the plaintiff's default, the defendant will be at liberty to sue out the same directed to his own commissioners. If he reside not less than four miles from Lincoln's Inn Hall, and is unable by reason of illness to travel from home, he is also, upon affidavit thereof, entitled to such *dedimus*, on notice being given as above mentioned.

All pleas (except those to the jurisdiction of the court, *in pais*, to the disability of the plaintiff, and those which are taken by *dedimus*, where the defendant resides in the country) must be signed by counsel.

If a plaintiff intends to dispute the validity of the plea, he should not reply to it before it comes on to be argued, because by so doing he is considered to admit that it is good.

If the plaintiff considers the plea good, he may, upon payment of 20s. costs, submit to the same, and obtain an order to amend his bill.

If a plea be set down for hearing, and then the plaintiff decline to argue it, but desire leave to amend his bill, the validity of the plea is thereby admitted, and the plaintiff must pay to the defendant 5*l.* costs.

If, upon argument, a plea is allowed, the plaintiff must pay the defendant the taxed costs thereof; and if the plea is to the whole bill, the further taxed costs of the suit also, unless the plaintiff undertakes to reply thereto; when the costs will be reserved, unless the court shall (as it sometimes will, on over-ruling a plea) order it to stand for an answer, with liberty to the plaintiff to except thereto.

If a plea to an original bill has been over-ruled, the defendant cannot file another plea, or a demurrer, without a special order.

If a plea is to the whole or part of the bill, it will be held good to the same extent, and for the same purpose, as a plea allowed upon argument, unless the plaintiff, within three weeks from the expiration of the time allowed for filing such plea, causes the same to be set down for argument; and the plaintiff will be held to have submitted to the plea. Therefore, if the plaintiff does not set down the plea within the

time specified, the defendant will be entitled to the same benefit of it as he would have been entitled to if the plea had been set down and argued and allowed.

3. *Of an Answer.*—An answer is the general defence to a bill in equity. Its principal end is to supply proofs of the matters necessary to support the plaintiff's case. According to the practice as it stood until very recently, a defendant who submitted to answer the bill was bound to answer either by stating his ignorance or knowledge of all the facts stated in the bill, and thus the answer was frequently loaded with a quantity of matter which only tended to increase the costs of the parties. But now a defendant is not bound to answer any statement or charge in the bill, unless he is specially and particularly interrogated thereto; and he is not bound to answer any interrogatory in the bill, except those which he is *required* to answer; and if he does answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer will be considered impertinent. But if he is called upon to answer any interrogatory, and he is ignorant as to the matter to which it relates, he is bound to state such his ignorance in the answer. An answer must not be argumentative; and if it be short and delusive, and put in merely for the purpose of preventing an attachment, it will be taken off the file, and considered as no answer. So if the plaintiff be misnamed in the answer, it will be taken off the file. An answer must not contain any scandalous or impertinent matter. It is impertinence in an answer to set out all the items of a tradesman's bill, if not called for. Nothing that is relevant will be deemed scandalous. If a defendant should unknowingly mis-state or misrepresent any fact in his answer, the practice of the court is, upon application by the party, to allow him to file a supplemental answer in order to correct such mis-statement. For this purpose a notice of the intended application must be given to the opposite party; and the defendant must make an affidavit, that when he put in his answer he did not know the circumstance upon which he applies, or any other circumstance upon which he ought to have stated the fact otherwise than he has stated it in his answer.

A defendant, after appearance, is allowed eight weeks to put in his answer to an original bill; but, in a cause for an injunction to stay proceedings at law, the defendant must put in his answer within eight days after appearance, or the plaintiff will be entitled, as of course, to such injunction.

The answer must be signed by counsel, unless taken before commissioners, as in cases where the defendant resides more than twenty miles from London. It must also be signed by the party whose answer it is, and sworn to and signed by him, unless the plaintiff consents that it be taken without oath or signature, which is usually done in amicable suits.

A peer of the realm answers upon his honour, and not upon oath. A Quaker puts in his answer upon his affirmation. A Jew is sworn upon the Pentateuch. A foreigner may put in his answer in his own language; but a sworn translation must also be filed with it. A corporation puts in an answer without oath, under the corporation seal. An infant puts in his answer by his guardian, who is sworn to it;

Answer.—Exceptions to Answer.

but the infant, on coming of age, has a right to put in a new answer, stating a different case. A married woman may in some cases put in her answer separate from her husband by the leave of the court. And if a husband and wife put in a joint answer, the admissions will not be considered as evidence against the wife, it being taken to be the answer of the husband alone. A person of unsound mind, not found so by inquisition, puts in his answer by a guardian assigned to him by the court for that purpose.

All answers taken in London or within twenty miles thereof must be sworn before one of the masters in ordinary in chancery; they are usually sworn at the public office in Southampton Buildings.

The mode of taking an answer in a country cause is similar to that before stated in the case of a plea. An answer taken by commission in the country may be sworn before any clerk of records and writs, or before the clerk of enrolments, as occasion may require for the better dispatch of business.

4. *Of a Disclaimer.*—If a defendant renounces all right, title, and interest to the matter in demand by the plaintiff's bill, he must put in what is termed a disclaimer, and generally accompany it with an answer. A disclaimer is put in upon oath. When a defendant disclaims, the court will dismiss the bill as against him with costs; but a defendant cannot, by disclaimer, deprive the plaintiff of the right of requiring a full answer from him, unless it is evident that the defendant ought not, after such disclaimer, to be retained as a party to the suit.¹

V. EXCEPTIONS TO DEFENDANT'S ANSWER.

If the plaintiff considers that the answer of the defendant is insufficient, or that it contains scandalous or impertinent matter, he takes what are termed *exceptions* to it. These are allegations, stating the particular points or matters in the bill which the defendant has not answered, and, in cases of scandal or impertinence, the particular passages which are considered scandalous or impertinent. They are signed by counsel.

In all cases, whether the answer be filed in term time or in vacation, the plaintiff is allowed two lunar months² to deliver exceptions to such answer; and if the exceptions are not delivered within that time, the answer will thenceforth be deemed sufficient, and the plaintiff will not be allowed to disturb it. This, however, relates to exceptions for *insufficiency only*.³

A defendant is allowed eight days after the delivery of the exceptions to determine whether he will submit to answer them or not. If he submit to answer them, he signifies the same by handing a note to that effect to the plaintiff's clerk in court, and paying him 20s. costs. And if he is not in contempt, or has not consented to a serjeant at arms, but has submitted to answer the exceptions before an order to

¹ If a party has disclaimed in ignorance of his rights, and is desirous of getting rid of the effect of the disclaimer, see, as to the course to be pursued, *Sedden v. Lidiard*, 1 Russ. & Myl. 110.

² With respect to computation of time, we may observe, that the time which occurs

between the last seal after Trinity Term and the first seal before Michaelmas Term, and between the last seal after Michaelmas Term and the first seal before Hilary Term, is not reckoned.

³ See *Bradbury v. Booker*, 4 Sim. 325.

refer the same is obtained, he will be entitled, without an order, to four weeks to put in a further answer; but if the order is obtained prior to submission, then the time for putting in the further answer will be fixed by the master. If the defendant is desirous that the time so fixed should be extended, he must apply to the court before such time expires.¹ Formerly the time for answering &c. might be extended, by obtaining orders for time; but now this cannot be done unless under special circumstances, and any application for this purpose must be made to the master, in whose discretion it is to grant or withhold the privilege. If he grant it, it is generally upon condition that the party applying shall consent to a serjeant at arms going against him if he omit to put in his answer by the time limited by the master.

If the exceptions are for insufficiency, and are not submitted to, the plaintiff may, at the expiration of eight days after the exceptions are delivered (but not before, except in injunction causes) refer such answer for insufficiency, that is, obtain an order for referring the answer to the master for his determination as to the sufficiency, who, in so doing, will consider the relevancy or materiality of the statement or question referred to. If he do not refer the same within the next six days, he will be considered as having abandoned the exceptions, and in such case the answer will be deemed sufficient.

If the answer is referred for insufficiency, or for scandal or impertinence (in which latter case the order of reference must be obtained within six days after the delivery of the exceptions), the order will be considered as abandoned, unless the party obtaining it procure the master's report within a fortnight from the date of the order, or unless the master shall within the fortnight certify that a further time (to be stated in his certificate) is necessary in order to enable him to make a satisfactory report; and if the report be not obtained within such further time, the order will be considered as abandoned.

If the defendant, after his answer has been proved insufficient, puts in a second answer to the bill, and the plaintiff considers it also insufficient, he must not take fresh exceptions to such answer, but must, within three weeks after it is filed, refer the same upon the *old exceptions*, that is, the exceptions that were taken to the first answer; otherwise such answer will thenceforth be deemed sufficient. The same course is to be pursued as to a third answer, if it also be insufficient.

If the master report the third answer insufficient, the defendant will be examined before the master upon interrogatories to the points reported insufficient, and will stand committed until he shall have perfectly answered such interrogatories.

When an answer is referred to the master for scandal or impertinence, the master is directed, by the order of reference, to expunge any scandalous or impertinent matter which he shall certify to be contained in such answer; but he will not do so until the expiration of four days from the filing of his report, in order that the adverse party may have an opportunity of excepting to it.

If either party is dissatisfied with the master's report, he may take exceptions to it; and the validity of such exceptions will be decided by the court. If the court confirm the master's report, the defendant must, within four weeks, or the time limited by the master, as the case

¹ See *Wheat v. Graham*, 5 Sim. 570.

may be, put in a further answer: and if he omit to do so, he will be considered guilty of a contempt, and be dealt with accordingly.

The party excepting to the master's report must deposit 10*l.*, which will be paid to the adverse party if the exceptions are overruled; and in such case the party excepting will have to pay the further taxed costs occasioned by such exceptions, unless the court shall otherwise order; but if he partially succeed in his exceptions, the deposit will be dealt with, and the costs paid, as the court shall direct. The master may, in reporting upon exceptions to an answer referred to him for insufficiency, certify by whom and in what proportions the costs of any such exceptions and of the reference thereon ought to be borne; and when the general costs in the cause are taxed, regard will be had to this certificate, and the costs allowed to either party will be taxed and apportioned accordingly.

VI. OF AMENDING THE BILL.

If the master reports the answer to be sufficient, the plaintiff must consider (if still determined to bring the cause to a hearing) how he can best strengthen his case by amending the bill, or otherwise producing evidence in support of the case made thereby. If the plaintiff conceives, from any matter offered by the defendant's defence, that his bill is not properly adapted to his case, he may obtain leave to change the form of it by amending his bill.

If the party amending wishes to introduce new matter, whether it occurred to himself before the defendant answered, or was disclosed by the answer, such new matter, in order to be a proper subject for amendment, although *discovered* since the filing of the bill, must have *happened* before the bill was filed, otherwise it must be made part of the plaintiff's case by a supplemental bill.

Before the answer of the defendant comes in, the plaintiff may amend his bill as often as he pleases; and after the answer has been filed, he is entitled (how often soever he may have previously amended) to one order for leave to amend his bill.

But no further leave to amend will be granted after the answer has been filed, unless the court is satisfied by affidavit made by the plaintiff and his solicitor (or by the solicitor alone, if the plaintiff is abroad, or otherwise unable to join therein) that the draft of the intended amendments has been approved by counsel, and that they are not made for the purpose of delay or vexation, but because they are material to the plaintiff's case. This order must be obtained within six weeks after the answer, if there is only one defendant, or after the last of the answers, if there are two or more defendants.

The name of a defendant may be struck out of a bill by amendment at any time before he has answered; but if he has appeared to the bill, it can only be done upon payment of his costs of the suit. The name of a co-plaintiff, if his evidence is required, may also be struck out of the bill by amendment. Parties may be added to a bill by amendment, at any stage of the cause before it comes to a hearing.

If a demurrer or plea has been filed, the bill may be amended upon payment of 20*s.* costs; but the order must be obtained before the plea or demurrer is set down, otherwise taxed costs must be paid.

The plaintiff, on obtaining an order for leave to amend a bill, must undertake to amend within three weeks from the date of the order; otherwise the order will be void.

If an order to amend be irregularly obtained, it will, as to the progress of the suit, be treated as a nullity. The irregularity, however, may be waived by the other party accepting the costs of the amendment (20s.); and the parties may consent to or permit an amendment which is not strictly conformable to the practice of the court.

A defendant who has answered the original bill must, if required to answer the amendments, be served with a subpoena to answer the amended bill (service of which on the clerk in court is good service); but those defendants who have appeared but not put in their answers to the original bill need not be served with a subpoena. New defendants who are added by amendment must be served personally, and are entitled to be treated in all respects as original defendants.

If a plaintiff amends his bill, and requires a further answer to it, a defendant is allowed, after appearance, and without obtaining any order for the purpose, five weeks to plead, answer, or demur, not demurring alone. But if he intends putting in a demurrer, he must do so within twelve days after appearance. The answer of a defendant to an amended bill may be enforced in the same manner as to an original bill.

If the plaintiff amends his bill otherwise than by an alteration of names, dates, or sums, or the correction of mere clerical errors, though he may not require a further answer, the defendant is allowed eight days to consider whether it is necessary for him to answer the same; at the end of which time the plaintiff is at liberty to file a replication, or set down the cause for hearing, unless the defendant shall have previously served an order for time to answer, or taken out and served a warrant for time to answer the amended bill, in which case the master may allow the defendant such time for the purpose as he shall think fit.

An order for amending a bill for the purpose of rectifying any clerical errors in names, dates, or sums, may be obtained upon motion or petition, without notice.

If a bill has been amended after answer, and the defendant stands out, after all the several processes of contempt for want of an answer to the amended bill, it may be taken *pro confesso* generally, notwithstanding the answer to the original bill; and this not as to the amendment only, but as to the whole bill.

If a plaintiff has filed a replication, and afterwards wishes to amend his bill otherwise than by adding parties, he cannot withdraw his replication for that purpose without a special order made upon application to a master, who will require to be satisfied that the matter of the proposed amendment is material, and that it could not with reasonable diligence have been sooner introduced into the bill.

The amendments are incorporated with the original bill, and form with it one record; but if a bill is amended after a full answer has been put in, it is necessary to sue out a fresh subpoena to answer. After a cause is set down, no new charges can be introduced into a bill; nor can any material fact be put in issue, which was not so in the cause before. Neither can the prayer of the bill be *materially* varied.

VII. A SUPPLEMENTAL BILL, BILL OF REVIVOR, &c.

1. *Of a Supplemental Bill.*—The object of a supplemental bill is to supply the defects of former proceedings, where this cannot be done by amending the bill. If any event happens subsequently to the time of filing the bill, which gives a new interest in the matter in dispute to any person not a party to the bill, as the birth of a tenant in tail, the defect thus occasioned in the suit having occurred since the filing of the bill cannot be supplied by amending it, but a new bill, termed a *supplemental bill*, must be filed for that purpose. If a fiat in bankruptcy issues against any party to a suit, or he is discharged as an insolvent debtor, his interest in the subject of the suit having (unless he be a trustee) passed to his assignees, it is necessary that they should be made parties to the suit. This is done, in case of a sole plaintiff becoming bankrupt, by the defendant moving, upon notice served on the assignee of the plaintiff, that the assignee may file a supplemental bill within a given time (usually a fortnight), or that the bill may be dismissed *without costs*.^{*} Or if the bankrupt were one of several plaintiffs, the defendant may move to dismiss the bill for want of prosecution. If the interest of a sole plaintiff suing *en autre droit* entirely determines by death or otherwise, and the property thereupon passes immediately to another under the same title, the suit may be continued by a supplemental bill. If one creditor, who has filed a bill on behalf of himself and the other creditors, dies, another creditor may obtain an order to file a supplemental bill,³ if the representatives of the deceased creditor do not revive the bill within a limited time. If a supplemental bill states facts which, though they happened subsequently to the filing of the original bill, are immaterial as facts, it is demurrable.

A defendant is entitled, without order, to eight weeks after appearance, to plead, answer, or demur (not demurring alone), to any supplemental bill. If he intends to demur to the bill, he must do so within twelve days after appearance; and in causes for an injunction to stay proceedings at law, he must plead, answer, or demur within eight days after appearance, or the plaintiff will be entitled as a matter of course to the injunction.

A supplemental bill should state the original bill and the proceedings thereon; although this is not necessary unless the special circumstances of the case require it. The event by which the supplemental bill has been rendered necessary should be stated.

2. *A Bill of Revivor.*—If any of the parties to a suit who are *material* parties and concerned in interest die, the suit is said to abate; and in order to restore the suit to its original state, and enable the court to make a proper decree, it is necessary to have the representatives of such parties before the court; for which purpose a bill termed a *bill of revivor* must be filed. If, however, the interest of a party dying so determines that it can no longer affect the suit, and no person becomes entitled thereupon to the same interest (as in the case of a person tenant for life, or having a temporary and contingent interest), or if no claim can be made against the representatives of the party dying the suit is

¹ Randall v. Mumford, 18 Ves. 424; Porter v. Cox, 5 Mad. 80.

² Caddick v. Masson, 1 Sim. 501.

³ Dixon v. Wyatt, 4 Mad. 392.

not thereby abated. But if the party be the sole plaintiff or defendant, his death entirely abates the suit. If a feme sole *plaintiff* marries, the suit is said to abate, and it is necessary that her husband should be made a party to it: this is done by a bill of revivor. But the marriage of a female *defendant* does not produce this effect; it only becomes necessary to name the husband as well as the wife in all subsequent proceedings. If husband and wife are defendants to a suit, and both answer, and the husband dies, the suit does not thereby abate. So if husband and wife are plaintiffs in *her right*. The death of one of two plaintiffs tenants in common abates the suit, and his representatives ought to revive it. The bankruptcy or insolvency of a plaintiff or defendant is not an abatement of the suit, but merely causes a defect as to parties, which may be remedied in the manner above mentioned. The death of one relator, where there is more than one, does not affect the proceedings; but if all the relators die, an order of the court must be obtained for a new relator to be inserted, before the suit can be proceeded with.

The bill of revivor should state the pleadings in the original suit, though this is not necessary unless the circumstances of the case require it; and it should shew the nature of the abatement, and the right of the party filing the bill to revive. If the abatement has been caused by the death or change of interest of any one of the plaintiffs, and his representatives jointly with the other plaintiffs, or if there be only one plaintiff, then if his representative alone files a bill of revivor, all the defendants to the original bill must be made parties to the suit, and be served with subpoenas to answer. If there is more than one plaintiff, and on the death of any one of them the others are in a situation to revive the bill against his representatives, making them defendants, it is not usual to make the defendants to the original bill parties to the bill of revivor. So if the suit abates by the death of a defendant, the plaintiff only makes such defendant's representative a party to the bill.

The mere filing a bill of revivor is not of itself an adoption of the original suit. In order to this, an order to revive must be obtained by the party desirous of reviving the suit.

A defendant is entitled to the same time to put in his answer to a bill of revivor (if an answer is required) as is before stated with respect to an original bill.

If a defendant does not appear to a bill of revivor, he is liable to an attachment and the other processes of contempt; and if an attachment issues against him, and he is taken upon it, and refuses or neglects to enter his appearance to the bill within eight days after the return of such attachment, the plaintiff will be entitled as of course to the common order to revive. Or if the defendant cannot be found so as to be taken upon such attachment, and a return of *non est inventus* shall have been made thereon, the plaintiff, upon producing such return, and an affidavit that due diligence has been used in endeavouring to execute such attachment, and that there was good reason to believe that the defendant was in the county to which such attachment issued at the time of suing out the same, will be entitled as of course, at the end of eight days after the return of the attachment, to the common order to revive.

In order to prevent a suit being revived, the defendant must, within eight days after his appearance, show cause, by plea or demurrer (but not by answer), why the suit should not be revived.

If the bill of revivor does not pray an answer, on the order to revive being drawn up and served, the original cause proceeds as before abatement.

3. *A Bill of Revivor and Supplement.*—This is merely a compound of the two former kinds of bills, and is necessary under the following circumstances. If a suit becomes abated, and, by any act besides the event by which the abatement happens, the rights of the parties are affected, as by a settlement or devise, the parties must not only show the cause of abatement, but also the settlement or devise or other act by which their rights are affected; and this is done by filing a bill called a *bill of revivor and supplement*.

The answer to a supplemental bill, bill of revivor, or bill of revivor and supplement, may be enforced in the same manner as has been already pointed out in the case of an original bill.

VIII. OF THE DISMISSAL OF A BILL.

The defendant having put in his defence to the bill, it is incumbent on the plaintiff to take some step towards bringing the suit to a hearing. If he does not do so within the time limited by the rules of the court, that is, within two months after the answer is to be deemed sufficient,¹ the court will, upon an application by the defendant, dismiss the plaintiff's bill, and order him to pay the defendant all the costs he has incurred in the suit; unless the plaintiff, upon such application being made, undertake forthwith to take some step in the cause, as to file a replication and serve a subpoena to rejoin, or satisfactorily account for the delay which has taken place in the prosecution of the suit.

If a bill has been dismissed for want of prosecution, it is not the ordinary practice of the court to restore it; though this may be done under certain circumstances.

If one of several defendants is in a situation to dismiss the bill, he may do so as against himself without waiting until the answers of the others are filed.

A plaintiff may dismiss his bill without costs before the appearance of the defendant; but if afterwards, he must pay the defendant his costs. A plaintiff suing *in formâ pauperis* cannot dismiss his bill without costs. A bill may be dismissed as to one of several plaintiffs with costs, without the consent of the other plaintiffs, and even without notice to them; but not so as to injure them. A defendant in contempt cannot move to dismiss, unless the plaintiff has waived the contempt. If a plaintiff, after the defendant has appeared, does not prosecute the suit, the defendant may file his answer, and thus put himself in a situation to dismiss the bill. But this cannot, it seems, be done until the time allowed the plaintiff to amend his bill has expired; so that if, between the time of giving a notice of motion to dismiss a bill for want of prosecution and the making of the motion, the plaintiff amend his bill, it will (it seems)

¹ The intervals mentioned, *ante* (1003, note) are not reckoned in this computation. See Attorney General v. Jones, 5 Sim. 246.

be sufficient to prevent the bill being dismissed. Not so, however, if the amendment is one which requires no further answer. Nor if an order to amend be *irregularly* obtained, will it be any answer to a motion to dismiss the bill for want of prosecution. If a demurrer is put in to the bill, but not argued, the defendant cannot dismiss. Neither can he do so during the pendency of a plea.

Interlocutory applications to the court, such as applications for the appointment of a receiver, new trustees, &c., are no answer to a motion to dismiss the bill for want of prosecution.

IX. REPLICATION.

When the defendant, in his answer, denies, or does not admit, the plaintiff's case; or, admitting it, insists upon some new facts, which if true would prevent the plaintiff from succeeding in the suit, it is necessary for the plaintiff to file a *replication*; which, insisting generally that the allegations in the bill are true, and denying those in the answer to be so, puts the defendant to the necessity of proving his case. If the answer is not replied to, it is taken to be true. By replying to the answer, the plaintiff deprives the defendant of the power of reading it as evidence in support of his case. It is usual to reply to the answer, if the plaintiff is an infant, he being as such unable to admit any thing; but if it is not done, he will not be affected by it. If, instead of an answer, a plea is put in to the bill, a replication should be filed to the plea, if the plaintiff means to take issue upon the truth of the facts contained in it. And if a defendant pleads to a part of the bill, and answers another part, the plaintiff, if he intend to dispute the truth of the facts contained in them, should reply to both plea and answer.

A replication need not be signed by counsel. It is filed in the Record and Writ Clerks Office by the plaintiff's solicitor; if he sues by a solicitor, or by the plaintiff himself if he sues in person, and notice of its having been filed must be given by the plaintiff, or his solicitor, to the solicitor of the defendant or the defendant himself, as the case may be.

When a replication is filed, the plaintiff will not be permitted to withdraw it, without a special order.

X. REJOINDER.

When the plaintiff has replied, the next step to be taken by the defendant is a *rejoinder*, whereby he denies the truth of the plaintiff's replication, and asserts the truth and sufficiency of his own answer. A rejoinder is not in general actually filed; but the plaintiff obtains an order for a subpoena, returnable immediately against the defendant, requiring him to appear to rejoin, unless he will appear gratis.

If a subpoena to rejoin be sued out by the plaintiff before the replication is filed, it is irregular, and he will be liable to the costs.

If a plaintiff files a replication without having been served with a notice of motion to dismiss the bill for want of prosecution, he must serve the subpoena to rejoin; and in case he requires a commission to examine witnesses, must obtain and serve an order for such commission within three

weeks from the filing of the replication. Such commission is returnable on the first return of the second term then next following; and the plaintiff must give his rules to produce witnesses and pass publication in the same term, and set down his cause for hearing, and duly serve the subpoena to hear judgment, returnable in the succeeding term. If the plaintiff makes default herein, then, upon application by the defendant upon notice of motion, the plaintiff's bill will stand dismissed out of court with costs, unless the court make order to the contrary.

By the service of this subpoena, the cause is completely put at issue between the parties, and each may at once proceed to procure the best evidence he can in support of his case. In order to this, if there is any person whose evidence he thinks material, he proceeds to examine him.

XI. EXAMINATION OF WITNESSES.

The mode of examining witnesses in a court of equity is not, generally speaking, similar to that adopted in a court of law; but is by means of written interrogatories prepared for the purpose. Witnesses resident in London or within twenty miles thereof are examined at the Examiners Office; those in the country, under a commission for that purpose.¹

The witness having been sworn by the examiner, the interrogatories are read over to him *seriatim*, and the examiner takes his answers or depositions in writing; which, when completed, are read over to and signed by the witness. Strictly speaking, no person except the witness is allowed to be present before the examiner during the examination. The witness is kept in London, if not resident there, until his examination and cross-examination are finished, at the expense of the party requiring his evidence.

If the witnesses to be examined are resident in the country, an order for a commission to examine them there must be obtained. This order, as we have remarked, must be obtained and served within three weeks from the filing of the replication, and be made returnable on the first return of the second term then next following. By the rules of court, the plaintiff is first entitled to sue out this commission; but if, having served a subpoena to rejoin, he do not obtain and serve the order within three weeks after replication, the defendant may, without notice, obtain such order, returnable at the like period as the plaintiff would be entitled to, and will also be allowed the carriage of the commission. And if the plaintiff obtains an order for and sues out a commission, and neglects to execute and return the same within the above period, the defendant will be entitled to an order for a commission returnable on the last return of the term following that allowed to the plaintiff, as above stated, for the return of his commission.

A defendant may examine his witnesses under a commission obtained by the plaintiff.

¹ Obtaining and serving an order for a commission to examine witnesses (if the plaintiff requires such an order) is one of the modes whereby he may prevent his bill being dismissed for want of prosecution;

but such order must, in order to be effectual for this purpose, be obtained and served within three weeks from the date of his undertaking to file a replication and serve a subpoena to rejoin.

The commissioners are selected by the solicitors of the parties (or by the parties themselves when they sue or defend in person) in the following manner: first, he who has the conduct of the commission names a commissioner, then the other party names one, and so alternately till each has named four; then the party who has the conduct of the commission strikes out one of those named by the other party, and the other strikes out one of those named by the opposite party; then each strikes out one more, and the four remaining are the commissioners. If the defendant furnish names, but refuse or neglect to strike the commissioners' names, as it is termed, the plaintiff will be allowed to strike out two of his own and two of the defendant's commissioners, and the commission will be given to his (the plaintiff's) solicitor.

If a party has witnesses residing abroad whose testimony he is desirous of obtaining, he must apply, by a special notice of motion, for a commission to examine them there; and he must make an affidavit, stating that they are residing abroad and are material witnesses, and that he cannot safely proceed to the hearing of the cause without their testimony. The defendants, if the commission is sued out by the plaintiffs, may join in the commission; and *vice versa*. The commissioners for executing a foreign commission are selected much in the same way as those for executing country commissions.¹

When a commission issues for the examination of witnesses who do not understand English, the commissioners are authorized to swear an interpreter to interpret the interrogatories administered to the witnesses, and their answers. A commission will be granted to examine witnesses even in an enemy's country.

The commissioners, or any three or two of them,² are authorized to examine and cross-examine all witnesses on interrogatories to be exhibited before them on both sides. They are directed to reduce the examinations into writing on parchment, and return the same, with the interrogatories and the writ sealed up, within the time therein limited.

If a commission is to be executed abroad, it is not made returnable at any certain time, but a reasonable time is allowed, according to circumstances.

If the commission is joint (that is, obtained upon the application of the plaintiff and defendant), the solicitor for the party who has the conduct of it must give fourteen days notice, signed by two of his commissioners, to the defendants who have joined in the commission, of the time and place of executing it. The solicitor with his commissioners accordingly attends; and if the commissioners of the other party do not attend, the commissioners of the party having the conduct of the commission may proceed to execute it *ex parte*.

The commissioners, having met, proceed to open the commission by reading it and administering to each other an oath faithfully and impartially to take the examinations of the witnesses, and not to disclose them until publication shall pass; and the clerk to the commissioners

¹ The affidavit in support of the motion to examine witnesses abroad must state either the names of the witnesses, or the points on which they are to be examined.

² Two commissioners, at least, must always be present at the execution of a commission.

is also sworn faithfully and impartially to take down and transcribe the depositions, and not to disclose the same to any person until publication shall pass.

As to the persons who may or may not be examined: A plaintiff may, under certain restrictions, examine a defendant; but he cannot afterwards have a decree against him in the matters as to which he was examined. A defendant may examine a co-defendant, unless he is interested in the matter as to which it is proposed to examine him; but he cannot examine the plaintiff without his consent. Neither can a plaintiff examine a co-plaintiff, unless he strike his name out of the bill, and give security for the costs to which such person would be liable had he continued a party to the suit. Counsel, solicitors, and attorneys are privileged from being examined in respect of matters which came to their knowledge in that character; but if such persons *consent* to be examined, the court will not refuse to read their depositions. If a plaintiff wishes to examine a defendant, he should not reply to his answer; or, if he has done so, he should withdraw the replication.

The party suing out the commission has the privilege of examining the first witness. The commissioners administer the oath to the witness; and, after he is examined, his deposition is engrossed on parchment, and distinctly read over to him; he then signs his name at the end of it; and the commissioners also subscribe their names to each skin of parchment.

The interrogatories and depositions are annexed to the commission; a return indorsed thereon; and the whole of the proceedings are bound up together, under the hands and seals of the commissioners, and delivered to the solicitor of the party who has the custody of the commission.

If the production of any deed or paper in the possession of a witness is necessary at his examination, such production may be enforced by a writ termed a *subpœna duces tecum*, which requires the party to bring the deed or paper with him when he comes to be examined.

In order to compel the attendance of a witness, either under a commission or in the Examiners Office, it is necessary to serve him personally with a *subpœna ad testificandum*, together with a notice from the examiner, or a summons from the commissioners, as the case may be. The *subpœna* itself must be served; the service of the notice or summons merely is not sufficient. If at the time fixed the party does not attend, or having attended refuses to be sworn, or being sworn refuses to be examined, the court will, upon an affidavit of service of the *subpœna* and notice or summons (as the case may be), order that the party shall do the act required of him, or be committed to the Queen's Prison, or to the custody of the serjeant at arms. If the witness is confined in the Queen's Prison, he may be brought up by *habeas corpus* to be examined, or the examiner will attend to swear him.

Witnesses are privileged from arrest during the time necessarily consumed by them in going to and returning from the place where their attendance is required, and also during their necessary stay there; and it seems from a recent case,¹ that a witness who comes to London in order to be examined is protected from arrest *during the whole time he remains in London bonâ fide* for the purpose of giving evidence,

¹ Gibbs v. Philipson, 1 Russ. & Myl. 19. See also Orchard's case, 5 Russ. 159.

though a person who is served with a *subpœna ad testificandum* in London, being at the time a resident there, is not protected from arrest in the interval between the service of the subpœna and the time appointed for his examination.

A witness is not bound to answer questions which may have a direct tendency to criminate him or render him liable to pains or penalties ; but if he object on these or any other grounds to answer an interrogatory or any part of it, he must state his objection in the form of a demurrer or answer, which is in due time argued in court ; and if the demurrer is overruled, the witness must of course answer the interrogatory.

As to the credibility of witnesses, we may remark, that if the character of a person is such as to cause a reasonable doubt as to his testimony ; or if, from want of reason or understanding, he is incompetent to give evidence ; or if he have any interest in the matter in dispute ; on either of these grounds his evidence may be impeached. If an objection is made to a witness with respect to credit, in order to impeach his deposition, articles must be exhibited against him, alleging the fact upon which the objection arises.¹ If the objection is to the competency of a witness, it may be inquired into upon examination ; and a general interrogatory may be administered to every witness, whether he has any interest in the matters in question. If a party who has been examined as a witness when disinterested, afterwards becomes entitled to the property in question, his depositions may nevertheless be read ; and a who is interested may, upon producing a release of his interest, witness be examined.

Examination of Witnesses DE BENE ESSE.—The examination of which we have just treated is that which takes place at the regular stage of the cause. It is, however, under certain circumstances, sometimes necessary to examine witnesses before the regular period for so doing arrives. Thus, if a material witness is so infirm, or of so advanced an age, as to render it doubtful whether he will live till the regular period for his examination arrives, or is going abroad and not likely to return before such period, or is the only witness to the case or to a material part of it ; in either of these cases the court will grant an order for the examination of such witness *de bene esse*, under which his examination may be immediately taken, to be used at the regular period for the examination of witnesses if the party cannot then be examined.

The above course is pursued if the testimony of the witness is to be used in a court of equity ; but if it is to be used in a court of law, a bill must be filed for his examination *de bene esse*, accompanied with an affidavit of the circumstances by means of which his testimony is in danger being lost.

Depositions taken *de bene esse* are open to the same objection and remarks as to credit and competency as the evidence of witnesses taken in the ordinary way. The depositions of witnesses examined *de bene esse* afterwards becoming interested may nevertheless be published.

Suppression of Depositions.—If there has been any irregularity in executing or returning the commission, or in the form of the interroga-

¹ See *Purcell v. M'Namara*, 8 Ves. 324.

tories (as, for example, if they are leading questions), or in the depositions themselves (as if they are taken already prepared), the court will not allow such depositions to be read, or, in other words, will suppress them. So if the depositions are thought to contain scandalous or impertinent matter, they may be referred to the master; and if he report them to be scandalous or impertinent, the court will suppress them. If a witness die after his examination has been taken, but before it is signed by him, it cannot be used.

Re-examination of Witnesses.—Generally speaking, a witness cannot be re-examined after publication has passed. When depositions have been suppressed for irregularity, a re-examination of the witness has been permitted; but the court is in all cases unwilling to allow of the re-examination of a witness. Where the depositions of a witness were too general, the court directed him to be re-examined upon interrogatories before a master, and it has allowed a witness to be re-examined *before publication* as to circumstances brought to his recollection after his examination in chief.¹

Publication of Evidence.—The commissioners and their clerk are prevented, as we have seen, from disclosing the depositions of the witnesses until publication has passed. By publication passing, liberty is given to the examiners, and to the solicitors of the parties to show the depositions openly, and give out copies of them. Publication passes either by rule, by order of court, or by consent. 1. By rule: If parties have been examined in the Examiners Office, or if one party takes out a commission to examine witnesses, and the other party does not join, or does not examine witnesses under it, or no witnesses are examined, the party wishing publication to pass gives to the other party, first, a rule calling upon him to examine his witnesses, and then a rule calling upon him to show cause why publication should not pass; and if no good cause is shown to the contrary, publication passes. 2. By order of court: If an order be obtained to enlarge the time limited by the rule, publication passes by order. 3. By consent: This is where the parties having examined such witnesses as they think proper, and being ready to bring the suit to a hearing, consent that publication shall pass.

The time for publication will be enlarged only upon special application made upon notice, supported by affidavit.

If a party who has not examined any witnesses wishes so to do; or if he has examined some witnesses and wishes to examine more, he must apply specially for the purpose.²

With respect to depositions *de bene esse*, it is an established rule, that they cannot be published unless there is a moral impossibility to have an examination in the ordinary way.

XII. MOTIONS AND PETITIONS.

During the progress of a suit, and before it comes on to be heard, it is frequently necessary to apply to the court, either for the protection of the property, or from circumstances arising out of the conduct of the parties to the suit. These applications, which are termed *interlocutory* applications, are made by *motion* or *petition*. If it is

¹ See *Kirk v. Kirk*, 13 Ves. 284. *Cockerell v. Cholmeley*, 3 Sim. 313.

² To a Master. See 3 & 4 Wm. IV. c. 94, § 13.

necessary to state the facts of the case to the court, a petition is generally resorted to.

Motions are either special, or of course. A *special* motion is one of which notice is required to be given to the opposite party before it is made, and which may be opposed. The notice must be served two clear days (exclusive of Sunday) before the hearing of the motion. Special motions must be accompanied with an affidavit in support of the application, verifying the material facts of the case. If a party gives notice of a motion and does not move accordingly, he is considered as abandoning it; and he will be ordered to pay to the opposite party, if no affidavit has been filed, 40s. costs; or, if an affidavit has been filed, taxed costs, unless the court shall itself fix the amount of costs to be paid by him.¹ A motion *of course* is one of which no previous notice is required, and the object of which will be granted upon asking for it. Of this description are motions to amend a bill before answer, to refer pleadings for scandal or impertinence, &c. There are various other motions of this kind, but these are the most usual. Special motions are made only on days appointed by the court for that purpose. Motions of course may be made on any day in term time; but, out of term, only on days appointed for motions, unless by consent.

Petitions are either *cause* petitions, or petitions *ex parte* (*i. e.* made without notice given to the opposite party). When the petitioner is a party to the suit, to the subject matter of which the petition relates, it is a *cause* petition; if it relate exclusively to the petitioner, and there is no suit existing respecting the subject matter of the petition, it is *ex parte*. Several kinds of petitions are *of course*; as those for setting down pleas or demurrers, to confirm a master's report, &c.

A petition is addressed to the person holding the great seal, or to the master of the rolls, and is delivered to the secretary of the judge to whom it is addressed, and who procures an answer to it, which answer consists in granting the prayer and requiring notice of the petition to be given forthwith. This notice must, as in the case of a motion, be given two clear days (exclusive of Sunday) before the hearing of the petition. If the petition is a matter of course, the prayer is immediately granted; if, on the other hand, it is one that may be opposed, the parties are directed to attend the court the next day of petitions, when it is considered in court.

XIII. SETTING DOWN THE CAUSE FOR HEARING.

The plaintiff in a suit may, as we have already observed, if he think proper, set down his cause to be heard upon bill and answer, without entering into any evidence to support his case; and this he may do immediately upon the coming in of the defendant's answer. If he enter into evidence, he may set down the cause to be heard in the term next after publication has passed; and if he omit so to do, it may be set down at the request of the defendant for the next following term.

In order to set down a cause, the plaintiff obtains the certificate of the clerk of records and writs in whose division the cause is, that the pleadings in the cause have been regularly filed and publication

¹ The costs of an abandoned motion are not costs in the cause. See 3 M. & K. 70.

duly passed.¹ This certificate is taken to the senior clerk of the registrar of the court where the cause is to be heard, and by him entered in a book kept for the purpose; whereupon he gives a note of the day on which the cause is fixed for hearing.

Causes which are set down for hearing before the lord chancellor are put into the paper of the vice-chancellor for whose court the cause is marked, as a matter of course, unless the party obtain from the lord chancellor an order reserving the cause to be heard by himself. If a cause is set down to be heard either before the lord chancellor himself, or the master of the rolls, and is afterwards set down to be heard in the other of the said courts, the solicitor for the plaintiff must certify the fact to the registrar of the court where the cause was originally set down, who will cause an entry thereof to be made in his book of causes opposite the name of such cause. If any cause becomes abated, or is compromised, after it is set down to be heard, the plaintiff's solicitor must certify the fact to the registrar of the court where it is set down, who will in like manner cause an entry thereof to be made in his cause book.

Consent causes are those in which the decree to be made is a matter of course, and consented to by the other party.

Short causes are those in which the decree is of course, or the point involved is one of no difficulty. Before a cause is set down as a short cause, the party setting it down should obtain from his counsel a certificate that it is proper to be heard as a short cause, and the consent of all parties to its being so heard must be obtained. If it be improperly set down as a short cause, or if all the parties do not consent to its being heard as a short cause, the court may order it to be struck out of the paper.

The cause being set down for hearing, a process termed a *subpœna to hear judgment* is (unless it be a consent cause) sued out by the person by whom the cause is set down. By this writ the party is commanded to appear before the judge by whom the cause is to be heard, on a certain day, to receive such judgment as may be made, upon pain of judgment being pronounced against him by default. This subpœna may be served and made returnable on any day, as well out of term as in term. If the cause is set down at the request of a defendant, he is bound only to serve the plaintiff with the subpœna, and it is the duty of the plaintiff to serve the other defendants, if there are any.

When the cause is called on, the plaintiff's junior counsel opens the pleadings by stating the object of the suit; then the defendant's counsel, the answer. The plaintiff's counsel then argues the case; after which the plaintiff's evidence is read. The defendant's counsel then addresses the court, and reads his evidence. After which the plaintiff's senior counsel (or, in his absence, the junior) is at liberty to reply. The judge then delivers his judgment, or sometimes, in cases of difficulty and importance, defers it.

¹ If any person, whether a party to the suit or not, be desirous of obtaining information of the state of any cause, he may require any Record and Writ Clerk, upon paying the sum of 4s., to furnish him with a

certificate from the Record and Writ Clerks Office, in which the dates and general description of the proceedings in the cause which have taken place in such office will be specified.

A cause is sometimes heard *in private*. If, at the hearing of the cause, it appear that the proper parties are not before the court, the court will allow the cause to stand over, on the plaintiff paying the costs of the day.

If the cause, when called on to be heard, cannot be decided by reason of a want of parties, or other defect on the part of the plaintiff, and is therefore struck out of the paper (as is sometimes done), and the same cause is again set down, the defendant will be allowed the taxed costs occasioned by the first setting down, although he do not obtain the costs of the suit.

If a cause, being in the paper for hearing, is ordered to be adjourned upon payment of the costs of the day, the party to pay the same must pay the sum of 10*l.*, unless the court make other order to the contrary.

If the plaintiff does not appear when the cause is called on, upon affidavit by the defendant that he was served with a subpoena to hear judgment (if the cause was set down by the plaintiff), or that the plaintiff was served with such subpoena (if the writ was sued out by the defendant), the bill will be dismissed, with costs to be paid by the plaintiff.

If the defendant does not appear, the plaintiff, on producing an affidavit of service of subpoena to hear judgment either on the defendant or on himself, will be entitled to such a decree against the defendant as he the plaintiff thinks he can abide by or maintain.

When a cause is called on, it sometimes happens that a party, though present, is not ready to go on, and he then applies to the court that the cause may stand over. If this application is not consented to by the other parties, the party making the application will have to pay to the other parties their costs of the day ; but if, upon the hearing, it appear that the same cannot conveniently proceed by reason of the solicitor for any party having neglected to attend personally, or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the court, and which according to its practice ought to have been delivered, such solicitor will be ordered personally to pay all or any of the parties such costs as the court shall think fit to award.

The decree or order having been pronounced by the court, minutes or heads of it are taken down by the registrar. If any mistake appears in the minutes, and the registrar cannot make the alteration required, an application by petition or motion must be made to the court to rectify it. From these minutes the decree is drawn up, passed, and entered, by the registrar signing it with his initials, and its being entered in the book kept for that purpose. Any party to the suit is entitled to an office copy of the decree.

XIV. PROCEEDINGS IN THE MASTER'S OFFICE.

It frequently happens, that the court, before making a *final* decree refers certain matters to a master for his investigation ; such, for instance, as the state of a person's family, inquiries as to the heir at law or next of kin of a person who died intestate, &c. It may therefore be useful shortly to state the mode of proceeding in these cases.

The first step is to leave a copy of the title and the ordering part of the decree with the master to whom the cause is referred, which is termed *bringing in a decree or order*, and at the same time to take out a warrant naming a time (which is settled by the master) for the purpose of taking into consideration the matter of the decree, and to serve the warrant upon the solicitors of the respective parties, if they sue or defend by a solicitor, if not upon the parties themselves.

If the decree is not brought into the master's office within two months after it is pronounced, any party to the cause, or any person interested in the matter of the reference, may apply to the court by motion or petition for the purpose of expediting its prosecution.

At the time appointed for considering the matters of the decree or order, the master will proceed to regulate, as far as may be, the manner of its execution; as, for example, to state what parties are entitled to attend future proceedings, to direct the necessary advertisements, to point out which of the several proceedings may be properly going on at the same time, and as to what particular matters interrogatories for the examination of the parties appear to be necessary, and whether the matters requiring evidence shall be proved by affidavit or by the examination of witnesses; and in the latter case he will, if necessary, issue his certificate for a commission.

If the parties do not attend the master at the time appointed, he may, if he think fit, proceed *ex parte*; and such proceeding will not be reviewed in the master's office, unless he shall be satisfied that the party who was absent was not guilty of any wilful delay or negligence, and then only upon his paying all the costs occasioned to the other parties by his non-attendance. If any proceeding before the master fails by reason of the non-attendance of any party, and the master does not think fit to proceed *ex parte*, he will certify what amount of costs (if any) the absent party or his solicitor ought to pay; and the payment of such costs will be enforced by the court.

If a party prosecuting a decree or order before the master does not proceed with due diligence, the master may, upon the application of any other party interested, either as a party to the suit, or as one who has come in under the decree or order, commit to him the prosecution of the decree or order; and from thenceforth the party making default and his solicitor will be prevented from attending.

The master may examine any creditor or person coming in to claim before him either upon written interrogatories or *vivâ voce*, or in both modes; and the evidence upon such examination is taken down and preserved, in order that it may be used by the court if necessary.

Sometimes the court directs an estate to be sold before the master. In this case particulars of the estate must be prepared by the plaintiff's solicitor, and advertisements of the sale published in the London Gazette and some newspaper circulated in or near the place where the property is situated. The draft of these advertisements must be signed by the master before they are inserted. The master has the power of ordering an estate in the country to be sold there, if he think it likely to benefit the parties interested.

If an estate is sold under a decree of the court, the court exercises a power, before the report of the purchase has been absolutely confirmed,

of allowing the biddings to be opened and the premises resold, under certain restrictions.

Any person who is capable of becoming the purchaser may apply to open the biddings; and it is no objection to his doing so that he was present at the sale. Generally an advance of 10*l.* per cent upon the original purchase money of an estate is required before the court will open the biddings. In a recent case they were opened on an advance of 300*l.* on 5030*l.*

A decree frequently directs books, papers, or writings to be produced before the master. In this case it is in the discretion of the master to determine what books, papers, or writings are to be produced, and whether and for how long they are to remain in his office; or, if he shall not deem it necessary that they should be left in his office, he may give directions for the inspection thereof by the parties requiring the same.

The master, having investigated the several matters referred to him, states the result of such investigation to the court by a certificate or report. A *certificate* is a simple notification of a fact, or of an opinion or conclusion from facts, or a representation to the court of the state of any particular proceeding. A *report* contains the result of the master's inquiries, embracing the whole of the matters referred to his consideration, with his findings or conclusions and opinions thereon.

No part of any state of facts, charge, affidavit, deposition, examination, or answer, brought in or used before the master, ought to be stated or recited in his report; but such proceedings must be so far identified in the report as to enable the court to see what state of facts, charge, affidavit, deposition, examination, or answer, was brought in and used before the master.

Before the master finally settles his report, a warrant is issued, under which all the parties who have been before the master attend, when the draft of the report is finally settled. The master will not receive further evidence as to any matter depending before him after issuing the above warrant; but he will not issue such warrant without calling upon the parties to show cause why it should not issue. The master may, upon the application of any party interested, make a separate report from time to time.

If any party wishes to complain of any matter introduced into any proceeding before the master, on the ground that it is scandalous or impertinent, he may, without applying to the court, take out a warrant for the master to examine such matter, and the master may expunge any such matter which he shall find to be scandalous or impertinent.

If either party is dissatisfied with the master's report, he takes exceptions to it, expressing the points objected to, or presents a petition praying that the master may review his report. If the exceptions are overruled, or the prayer of the petition refused, the report is absolutely confirmed; otherwise it is referred back to the master to review his report, as is before mentioned with respect to exceptions to an answer.

XV. ISSUE.—SPECIAL CASE.

On the hearing of a cause, if any material question of fact or of mere law arises (such as the due execution of a will of real estate, or in a tithe

suit the validity of a *modus*), upon which the court is unable satisfactorily to decide, it will send a case for the opinion of a court of common law, or direct an action to be brought or an issue to be tried. In cases of doubt concerning facts, an issue is directed; questions of law are referred to a court of common law, in the shape of a special case. As instances of the former, where a will is sought to be set aside for fraud, an issue must be directed *devisavit vel non*. So if a contract is the subject matter, and a question arises whether or not it is usurious, and the circumstances under which the contract was entered into are doubtful, the court will order an action to be brought on the contract.¹ The party applying for the issue may elect in which of the three courts of common law it shall be tried, though this is usually settled by the court. After the issue has been tried, the judge before whom the trial took place certifies how it was found. If a case has been sent, the judges of the court to which it was directed, after it has been argued by counsel before them, return their opinion in the form of a certificate, but without stating the reasons for their opinion.

If the judge by whom the case was directed is dissatisfied with the opinion of the court of common law, he may send the case to the judges of another court; but it is not usual to send it back to the same court. So if either party is dissatisfied with the verdict, or with the opinion given by the judges, he may in the one case apply for a new trial, and in the other contend against the certificate, and ask that another case may be sent to the same or another court of law. For a new trial the application must be made to the court of law where the action was tried. The grounds on which it may be applied for are, 1. A misdirection of the judge; 2. Because the verdict was contrary to evidence; 3. Because of an informality in the evidence.

If a party is dissatisfied with a decree or order directing the issue, he should lose no time in applying for a rehearing; for after the trial has taken place, the order directing the issue cannot be appealed from.

The party who has obtained the order directing the issue or case, should use all due diligence in bringing on the trial, as negligence in this respect may be taken advantage of by the opposite party.

XVI. SETTING DOWN A CAUSE ON FURTHER DIRECTIONS.

The difficulties which stood in the way of the court making a final decree as to the matters in question having been removed by the means above mentioned, the cause comes again before the court upon further directions, or upon the equity reserved. In order to this, a petition is presented to the judge before whom the cause is to be set down, and at the same time a copy of the decree and of the master's report, or of the verdict or certificate, as the case may be. After an issue or action, the cause cannot be set down upon further directions until after the first four days of the term next after the trial are elapsed, in order that the party against whom the verdict was given may have an opportunity of moving for a new trial. When the cause comes on, the court makes a final decree.

¹ *Lowe v. Waller*, 2 Douglas, 735.

XVII. EXECUTION OF DECREES AND ORDERS.

Until recently, if a party against whom a decree or order was pronounced refused or neglected to obey it, and took no steps towards appealing from it, a writ of execution of the order was served on the party; and upon non-compliance therewith, and affidavit of the service of the writ, the usual process issued, as in other cases of contempt. But now, no writ of execution is issued for the purpose of requiring or compelling obedience to any order or decree, but the party against whom it is made is, upon being duly served with it, held bound to obey it; and if the party, after being so served, do not obey the same within the time limited for the performance thereof, the party prosecuting the order will be entitled to issue an *attachment* against the party. And if such party shall be taken and detained in custody under such writ of attachment without obeying the order or decree, then the party prosecuting the same will, upon the sheriff's return that the party has been so taken and detained, be entitled to a commission of *sequestration* against the estate and effects of the recusant party. And if the sheriff shall return *Non est inventus*, the party prosecuting the order will be entitled either to a sequestration in the first instance, or to an order for a serjeant-at-arms, and to such other process as a party was formerly entitled to upon a return of *Non est inventus* made by the commissioners named in a commission of rebellion issued for the non-performance of an order or decree.

Every order or decree requiring a party to do any act must state the time, after service of the order or decree, within which the act is to be done; and upon the copy of the decree or order which is served upon the party required to obey the same, a memorandum to the following effect must be indorsed; *viz.* "If you, the within-named *A. B.*, neglect to obey this order (or decree) by the time therein limited, you will be liable to be arrested under an attachment issued out of the High Court of Chancery, or by the serjeant-at arms attending the same court, and also be liable to have your estate sequestered, for the purpose of compelling you to obey the same order (or decree)."

With respect to persons having privilege of peerage or of parliament, an order for a sequestration *nisi* must be obtained; and if, upon being personally served with a copy of the order, the party does not comply with it within the time fixed, it is made absolute in the usual way.

With respect to corporations, the mode of enforcing a decree is nearly the same as is before stated with respect to enforcing an answer.

To enforce a decree directing the *delivering up possession of lands*, it was, until recently, necessary that a writ of execution of the decree should be served personally upon the defendant, and that the plaintiff should, either personally or by attorney, demand possession of the estate. But now, upon due service of the decree or order for delivery of possession, and upon proof of demand and refusal to obey the order, the party prosecuting it will be entitled to an order for a *writ of assistance*.

Every person not a party to a cause who has obtained an order, or in whose favour an order is made, shall be entitled to enforce obedience

to such order by the same process as if he were a party to the cause; and every person not a party to a cause, against whom obedience to an order of the court may be enforced, is liable to the same process for enforcing obedience to such order as if he were a party to the cause.

XVIII. Costs.

It may be safely stated, that there is no point in the progress of a chancery suit which gives rise to more difficulty and discussion than the question, by whom and in what manner the costs of the suit are to be paid. The giving or withholding costs is entirely in the discretion of the court. Generally speaking, they follow the result of the case; so that the party who fails in establishing his case pays, not only his own costs, but also those of his adversary. This rule, however, as we shall see, admits of several exceptions.

The crown, as before observed, pays no costs.

In suits relating to charities, where the relators conduct themselves properly, or the institution of the suit may be fairly considered beneficial to the charity, they will be allowed their costs.

Trustees and executors, whether plaintiffs or defendants, will, generally speaking, be allowed their costs; but if the suit has been rendered necessary by neglect or vexatious conduct on their part, or if they refuse to act without the direction of the court in a case that admits of no reasonable doubt, they will have to pay their own costs; and cases might be put in which they would have to pay not only their own costs, but also those of the other parties, as if any loss had accrued to the trust estate by their neglect or fraudulent conduct.

A mortgagee is *primâ facie* entitled to his costs, unless there has been positive misconduct on his part, or he has set up an unjust defence.

With respect to parties seeking the specific performance of agreements, Lord Eldon thus states the rule as to costs: "I think, in such a suit, he who fails is *primâ facie* to be taken to be the party liable to costs; and those parties who depend upon circumstances to govern the discretion of the court in withholding costs have it imposed on them to shew the existence of those circumstances in a sufficient degree to cut down the *primâ facie* claim of costs."

With respect to an heir at law, if he is plaintiff in a suit instituted by him for the purpose of invalidating the will, and he fails, he will not have his costs; and if the suit be groundless, he will have to pay costs. But if he is a defendant in a suit to establish a will, and an issue is directed at his request, though the verdict be against him, he will be entitled to his costs, both at law and in equity.

An infant is not personally liable to the payment of costs; but if he is plaintiff, his next friend, as we have already seen, may in certain cases be liable to pay them.

The court will in some cases give a party costs beyond those which may be found due to him upon taxation; as, for example, if a trustee, in the due and *bonâ fide* execution of his trust, has taken the opinion of counsel, he will be allowed the costs so incurred by him, in addition to the costs of the suit.

By 1 & 2 Vict. c. 110, § 18, all decrees and orders of the Court of Chancery are to have the effect of a judgment in a superior court of common law; and the persons to whom any moneys, or costs, charges, or expences, are made payable by such orders are to be considered as judgment creditors within the meaning of that act, and have the like remedies. And orders have been made by the Court of Chancery in pursuance of this act, under which the performance of any decree or order of the court by any person party to it may be enforced by means of writs of *fieri facias*, *elegit*, and *renditioni exponas*. Forms of the various writs adapted to these purposes have been prescribed by the court, and will be found in the orders of the 10th of May, 1839.

There are three modes of taxing costs: 1. As between party and party; 2. As between solicitor and client when they are paid out of the general fund; and 3. As between solicitor and client when they are paid by the client out of his own fund. If the order is simply to tax the costs of the suit, it is always construed to mean as between party and party. In the taxation of this kind of costs, the principle is, to have a fixed allowance for every proceeding in the suit, which is not to be varied to meet the circumstances of any particular case. Thus, the fee which is allowed the solicitor for taking instructions for a bill is the utmost that will be allowed in any case, whatever trouble he may have had in collecting the materials for the suit. If a party, in addition to the costs of the suit, has incurred any expences not strictly included under the word "costs," the court will, in the case of executors and trustees, give them, under the term of "just allowances," all the costs, charges, and expences properly incurred by them. If costs are taxed as between solicitor and client, to come out of a fund belonging to the client solely, the solicitor is not only entitled to be paid for such proceedings as he took necessarily, but also for those not strictly necessary, but which the client directed to be taken, after being made to understand the circumstances of the case, as if a client direct his solicitor to employ four or five counsel, he must pay the solicitor for the same.

A plaintiff in a creditors' suit will be entitled to his costs as between solicitor and client, if the fund is sufficient to pay the debts; otherwise he will be entitled to his costs only as between party and party.

Enforcing Payment of Costs.—The taxing master having certified the amount of the costs, and his certificate having been filed, they are recoverable in the following manner. The party to whom they are payable issues a subpoena, commanding the party to pay them to the party entitled to receive them, or bearer; and if, upon personal service of the subpoena and demand, they are not paid, then, upon affidavit of such service, demand, and refusal or neglect to pay the same, an attachment will be issued against the party, and further process of contempt, to a sequestration, will be granted, if there be occasion.¹

In order to recover costs against a peer, he must be personally served with a subpoena; and, upon his failing to pay, the party must obtain an

¹ The preceding observations apply only to the cases in which costs are payable by one party to another. A solicitor, in order to recover payment of his bill of costs from his client, may maintain an action. The

enactments relating to this subject are the 3 James I. c. 7; 2 Geo. II. c. 23; and 30 Geo. II. c. 19. See also *ante*, p. 286 &c., and 1 Smith, 528, &c.

order *nisi* for a sequestration, which, upon affidavit of personal service, will be made absolute, unless good cause is shown to the contrary.

Costs are recovered from a corporation by subpoena and distringas.

If the costs are payable by a person not a party to the suit, they cannot be recovered in the mode above mentioned; but the party entitled must apply specially to the court.

Where the plaintiffs are decreed to pay costs to the defendant, and *vice versa*, he may proceed against all or any one of them.

If at the hearing the bill is dismissed for want of prosecution, and the plaintiff is directed to pay the costs of the suit, and he afterwards, without having done so, file another bill for the same subject matter, the court will order the proceedings in the second suit to be stayed until the costs of the first are paid.

If a party directed personally to pay costs, which are referred to the master to be taxed, dies before taxation, they cannot be recovered from his representatives. But if they were taxed before his death, or, although he died before taxation, if any thing remained to be done in the decree beyond the payment of costs, they may be recovered, and for that purpose a bill of revivor should be exhibited against his representatives. In like manner, if the party entitled to *receive* costs dies before taxation, the right to them is lost.

XIX. REHEARINGS, APPEALS, AND BILLS OF REVIEW.

If a party think himself aggrieved by a decree, he may either petition the judge by whom it was pronounced for a rehearing of the cause by him; or, if the decree was made by the master of the rolls or either of the vice-chancellors, he may apply, by way of appeal, to have the cause reheard by the lord chancellor. In such case a caveat must be entered, to prevent the enrolment of the decree for twenty-eight days after the docket is presented to the lord chancellor for his signature; for after a decree has been enrolled, the cause cannot be reheard, either by the judge who pronounced it or by the lord chancellor, and the party will be compelled to resort either to a bill of review or an appeal to the House of Lords.

A cause that has been reheard before either of the vice-chancellors or the master of the rolls may be heard before the lord chancellor on appeal.

Every petition for a rehearing or appeal must be signed by two counsel, usually such as have been concerned in the cause, certifying that the cause is proper to be re-heard, or that there is reasonable cause of appeal from the decree. Presenting a petition of rehearing or appeal will prevent the enrolment being signed. It may be presented at any time before the decree is enrolled, and the practice does not appear to have prescribed any time beyond which such a petition cannot be presented. If there has been any irregularity in the enrolment, the court will vacate it.

The party presenting a petition of rehearing or appeal must deposit in the hands of the registrar the sum of 20*l.*, which will be paid to the adverse party if the decree is not varied in any material point. The mode of dealing with it is, however, in the discretion of the court.

A decree that has been made by consent cannot be appealed from.

If there are any clerical mistakes or errors in a decree, arising from an accidental slip or omission, it is not necessary, in order to correct these, to have recourse to a petition of rehearing or appeal; but it may be done by presenting an ordinary petition, provided it be presented before the decree is enrolled.

Generally speaking, neither an appeal nor a rehearing will lie on a question whether costs should or should not have been given. A decree, however, has been varied in respect of costs only.¹

A party may appeal *in formâ pauperis*.

The general practice is to allow of only one rehearing; but the rule is not inflexible.²

If a party be dissatisfied with the decision of the master of the rolls or of either of the vice-chancellors upon a *motion*, he need not present a petition of rehearing or appeal; but he may give a notice of motion before the lord chancellor, to discharge or vary such order. With respect to an order made upon a *petition*, it appears that the party must present a regular petition of appeal.

Bill of Review.—If the decree has been signed and enrolled, a reversal of it can be obtained only by a bill of review. This proceeding may be had upon apparent error in judgment on the face of the decree, or by special leave of the court, upon oath made of the discovery of new matter or evidence which could not possibly be had or used at the time the decree was made. No new evidence or matter then in the knowledge of the parties, and which might have been used before, will be sufficient ground for this kind of bill.

The appearance of a party to a bill of review may be enforced in the same manner as to an original bill. A demurrer appears to be the only proper defence to a bill of this nature; and if the demurrer is allowed, and the order allowing it is enrolled, it is an effectual bar to a new bill of review on the same grounds.

It seems that a bill of review cannot be brought after twenty years have elapsed from the time of pronouncing a decree.

Supplemental Bill of Review.—If a decree has not been signed and enrolled, it may be examined and reversed upon a species of bill termed a supplemental bill of review. When any new matter has been discovered since the decree, the effect of this bill is to supply the defect which occasioned the decree upon the former bill. It is necessary to obtain the leave of the court to bring a supplemental bill of this nature; and the same affidavit is required for this purpose as is necessary to obtain leave to bring a bill of review upon the discovery of new matter. In its frame it nearly resembles a bill of review; except that, instead of praying that the former decree may be reviewed or reversed, it prays that the cause may be reheard with respect to the new matter made the subject of the supplemental bill, and at the same time be reheard upon the original bill, and that the plaintiff may have such relief as the case made by the supplemental bill requires.

¹ *Burkett v. Spray*, 1 Russ & Myl. 113.

² See *Mousley v. Car.* 3 Myl. & Keen, 205.

CHAPTER XII.

Of the Ecclesiastical Courts.

THERE are numerous injuries and offences, as well of a private as of a public nature, which are not remediable in a court of law or equity, but only in one of the spiritual or ecclesiastical courts; and there are others in which the courts of equity or of law have concurrent jurisdiction with the ecclesiastical courts, and yet it may be preferable to proceed in the latter.

I. PRIVATE injuries cognizable in the ecclesiastical courts may be arranged under the following heads:—1. Causes pecuniary; 2. Causes matrimonial; 3. Causes testamentary; 4. Suits for defamation; and 5. Suits for perturbation of pews, or disturbance of seats in a church.

The ecclesiastical courts have jurisdiction not merely with reference to the locality of the subject matter, but to the locality of the person cited; and therefore, although the defendant may usually reside out of the kingdom, yet if he be served with a citation within the jurisdiction of an ecclesiastical court here (as of the Consistory Court of London, in a suit there for nullity of marriage), that court has jurisdiction. For, in matrimonial suits, an ecclesiastical court has jurisdiction to try the marriage of English subjects wherever contracted. But, generally speaking, as regards testamentary causes, all ecclesiastical jurisdictions are limited in their authority to property locally situate within their district.

1. *Causes Pecuniary.*—When the right to tithes is disputed, claims can only be instituted in the ecclesiastical courts between spiritual persons; but against lay persons, only to compel the render of tithe in kind when the general right is admitted. When there has been an agreement for a composition, the remedy is usually at law; and it has been supposed that in such a case a suit in the consistorial court for subtraction of tithe is not maintainable, and that the composition need not be tendered. But recently Sir John Nichol has decided, on an appeal from the consistorial court of Exeter to the Arches Court, that as the ecclesiastical court had power to interfere in cases of modus, he considered they had jurisdiction also in cases of composition, which were in effect moduses for the time being, and reversed the sentence below, decreeing that the value of the tithe, to be ascertained by the registrar, should be paid to the appellant with his costs. In a suit by a clergyman for small tithe, he will in general recover his costs in the ecclesiastical court, although he succeed only in part, deducting the costs of the pleadings relative to the unsuccessful part.

Ecclesiastical dues to the clergy, as pensions, mortuaries, compositions, offerings, and whatever falls under the denomination of surplice fees, for marriages or other ministerial offices of the church, are also recoverable in the ecclesiastical courts. But curates' salaries are more

usually recovered by action at law. Claims in respect of spoliation or ecclesiastical waste and dilapidations are also cognizable in these courts; but it is more usual to proceed for the latter by action at common law. It should seem that every incumbent who permits the buildings belonging to his benefice to continue dilapidated, may be prosecuted by the bishop and churchwardens in the consistory court, so as to compel him to repair. So a suit may, if the facts warrant, be sustained by churchwardens against a bishop, as an impropiator of a portion of the great tithes of a parish, to compel him to repair the chancel. But if a custom for the parishioners to repair be pleaded, a prohibition goes to the ecclesiastical court, and such question of fact will be heard in a court of law by a jury, which if found in favour of the bishop will be conclusive; for as the ecclesiastical court cannot investigate whether the alleged custom be illegal, the impropiator will be entitled to be dismissed with all his costs incurred in the ecclesiastical courts.

2. *Matrimonial Causes.*—We have seen that courts of equity have not in general any direct jurisdiction over matrimonial causes, but that they are exclusively taken cognizance of in the spiritual courts, especially in cases of clandestine marriages, although the lord chancellor may direct that the marriage of a ward in chancery shall be repeated more formally.

Matrimonial causes are of several descriptions; as, 1. Suits for a malicious jactitation or boasting of a pretended marriage with the complainant without his consent, when there has been no marriage in fact; 2. Suits for nullity of marriage, on account of force or fraud, or incest, or too near relationship, or incapacity to consent, or want of actual consent (as in case of lunacy or great mental weakness imposed upon by fraud, and which may be instituted by the committee), or for want of due form (as misnomer in publication of banns), or on account of impotency or sterility; 3. Suits for restitution of conjugal rights; 4. Suits for divorce on account of cruelty or adultery; and 5. Suits for alimony.

The ecclesiastical courts cannot annul a marriage after the death of one of the parties, though they may proceed to punish the survivor, as for incest; but a sentence of divorce on the ground of incest may be repealed by the spiritual courts after the death of the parties.

Suits for *restitution of conjugal rights*, when one of the parties refuses to cohabit, are not unfrequent, and have been sometimes adopted as a mode of trying the validity of the marriage, which must be charged to have taken place. If the complainant (whether wife or husband) succeed, the sentence of the court is, that the party is the lawful wife or husband of the opponent, and that the latter (if a husband) do receive her home in the character of a wife, and treat her with conjugal affection, and to certify to the court that he has done so by the first sessions of the next term. And if such sentence be disobeyed, the party will be perpetually imprisoned under process from a court of law, as in other cases.

By the practice of the courts a matrimonial suit frequently changes its original object, and this even on a collateral ground. Thus, in a suit against a woman for jactitation of marriage, if she plead that she

and the complainant were duly married, and establish the fact, the sentence will be for a restitution of her conjugal rights; and on the other hand a suit for restitution of conjugal rights may terminate in a decree of divorce, on account of the adultery of the complainant.

The only grounds of *divorce* arising after marriage are intolerable cruelty, guiltiness of the husband of some infamous unnatural crime or practice, or adultery. Mere bad temper, harshness, or unkindness, are not sufficient grounds of divorce.

The party applying on account of adultery must be free from a similar imputation; and if a husband cohabit with his wife after knowledge of her infidelity, the court will not interfere at his instance.

The jurisdiction of the spiritual courts in decreeing *alimony* is incidental to a decree of divorce; and, generally speaking, alimony cannot be otherwise obtained, except indeed in cases of agreement, when the Court of Chancery may interfere, or except by act of parliament, when there has been a divorce there. In general, on a divorce in the ecclesiastical courts on account of the adultery of the wife, no decree of alimony follows; though upon a divorce bill in the Lords it is otherwise, lest by total destitution she should be driven to continue in a course of vice.

In suits instituted either by the husband or the wife, the latter is a privileged party as to costs, and is entitled to alimony pending the suit. If the wife, therefore, be under the necessity of living apart, it is necessary that she should be subsisted during the pendency of the suit, and that she should also be enabled to procure justice by being provided with the means of defence. And we have already seen, that an attorney for the wife, in a proceeding by her against her husband, may recover his costs from the husband on the ground of these being necessities. But when the wife has an independent or separate income, no alimony or costs pending the suit will be allowed, though something may be added where her pin-money is small. If she has no property, in case of a divorce at her suit, she is entitled to alimony, the general proportion of which, it is said, is rather higher than one-sixth, or about one-fifth of the income of the husband, to be paid from the date of the decree; and even a moiety of the property has been given, where the wife brought the whole of the property and she was blameless; and where the husband pretended to have assigned away all his property, he was nevertheless compelled to pay alimony pending the suit for a divorce on account of adultery, at the rate of 50*l.* per annum out of 140*l.* The reduction of the husband's income by unprofitable speculations is no ground for a reduction of alimony allotted many years before; but it is otherwise when his income has decreased without any fault on his part. The arrears of alimony ought to be enforced from year to year, for after greater delay the ecclesiastical courts will not in general assist.

3. *Testamentary Causes*.—The ecclesiastical courts, and especially the Consistorial and Prerogative courts, have *original*, and in some cases *exclusive*, jurisdiction upon questions regarding the validity of wills relating to *personalty*; for we have seen that a court of equity has no jurisdiction to determine on the validity of a will, the granting

of probate or letters of administration, or taking and assigning administration bonds, though afterwards an action for a breach of the condition may be brought in a temporal court. But the ecclesiastical judges admit that a court of equity is the fittest jurisdiction to decide upon the validity of an *appointment* in or by a will, and will therefore endeavour to put the question in a course of inquiry there; and it is admitted that the ecclesiastical courts have no authority to decree the execution of a *trust*.

Courts of equity exercise a concurrent and more efficacious jurisdiction in compelling executors and administrators to account and distribute; and the Court of Chancery has powers as extensive as those of the court of probate to receive evidence which may explain any ambiguity on the face of a will.

If a will once proved to have existed be not forthcoming, the presumption of law is, that the testator himself destroyed it, and therefore a copy will not be admitted to probate.

The ecclesiastical courts have proper jurisdiction over personal legacies charged upon or to be paid out of mere personal estate, and upon the construction of a will respecting the same.

But an injunction may be granted in chancery to restrain a husband's suit in the ecclesiastical court for a legacy to his wife, he not having made a settlement. So when there is a *trust* affecting a legacy, chancery will interfere. When the estate of the deceased is considerable, or the legacy large, a suit in equity against the executor may be more effectual to secure the fund and a due distribution; but when the legacy is small, it is in general best to institute a suit against the executor in the Arches Court if the will has been proved in the Prerogative Court of Canterbury. The simple mode pursued in the ecclesiastical courts or enforcing payment of a legacy is very convenient and summary, and avoids the necessity for resorting to chancery, and, though but little known, should be constantly resorted to, especially when the legacy is small. This jurisdiction is exercised by the Arches Court in all cases of wills proved in the Prerogative Court, and by the official principals of each diocese in cases of wills proved in the diocesan court. But in some cases the legatee should be prepared to give security to refund, where there is a possibility of creditors appearing. Where a legacy has been given to the separate use of the wife in exclusion of the husband's interference, the suit is to be instituted in her name separately against the executor, and the husband or his assignee is only to be cited *pro formâ*. When an executor or administrator has expressly promised to pay a legacy in consideration of forbearance, an action at law may in general be sustained if he have assets, but not otherwise.

4. *Suits for defamation* are frequently instituted in the ecclesiastical courts; but as no damages are there recoverable, and there is no penance, except the compulsory admission of complainant's innocence, asking forgiveness, and payment of costs, there is not much inducement to sue. In case of verbal slander, when the opprobrious words merely impute an immorality punishable only in the ecclesiastical courts, as calling a woman a whore or bawd, or any less explicit charge of fornication, if no special damage can be proved, a suit in the spiritual court is the

only remedy; and as regards personal considerations, the compelling such admission of innocence, apology, and payment of costs, may afford some degree of satisfaction to the insulted individual. The remedy in the ecclesiastical courts for slander is limited to six calendar months. Slander imputing an offence punishable by indictment is not within the jurisdiction of the ecclesiastical courts; and in London and Bristol the imputation of whoredom to a woman is punishable by action. But if part of the offence impute only a spiritual offence, then after sentence a prohibition will not be issued to the spiritual court, although other words were actionable at law. The ecclesiastical court has no jurisdiction unless the defamation impute to the plaintiff the guilt of some offence punishable in that court. Nor can a suit be instituted in the ecclesiastical courts for a written libel, because any slander reduced into writing is remediable at law.

It seems that in this court not only a party guilty of speaking specific words, importing a particular or general charge of some spiritual offence, may be prosecuted, but also a person guilty of maliciously using general opprobrious and uncharitable expressions, tending to destroy brotherly charity; such as, "Thou art a dishonest liver," or "Thou art a liar," or "knave," or "Thou art not to be trusted upon thy word or oath more than a dog."

In general, in a suit for defamation in a spiritual court, some slanderous words must be proved by two witnesses; but it seems sufficient if one witness prove defamatory words uttered at one time, and another witness words of similar import at another time. But in a suit of this nature the spiritual court is bound to allow the defendant the advantage of any justification which would have availed him at common law, as a plea, that the words were true.

There is this peculiarity, that in the ecclesiastical courts a woman may sue alone without her husband for defamation; and though he might release the costs, yet he could not determine the suit, so as to release the defendant from the necessity of performing the enjoined penance. Indeed, by the law spiritual, the husband and wife may not join in a suit in the ecclesiastical courts, as they must in the temporal, but each shall sue separately upon their own cause of action.

The punishment for defamation is payment of costs and penance enjoined at the discretion of the judge. If the slander was privately uttered, the penance may be directed to be performed in a private place; but if publicly uttered, then the penance is to be public, as in the church of the parish where the party defamed resides, in time of divine service (but not covered with linen garments, as in cases of correction for fornication &c.); and the defamer may be required publicly to pronounce, that by such words (naming them, as set forth in the sentence) he had defamed the plaintiff, and therefore that he begs pardon and forgiveness, first of God, and then of the party defamed, for uttering such words.

5. *Suits for Disturbance* (technically called *Perturbation*) of *Pews* or seats in a church or chapel are frequently the subjects of litigation in the ecclesiastical courts; and in such a suit every description of right to a pew or seat may arise and be discussed. But when the legal right is clear, an action on the case for the disturbance, or an action of tres-

pass, if there has been an assault, may be preferable; and in one case, where it appeared that the temporal right was the question, a prohibition was awarded to prevent the continuance of a suit in the spiritual court for a disturbance in the church. As a decree in an ecclesiastical court (even the Arches) respecting a pew is not in all cases conclusive, and the decision there may be afterwards disputed in an action, it is obviously, when the right is in dispute, better to proceed at law.

The *right of burial* in a particular vault or place is also sometimes a private claim discussed and determined in a spiritual court.

II. The ecclesiastical courts have also considerable jurisdiction over PUBLIC MATTERS of a spiritual nature, as *church rates*, and over *ecclesiastical officers* and certain *offences of a spiritual nature*.

Church rates are peculiarly subject to the jurisdiction of the ecclesiastical courts; and although the 53 Geo. III. c. 127 gives justices of the peace jurisdiction to enforce payment when the arrear of rates does not exceed 10*l.*, yet at the same time it expressly enacts, that the justices shall not proceed when the rate is in a course of litigation in the ecclesiastical court. And if, for the first time, it be *bonâ fide* insisted before justices that the liability to pay is *intended* to be disputed in that court, they cannot proceed further.

The proper course, when a rate is required in order to repair the church, is for the churchwardens to call a vestry; and it is for the majority of the parishioners at such vestry to say whether they acquiesce in the rate proposed, or what rate shall be assessed. The right to tax themselves is vested exclusively in the majority, and no ecclesiastical court can assess the *quantum*. If the majority of the parishioners refuse to make a rate, still the churchwardens themselves cannot make one. If the parishioners contumaciously, obstinately, and pertinaciously refuse to make any rate at all when it is necessary, or will only make such a rate as is manifestly collusive, then they may be articted in the ecclesiastical court for such refusal, and there punished.

After a rate has been made, the formal and strictly proper course is for the churchwardens to apply to the ordinary to confirm the rate; though a rate is valid without confirmation.

In a suit for subtraction of church rate, brought by the churchwardens against a parishioner, the presumption is in favour of the rate; and unless he establish that he is unequally assessed, he will in general be condemned as well to pay the amount of the assessment as also the costs. The resistance by a single individual of such rates is generally treated as vexatious, because it occasions great trouble and difficulty in a parish.

Spiritual courts have also jurisdiction over *grammar schools*.

The ecclesiastical courts have jurisdiction over *ecclesiastical officers*, to compel them to perform their duty; as to compel churchwardens to deliver their accounts, though they cannot decide on the propriety of the charges therein. If a clergyman refuse or neglect to perform the office of burying when he ought, he may be suspended for three months by the ordinary; or he may be punished in the temporal courts by indictment or information, if any inconvenience to the public should arise from the neglect.

The statute 5 Eliz. c. 23, § 13, specifies some of the *ecclesiastical*

offences punishable in the spiritual courts, and which are thereby required to be specified in the *significavit*; such as heresy, refusing to have a child baptized, to receive the sacrament, or to attend divine service, errors in matters of religion, incontinency, usury, simony, perjury in the ecclesiastical courts, and idolatry.

Simony, whether the offender be a clergyman or layman, may be prosecuted in the ecclesiastical courts.

Usury also, when beyond ten per cent, may be prosecuted in these courts.

So, by 5 & 6 Edw. VI. c. 4, § 1, if any person shall by words only quarrel, chide, or brawl in any church or churchyard, it shall be lawful for the ordinary of the place, on proof by two lawful witnesses, to suspend every ecclesiastical person so offending, and every layman, from the entrance of the church; and if he be a clerk, from the ministration of his office, so long as the ordinary shall think fit, usually six months. The statute was intended rather to secure the sanctity and dignity of the place than the party assailed or abused; and indecorous words and conduct towards the presiding minister at a vestry meeting is an ecclesiastical offence; and the circumstance of the other party having used the most provoking language and conduct, affords no defence or excuse. The sentence against a layman may be suspension from the church for a week, three weeks, or a month, or longer; with admonition, and payment of costs generally, or 20*l.* or 30*l.*, or other fixed sum, usually less than the actual costs, and a direction that the sentence shall be notified in church.

Assaulting a clergyman is also an offence punishable in the ecclesiastical courts by censure and costs. But the arresting a clergyman whilst performing or going to or returning from divine service is now declared to be an indictable misdemeanor by the 9 Geo. IV. c. 31, § 23.

The mother of a bastard child is punishable in these courts: and adultery, fornication, lewdness, drunkenness, blasphemy, and absence from church, are all offences to be here prosecuted. Solicitation of chastity may also be prosecuted in these courts.

Suits in the ecclesiastical courts for defamatory words must be commenced within six calendar months from the time they were spoken, and for fornication or incontinence, or for striking or brawling in a church or churchyard, within eight calendar months, by the 27 Geo. III. c. 44. But a suit in the ecclesiastical courts against a clergyman for incontinence, where the object is to obtain his suspension or deprivation, is not within that enactment.

The ecclesiastical courts have no jurisdiction over contracts or trespasses; and the ordinary cannot punish a trespass committed even in the body of the church, unless it hinder divine service. Nor has a spiritual court any jurisdiction over trusts (if still subsisting); and therefore where a party, sued as a trustee, was arrested on a writ *de contumace capiendo*, the Court of Queen's Bench, on habeas corpus, discharged him out of custody. And although this court may compel a churchwarden or an executor to deliver his accounts, yet after the same, or an inventory by an executor, has been delivered, this court cannot proceed to impeach the account. These courts have no jurisdiction over a devise of real property, or of a legacy or charge thereon.

Neither have they any jurisdiction in cases of treason or felony, or other offence cognizable or punishable in the temporal courts. So a suit for defamation cannot be instituted in the spiritual court for a *written* libel, because any written slander of a person is actionable or indictable. Nor can damages be recovered in the ecclesiastical courts, but costs only.

III. COURSE OF PROCEEDING IN ECCLESIASTICAL COURTS.—Causes or suits which may be instituted in the ecclesiastical courts, in respect of the different course of proceeding in each, are either formal (termed *plenary*) or summary.

The complaints that must be formally instituted and prosecuted are—1. All testamentary proceedings and businesses of administration (unless in the Prerogative Court, where the proceedings are always summary, as by motion or petition); 2. All causes of legacy; 3. Causes of defamation, or reproachful or opprobrious language; 4. Causes of divorce, or separation from bed and board; 5. Jactitation of marriage; 6. Impediments to marriage; 7. Suits for ecclesiastical dilapidations; 8. Suits relating to seats in churches; and 9. Suits for tithes.

The suit may sometimes, even of necessity, be in the name of a married woman alone, as either for words defaming her, or for a legacy bequeathed to her for her separate use.

The *process* in the ecclesiastical courts is by *citation*, which differs from process in the temporal or equity courts, inasmuch as, being for the enforcement of a moral or religious duty, it may be served on a Sunday.

Instead of the declaration at common law or bill in equity, the statement of the complaint is termed a *libel*.

The plea in this court may be called the *answer*, in which the defendant denies or extenuates; and if the suit be for slander, as calling a woman a whore, the defendant may justify that the words were true.

If the defendant deny the charge, the complainant proceeds to proof by *witnesses*, whose testimony is taken down in writing by an officer of the court. In an action for defamation and many other cases, the words must be proved by two witnesses, but they need not both swear to precisely the same words, or to words spoken at the same time.

As regards the *sentence* or judgment, an ecclesiastical court has no jurisdiction to award damages; and they cannot either fine or amerce. The punishment is only by enjoining the performance of penance and payment of costs, either generally or a named sum, or, as in a suit for restitution of conjugal rights, "performance" of the enjoined duty. The penance enjoined in a private suit may be commuted or dispensed with for money paid to the complainant.

The 53 Geo. III. c. 127 prohibits sentences of excommunication and writs of *excommunicato capiendo*, but gives a new process, called a writ *de contumace capiendo*, being an execution at law, which, provided the sentence and proceedings are regular, in case of continued disobedience, operates as a perpetual imprisonment; the confinement under that writ being considered in the nature of an imprisonment for contempt, and not for a debt; on which account, where the sum to be paid was under 20*l.*, and the party had been imprisoned upwards of a year, he was held not entitled to his discharge under the 48 Geo. III. c. 123 (the Small Debts Act). However, a person imprisoned under

this writ is entitled to the benefit of the rules of the Queen's Bench prison; and if imprisoned in a county prison, he might be removed into the Queen's Bench, and then obtain the benefit of the rules.

In a suit for brawling and smiting in a church or churchyard, there may be sentence of imprisonment, as for seven days, or not exceeding six months, with payment of costs.

In case of nonconformity to the sentence of the ecclesiastical court, as upon a decree against a wife of restitution of conjugal rights, if the defendant disobey, she may be imprisoned under the statute 53 Geo. III. c. 127, for the contempt, at the instance of the complainant; and such imprisonment is not, as has been supposed, terminable at the pleasure of the ecclesiastical judge by whom the party has been pronounced in contempt, unless on its being established that the party has obeyed the sentence; for without such obedience the court cannot relieve from the imprisonment.

IV. The COURTS exercising ecclesiastical jurisdiction are the following. None of them, it may be observed, are deemed courts of record; their jurisdiction and power are, however, supported and enforced by the aid of the courts of law, and by some modern statutes, viz. the 2 & 3 Wm. IV. c. 92, and 3 & 4 Wm. IV. c. 41.

1. The ARCHDEACON'S COURT, the most inferior of the ecclesiastical courts. It may be held, in the archdeacon's absence, before his official appointed by him; and its jurisdiction is sometimes in concurrence with, and sometimes in exclusion of, the Consistory Court of the bishop. From this court, by the 24 Hen. VIII. c. 12, an appeal lies to the consistory court.

2. The CONSISTORY OR DIOCESAN COURT is the court of every diocesan bishop, held in his cathedral, for the prosecution, hearing, and trial of all ecclesiastical causes arising within his diocese, and also for granting probates and letters of administration where there are assets only in that diocese. The bishop's chancellor, or his commissary, is the judge; and from his sentence an appeal lies, by virtue of the 24 Hen. VIII. c. 12, to the archbishop of the province, viz., to the Court of Arches.

The COURT OF PECULIARS, as the term imports, is an exempt jurisdiction over certain parishes dispersed through the province of Canterbury in the midst of other dioceses, and which are exempt from the ordinary or bishop's jurisdiction, and subject to be appealed from only to the metropolitan or archbishop's court. All ecclesiastical causes arising within these peculiar or exempt jurisdictions are originally cognizable by this Court of Peculiars. The Commissioners for inquiring into Courts of Justice, in their report, thus describe the Peculiars of the Court of Canterbury:—"The Peculiars of his Grace the Archbishop of Canterbury comprise a number of parishes, most of which are situated in London and the neighbouring counties. They are divided into districts, the principal of which are the deanery of the Arches in London, the deanery of Shoreham in Kent, and the deanery of Croydon in Surrey. The judge is properly Dean of the Arches, an appellation not unfrequently, though inaccurately, applied to the official principal of the Arches Court of Canterbury; as these two offices have been generally, though not necessarily, held by the same person."

4. The COURT OF ARCHES is chiefly a court of appeal from the courts of the several bishops or ordinaries within the province of Canterbury, and its *appellate* jurisdiction extends to all causes or suits relative to wills, intestacies, tithes, church rates, marriages, and other matters cognizable in these courts. But it has also an *original* jurisdiction in suits for *subtraction of legacy*, where the will has been proved in the Prerogative Court of Canterbury, and there is no trust to be performed by the executor beyond that of merely paying the legacy; and it should seem that this is a preferable court to resort to when the legacy is small. It also entertains original suits on *letters of request*, which dispense with the necessity for instituting a suit in the first instance in the inferior jurisdiction, as in a consistory court, and authorize it to be at once instituted in or transferred to a superior court. To obtain letters of request, the plaintiff may (without the consent of the defendant, or even apprising him) apply to the judge of the inferior or diocesan court in order that the cause may in the first instance be commenced in the Arches Court, and upon the letters of request being signed by the judge of the diocesan court, and accepted by the judge of the Arches, a decree issues under the seal of the latter court, calling upon the defendant to answer the charges therein preferred against him.

The course of proceedings in the Arches Court is usually as follows. The executor being cited to answer the legatee in a suit of subtraction of legacy, after appearance given, a short libel is brought in, pleading that A. B. made a will, that he thereof appointed C. D. executor, and is since dead, leaving *bona notabilia*, and without revoking or altering his will; that since his death C. D. has proved such will in the Prerogative Court of Canterbury; that by his will A. B. left a legacy to E. F. in the following terms (*reciting the clause of the will*), that this legacy remains unsatisfied, and that C. D. is possessed of and has admitted assets; has been applied to and refuses payment; and further pleads the identity of E. F. and the legatee, and that he is of age; and the libel concludes with a prayer that the executor may be compelled to pay the legacy, and be condemned in costs. The records of the Prerogative Court prove all the facts, except the assets, age, and identity of the legatee; and the executor is, upon the libel being admitted, assigned to give in his answer, which he must do on oath. Should he in his answer deny assets, or the legatee's identity or age, witnesses may be examined. Sometimes there may be some special circumstances stated in the libel, and the executor also may plead responsively. But in a great majority of cases, the legacy is paid either as soon as the citation is taken out, or as soon as the libel is admitted. Sometimes, as a preliminary proceeding, an inventory and account are called for in the Prerogative Court, and which it is advisable to apply for before the commencement of the proceeding, when it is at all apprehended that the executor will dispute his having received assets. Formerly, by the 25 Hen. VIII. c. 19, the appeal from this court was to the Court of Delegates, but is now to the Judicial Committee of the Privy Council.

5. The PREROGATIVE COURT.—The archbishop of Canterbury (and of York also) has his Prerogative Court, as well for proving wills and granting letters of administration, when the deceased has left *bona notabilia* in different dioceses, as for instituting, hearing, and determining

all causes, formal or summary, relating to wills, administrations, or legacies, before a judge appointed by the archbishop; called the judge of the Prerogative Court. This court properly hears all suits and proceedings relative to the grant of probates, or letters of administration, and to the assignment of administration bonds. The appeal from this court was formerly to the Court of Delegates, but is now to the Judicial Committee of the Privy Council.

The *mode of proceeding* to obtain probate of a will, or letters of administration to the effects of a person deceased, is to apply to a proctor of the ecclesiastical court; and if the party applying be an executor, or entitled to the administration of the intestate's effects, he is sworn before a surrogate of the judge to the full value of the deceased's personal estate, without deducting the debts due from him. The original will is deposited in the public registry of the ecclesiastical court, and probate of a collated engrossed copy is granted. The probate and administration are documents on parchment, in which are stated the name and late residence of the deceased, also the name of the executor or administrator, by what court, and the day on which it is granted.

For the purpose of allowing any person interested in the deceased's effects an opportunity of contesting the validity of the will, or the right of a party to administration, such person can, upon application to a proctor, procure a *caveat* to be entered in the public registry against a grant of probate or administration issuing unknown to the proctor entering it; which *caveat* may be entered on behalf of the interested party in a fictitious name. *Caveats* are generally entered on the behalf of legatees in a will, or of the next of kin in cases of intestacy.

In many cases parties beneficially interested in the due distribution of the assets may call upon the parties to whom the probate or administration is to issue, and prior to its passing the seal, to give into court a declaration in lieu of a detailed inventory of the deceased's effects. This declaration, without specifying the particular effects, gives a general account thereof, and of their real or presumed value, according to the belief of the parties on their oath.

In administration, a bond is entered into, in a penalty of double the value of the deceased person's effects, and generally with two sureties.

In the Prerogative Court summary applications are to be made for the delivering out of administration bonds, so as to enable the creditors or legatees or next of kin to proceed in an action at law in the name of the obligee (in the case of a prerogative administration, the archbishop of Canterbury) against the principal or sureties for a breach or breaches of the condition, the form of which is prescribed by the 22 & 23 Car. II. c. 10, § 2, viz. for five distinct acts:—1. For the administrator's making a perfect inventory of the deceased's effects; 2. His exhibiting the same into the registry of the court at or before a named day; 3. Well and truly to administer, according to law, the effects that shall come to hand according to law, meaning duly to satisfy creditors in due order; 4. To make a true and just account of such his administration before a named day; 5. To deliver and pay the residue (*i. e.* after satisfying creditors) as shall be decreed by the judge of the court. It follows that the obligors may be sued if the administrator be guilty of a breach of either of these stipulations.

The archbishop has what is termed a COURT OF FACULTIES, which, as it does not hold plea in any suit, ought not, perhaps, strictly to be here mentioned; but yet it may be proper to notice it, because it is in this court that the right to pews or monuments, and other rights of burial, so interesting to individuals and their relatives, are created. It has also various other powers under the 25 Hen. VIII. c. 21, in granting licences, dispensations, faculties, &c.

So the obtaining a faculty is the only legal mode of erecting an organ in a parish church, or to level a church-yard, &c. The same law applies to monuments and vaults.

CHAPTER XIII.

Of the Admiralty and Prize Courts.

I. THE ADMIRALTY COURT.

THE Court of Admiralty (also termed the Instance Court) is a mere municipal tribunal, perfectly distinct from the Prize Court, which is principally an international court, existing only during war or until the litigations incident to war have been brought to a conclusion, although frequently confounded, in consequence, perhaps, of the same judge usually presiding in both courts. It is a court principally for the determination of injuries to private rights arising at sea or intimately connected with maritime subjects, the principal of which are enumerated in a recent act, 2 & 3 Wm. IV. c. 51, § 6, which removes all doubts as to the jurisdiction of the vice-admiralty courts abroad, and enables them to hear and determine suits for seamen's wages, pilotage, bottomry, damage to a ship by collision, contempt in breach of the regulations and instructions relating to her majesty's service at sea, salvage, and droits of admiralty, when a ship or its master shall have come within the local limits of the court, notwithstanding the cause of action arose elsewhere. The vice-admiralty courts abroad, and this court as a court of appeal therefrom, have not, it should seem, any original jurisdiction in revenue cases, unless under express statute; but questions of that nature must be tried where the offence was committed or the seizure made.

This court has jurisdiction to try and determine most maritime causes or suits for private injuries, which, although had the same transaction entirely occurred on shore, would in their nature have been of common law cognizance, yet having been either committed on the high seas, or connected with maritime transactions, are therefore considered better to be examined and remedied in this peculiar court. The statutes 13 Ric. II. c. 5, 15 Ric. II. c. 3, and 2 Hen. VI. c. 11, however, direct that the admiral and his deputy shall not meddle with any thing but only things done upon the seas, and quarrels there arising; and therefore the Admiralty Court has properly no cognizance of any contract,

or any thing done within the body of any county either by land or by water (meaning rivers), nor strictly of any wreck of the sea, for that must be cast on land before it can become a wreck. Damages are recoverable for a wrongful suit in the admiralty when it is not properly cognizable there.

As to *flotsam*, *jetsam*, and *ligan*, the admiralty hath jurisdiction when they are in and upon the sea. If part of any contract or other cause of action have arisen upon the sea and part upon the land, then the common law excludes the Admiralty Court from its jurisdiction; and therefore, though pure maritime acquisitions, which are earned and become due on the high seas, as seamen's wages, are proper objects of the admiralty jurisdiction, even though the ordinary contract for them be made upon land, yet in general, if there be a contract made on shore or in a river in England, to be executed upon the seas; or if a contract be made upon the sea to be performed in England, as a bond on ship-board to pay money in London, these kind of mixed contracts belong only to the courts of common law. But to these rules there are exceptions; and therefore we will consider more particularly the subjects of jurisdiction, which may be arranged under three general divisions; as, 1. In cases of tort; 2. In cases of contract; and 3. The general practice or course of proceedings in the admiralty court, which may be considered as constituting part of its jurisdiction, and rendering it very frequently expedient to resort to this court in preference to any other.

So far from the judges of the Court of Admiralty now attempting to extend their jurisdiction, a contrary disposition prevails; and the court reluctantly interferes when the right or title (as to a ship) is the direct question to be determined, or when a more comprehensive suit connected with the cause is pending in the Court of Chancery, though it will then decide upon a mate's claim to wages against a person acting as owner or employing him.

From the sentence of the admiralty judge the appeal is to the Judicial Committee of the Privy Council under the recent statute.

I. The jurisdiction of the Court of Admiralty in cases of torts is confined to torts committed at sea, or at least committed on the water and within the jurisdiction of the Court of Admiralty, principally for—

1. *Sea Batteries*.—This suit may be instituted in the admiralty, not only by a sailor or officer or other person employed on board a ship during a voyage, against the captain or master or other person on board the same ship, or against a person on board another ship, for an assault and battery, but even by a passenger against the master, when the injury was committed during a voyage or on the high seas.

2. *Suits from Collision of Ships*.—A suit may also be instituted with advantage in this court for damage occasioned by one ship running foul of another, although it is more usual to proceed by action in the temporal courts. Sir Wm. Scott thus distinctly stated the legal classification of collisions of this nature:—"There are four possibilities under which an accident of this sort may occur. In the first place it may happen without blame being imputable to either party, as where the loss is occasioned by any other *vis major*; in that case the misfortune must be borne by the party on whom it happens to fall, the other not

being responsible to him in any degree. 2dly, A misfortune of this kind may arise when both parties are to blame, as where there has been a want of due diligence or of skill on both sides; in such a case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. 3dly, It may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burthen. Lastly, It may have been the fault of the ship which ran the other down, and in this case the injured party would be entitled to an entire compensation from the other." It is further a general rule, that the law imposes upon the vessel having the wind free the obligation of taking proper measures to get out of the way of a vessel that is close-hauled, and of showing that it has done so, and if not, the owners of it are responsible for the loss which ensues. In a case of collision against a steam vessel, the court, assisted by Trinity Masters, pronounced for damages and costs, holding that a steam vessel, not receiving her impetus from sails but from steam, is or ought to be more under command, and manifestly having seen the other vessel, was to blame. It would seem that steam boats should generally go to the starboard; whilst the general rule of navigation is, that when other ships are crossing each other in opposite directions, and there is the least doubt of their going clear, the ship on the starboard tack is to persevere in her course, while that on the larboard tack is to bear up or keep more away from the wind.

When it is doubtful which vessel was to blame, or whether such a degree of blame may not be imputable to each as to render it difficult to decide who, if either, ought to make compensation, then it seems preferable to proceed in the Court of Admiralty, because this court has a peculiar jurisdiction to decree that the owners of each vessel shall make good a moiety of the entire damage.

When the ship that occasioned the damage is foreign, or the owner or person to be sued resides abroad or is insolvent, so that a verdict at law for damages could not be enforced, it is certainly preferable to proceed in this court; because here, by the usual course of proceeding, the suit is begun by arrest of the ship, tackle, &c., which will not be removed except upon the terms of adequate bail. And the statute 1 & 2 Geo. IV. c. 75, allowing a summary proceeding and arrest of a ship in case of collision, extends as well to foreign as to British ships; and so the Pilot Act, 6 Geo. IV. c. 125, § 52, protects the owner and master of a foreign ship from liability, when he has duly conformed to the act by taking a regular pilot on board. But if a collision takes place in a river, or within the body of any county, then no suit in the Admiralty court would be sustainable, but that court on protest would decline to interfere, or a prohibition from the Queen's Bench might be issued. In suits for collision the crew of the ship charged with the damage are admitted as witnesses from necessity.

¹ For the course to be observed by steam-vessels in passing each other, see 9 & 10 Vic. c. 100; which act contains regulations as to the construction of sea-going steam-vessels, and for the preventing the occurrence of accidents (so far as may be possible) in steam navigation, and for requiring sea-going vessels to carry boats. It also requires, that whenever any steam-vessel shall have sustained or caused any serious accident, or received any material damage affecting her sea-worthiness, the master or other person in charge of her shall as soon as possible transmit a report thereof to the Board of Trade, under a penalty of 50*l.*, in order that, if such board think fit, they may appoint inspectors to inquire into it.

3. *Suit for Possession of a Ship*.—To a limited extent this court has jurisdiction, upon a suit instituted therein, to put a claimant into possession of a ship, independently of cases between part-owners. If a question of title occurs incidentally in a cause of possession, it then becomes necessary for the court to inquire into the title, at least so far as to satisfy itself that it may safely decree possession to the party seeking it. The mere averment by one of the parties that there is a conflicting claim of title, which may be perhaps a mere cobweb title does not arrest the progress of the cause; but the court may so far inquire into the pretended title, as to ascertain whether it be *bonâ fide* founded on probabilities, or merely colourable; and if the latter, the court will decree possession to the other party.

4. The Court of Admiralty has authority to entertain a civil suit or intervening claim for the *restitution of goods* (technically called for the *point of restitution*) taken piratically on the high seas, or otherwise than under colour of capture; though its criminal jurisdiction was in a great part removed by 28 Hen. VIII. c. 15. If goods are taken piratically at sea, though sold afterwards at land, the Court of Admiralty here has cognizance thereof, and may award restitution to the original owner, as well against the original spoliator as against the purchaser; and, even without a previous conviction of the piracy, the original owner may proceed in a suit for restitution.

II. The jurisdiction of the Court of Admiralty in cases of *CONTRACTS*, express or implied, when they are of a maritime nature, is also extensive; as, 1st, Between part owners of a ship; 2dly, Suits for mariners' and officers' wages; 3dly, Suits for pilotage; 4thly, Suits on bottomry and respondentia bonds; and 5thly, Suits for salvage and relating to wreck.

1. *Suits between Part-Owners*.—The jurisdiction of the Court of Admiralty between part-owners of British ships is in some respects concurrent with that of the Court of Chancery. When the extent of the shares of the several co-owners is not in dispute, the court is open to an application by one or more to restrain the others from sending the ship on a voyage without the consent of the applicant, until they give security to the value of the interest of the applicant opposing such voyage. The applicant, in such case, will not be liable to any part of the expences of the outfit, nor on the other hand will he be entitled to any earnings of the ship during the voyage.

The course of proceeding is to obtain a warrant to *arrest the ship*, whereupon, unless the required security be given, she will remain secured in port. If no security is given, a bill in equity to compel an arrangement between the owners must be filed. If the minority happen to have possession of a ship and refuse to employ it, then the majority may by a similar warrant obtain possession of it, and send it to sea upon giving such security. If the amount of the respective shares be in dispute, the Court of Admiralty will not interfere, and the proper course is to file a bill in chancery praying an injunction. The application, either to the Court of Admiralty for security, or to the Court of Chancery for an injunction, should be made promptly.

2. *Suits for Wages*.—Although mariners' wages are recoverable by action at law, and by other more summary means, yet the Court of

Admiralty is in many cases the preferable tribunal, particularly when there are several seamen unpaid, or where the owners are insolvent. For all the seamen and officers (except the captain or master) of a British vessel may, either singly or jointly, sue in this court, and arrest the ship by its process as a security for their demand, or the proceeds remaining in the registry. But in all cases of wages of seamen not exceeding 20*l.* a summary mode of recovering the same is afforded by the 5 & 6 Wm. IV. c. 19, before any justice of the peace near to the place where the ship ended her voyage, cleared at the custom house, or discharged her cargo, or where the master or owner resides. Such justice is empowered to examine the parties and their witnesses upon oath, and to make such order for payment of the wages as shall appear reasonable and just; and if not paid within two days after the order made, may issue his warrant for levying the same upon the goods and chattels of the party; and in case of no sufficient distress, upon the ship itself; and if the ship be not within his jurisdiction, may then commit the party to gaol, there to remain without bail till the amount of wages and all expences are paid. The decision of such justice is final and conclusive, as well upon every such seaman as upon the owner and master of the ship. And if any suit for the recovery of a seaman's wages be instituted against the ship, or the master or owner, either in the court of admiralty or in any vice-admiralty court, or in any court of record, and it shall appear that the plaintiff might have had an effectual remedy by complaint to a justice of the peace, as before provided, the judge is required to certify to that effect, and no costs of suit shall be awarded to the plaintiff.

3. *Suits for Pilotage*.—The Court of Admiralty has in some cases jurisdiction over questions of *pilotage*. The 6 Geo. IV. c. 125 expressly provides, that the provisions of that act shall not affect or impair the jurisdiction of the High Court of Admiralty; but it has been determined that a charge for pilotage under the old statute, where the service was performed in a river within the body of a county, could not be recovered by a suit in the Court of Admiralty.

4. *Suits on Bottomry Bonds*.—This court has a peculiar jurisdiction (exclusively as regards the proceeding against the ship itself) in case of *bottomry bonds* and other deeds of hypothecation. To entitle the lender abroad to proceed against the ship itself, there must be a written instrument of hypothecation. Bills of exchange drawn by the master as a security for the money advanced to him, though accompanied with a verbal engagement from him that the ship shall be liable, will not suffice.

Upon the arrival of the ship in this country, if the loan and premium be not paid within the time prescribed, the agent of the lender applies to the Court of Admiralty with the bond or other contract and a proper affidavit of the facts, and obtains a warrant to arrest the ship and cite all persons interested to appear before the court; and such citation is generally made by posting a copy of the warrant upon some part of the ship. If there be several claimants of the same nature, though the law the first mortgagee of land is preferred and must be first satisfied, in this court the last obligee is to be paid first, provided the advance was absolutely essential. But unless the last loan was essential for the

preservation of the vessel, a former security will be preferred. Claims for mariners' wages are always preferred to bottomry bonds. The Court of Admiralty has jurisdiction to reduce a stipulated premium; but it cannot be impeached under the usury laws.

The Court of Admiralty has also extensive jurisdiction, as well original as appellate, from the decisions of justices or arbitrators in questions of *salvage*.

Although, strictly speaking, the Court of Admiralty has no jurisdiction over questions of *wreck*, yet incidentally in suits for salvage the court has jurisdiction. The proctor of the admiralty interposes for its protection until a claim is given; but as soon as a lawful owner appears, the proctor withdraws his claim, and the right of the crown to the property is then gone, the ship and goods are restored, but the charges of the admiralty are still to be paid.

III. COURSE OF PROCEEDINGS.—It has been said that the proceedings of the Admiralty Court are according to the method of the civil law, like those of the ecclesiastical courts, and that upon that account it is usually held at the same place, namely, at Doctors' Commons. But although some parts of the practice of the civil law may have been adopted, yet there is much more wholly independent of the civil law course of proceeding, and, in particular, the judge of the Admiralty Court may, as well in civil as in criminal cases, have the assistance of a jury.

In some cases, as in the instance of collision of ships, whether British or foreign, the 1 & 2 Geo. IV. c. 75, § 22, allows a summary application to any judge of either of the courts of record at Westminster, or to the judge of the Court of Admiralty, and upon either being satisfied that damage has arisen by the misconduct or negligence of the master or mariners of a foreign ship, such judge may cause the foreign ship to be arrested and detained until the master or owner or consignee shall undertake to appear to the suit, and find sufficient bail for all costs and damages.

There is a convenient summary form of proceeding in matters of slight interest, called an "act on petition," in which the parties state their respective cases briefly, and support their statements by affidavit. This form is adopted in proceedings to enforce payment of a bottomry bond; but it is not adopted in important cases.

The Admiralty or Instance Court is so distinct in jurisdiction from the Prize Court, that if an affidavit in a civil suit be sworn before a prize commissioner, it is irregular.

The first process in this court is frequently by arrest of the defendant's person, as in the instance of a sea battery, upon which the defendant must find bail, or fidejussors in the nature of bail; and in case of default, the bail and principal may be imprisoned. The court may also fine and imprison for a contempt in the face of the court; and yet this is not a court of record.

In the admiralty it is an ancient established formula to commence a suit by arrest of the ship, tackle, apparel, and furniture, leading to a full remedy, affecting all the property of every kind belonging to the owner. In order to obtain restitution, there must be bail for the value of the ship and intermediate earnings, and to return the vessel into the

¹ See the 9 & 10 Vic. c. 99, which consolidates and amends the laws relating to wreck and salvage.

hands of the owners if the court shall ultimately adjudge the possession to them.

Sometimes a *monition* is the first proceeding, as the monition requiring an agent to bring in his account of the sale of a ship and cargo, and the balance of the proceeds undistributed, as in case of prize. If a satisfactory return be not made to the monition, then the judge may decree him to be attached, but may afford time for submission, by ordering that the attachment shall not be enforced until a certain time; after which, if the agent still remain in contempt, he may be imprisoned.

With respect to *contempts*, the usual practice is not to arrest the guilty party in the first instance, although there is no doubt of the power; but, in cases of wearing false colours, the first step is usually to grant a warrant to attach the person, founded on an affidavit of the fact.

There is an express rule of the Court of Admiralty of the 5th August, 1806, that in every case where bail is required to be given in any cause depending in this court, a notice in writing of the person proposed to become bound shall be delivered at the office of the adverse proctor, and that no bail bond or recognizance shall be taken unless the adverse proctor, or some other proctor for him, be there present, or an affidavit be exhibited to prove that he has had such notice for the space of twenty-four hours, and been required to attend at the time of giving such bail, for the purpose of objecting or consenting thereto.

It should seem that the Court of Admiralty, as well as the Prize Court, has jurisdiction to rehear and revise its own decrees, but they very reluctantly permit such a proceeding.

The practice of the Court of Admiralty has been considerably improved, and its jurisdiction extended, by 3 & 4 Vic. c. 65.

II. THE PRIZE COURT.

Sometimes the Prize Court has been described as if it were merely a branch of the Court of Admiralty; but although the same judge usually presides in each, his authority to hear and decide prize causes entirely depends upon a special and separate commission under the great seal, issued at the commencement of each war; and the whole system of proceeding in the Prize Court, though exceedingly important, is peculiar to itself, and governed by rules not applying to the Instance Court of the Admiralty, which is a mere civil tribunal.

Where the property is under 100*l.* in value, the Prize Court will determine upon the right on a summary proceeding. •No prohibition to the Prize Court of Admiralty will be granted for proceeding to adjudication on a ship taken as a prize, either during war or after the cessation of hostilities, for the court has jurisdiction to complete what has been regularly commenced.

In this Court of Prize are directly decided not only all questions relative to captures, but prize and sometimes booty (or prize on shore), and most other questions upon the law of nations; though sometimes the latter, and even the construction of treaties, are collaterally argued and determined in other courts. The jurisdiction of the Prize Court is not, like that of the Instance Court, confined to transactions on the sea, but extends as well to hostile seizures on shore.

CHAPTER XIV.

Of Courts of Error and Appeal.

HAVING thus considered the jurisdiction and general practice of the principal courts which have original jurisdiction, and some of which have also jurisdiction as courts of appeal and error from inferior courts, we now proceed to the consideration of those courts which have little if any original jurisdiction, but act and decide only as courts of error or appeal from the judgments or proceedings of other courts. Of this nature are, 1. The Court of Exchequer Chamber; 2. The Court of the Judicial Committee of the Privy Council; and 3. The Judicial Court of the House of Lords. The first is merely a court of error from the final judgments of the superior courts of law, as the Queen's Bench, Common Pleas, and Exchequer, in actions commenced in one of those courts. The second has no appellate jurisdiction either from the superior courts of law or equity, but principally from the ecclesiastical courts of England, the Admiralty Court, and the innumerable courts in her majesty's islands and dominions abroad; whilst the third has appellate jurisdiction, not only from the decisions of the Exchequer Chamber upon the judgment of the courts of Queen's Bench, Common Pleas, and Exchequer, but also upon the judgments of the Queen's Bench in error from inferior courts, and also on appeals from decrees in the courts of equity, and upon appeals and writs of error from Scotland and Ireland.

I. THE COURT OF EXCHEQUER CHAMBER.

Formerly a writ of error upon a judgment of the Court of Common Pleas was always returnable in the King's Bench, and, whether the judgment of the Common Pleas was reversed or affirmed, a further writ of error from such judgment of the King's Bench was afterwards returnable in the House of Lords, without being previously examined in the Exchequer Chamber. From a judgment in the King's Bench, when the action had been commenced by bill or latitat, the writ of error was returnable in the Exchequer Chamber, except in replevin and a few other actions; but if it had been commenced by original, then it was returnable in Parliament, without any intervening examination in the Exchequer Chamber. And from the judgment of the Exchequer of Pleas, the writ of error was returnable in the Exchequer Chamber before the lord chancellor, lord treasurer, and the judges of the courts of King's Bench and Common Pleas. But now, by the 1 Wm. IV. c. 70, § 8, it is enacted, That writs of error upon any judgment given by any of the said courts (the Queen's Bench, Common Pleas, and Exchequer of Pleas) shall hereafter be made returnable only before the judges (or judges and barons, as the case may be) of the other two courts, in the Exchequer Chamber; and that a transcript of the record

only shall be annexed to the return of the writ ; and the Court of Error, after errors are duly assigned and issue in error joined, shall, at such time as the judges shall appoint, either in term or vacation, review the proceedings and give judgment as they shall be advised thereon ; and such proceedings and judgment, as altered or affirmed, shall be entered on the original record ; and such further proceedings as may be necessary thereon shall be awarded by the court in which the original record remains ; from which judgment in error no writ of error shall lie or be had, except the same be made returnable in the High Court of Parliament.

This Court of Exchequer Chamber is not to re-investigate the merits upon any matter of fact ; for, it will be observed, the judges of this court are merely to review the proceedings, and give judgment as they shall be advised thereon. A writ of error is therefore only sustainable in the Exchequer Chamber in respect of some substantial apparent objection, not aided either at common law or by any statute of jeofails, and which can be discovered upon reading the transcript or copy of the proceedings of the court below, and not on account of any extrinsic fact or objection, such as the infancy of the defendant where he had appeared and been defended by an attorney, and the objection was not raised until after judgment, or coverture, or death of a defendant before verdict. In these cases, therefore, a writ of error *coram nobis* or *vo bis* is, notwithstanding this statute, still returnable in the same court in which the judgment was given, or in the Queen's Bench as heretofore. Nor does a writ of error lie from a judgment of the Court of Queen's Bench reversing or affirming a judgment of an inferior court, but in that case it lies direct from the Queen's Bench to the House of Lords.

In ordinary cases, when the pleadings are common and simple, it can scarcely ever occur that a writ of error in the Exchequer Chamber can be sustainable ; but when the declaration or plea is special, substantial defects not unfrequently arise, and the judgment may then, on writ of error in the Exchequer Chamber, be reversed.

There may, however, be a writ of error founded on matters of fact when disclosed by a bill of exceptions signed by the judge who tried the cause, and which by annexation becomes part of the entire record, or by a demurrer to evidence, or by a special verdict ; and on a bill of exceptions the Court of Error may look to the whole evidence on both sides, to see whether the verdict was sustained by the evidence, and whether upon the whole record with its annexation the party was entitled to judgment. But it has been recently held in the House of Lords, that in arguing a writ of error the counsel can rely only upon objections especially suggested to the judge, and raised by the bill of exceptions ; and the same reasoning applies to writs of error returnable in the Exchequer Chamber.

One general rule prevails in all courts of error, viz., not to inquire into the propriety of the rules and practice of a court below, for regulating either its general practice or the proceedings in a particular cause, as for amending a declaration, striking out pleas, or granting a new trial. Tindal, C. J., observed, " The practice of the courts below is a matter which belongs by law to the exclusive discretion of the court

itself, it being presumed that such practice will be controlled by a sound legal discretion. It is therefore left to their own government alone, without any appeal to or revision by a superior court."

II. THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The Court of Delegates and Commissioners of Review having been abolished, the 3 & 4 Wm. IV. c. 41 constitutes "The Judicial Committee of the Privy Council" the court of appeal not only from the Ecclesiastical Courts, but also from the Admiralty Court and Prize Court, and most of the courts in the foreign dominions of her majesty. The constitution of this court having been already considered when treating of the Privy Council (see p. 36), little remains to be said in this place respecting it.

It would be difficult to enumerate all the courts whose decisions, previous to the passing of this act, might have been brought before the privy council, and which, under this act, may now be referred to the Judicial Committee. The general rule with regard to appeals from the colonies appears to be, that whenever no limitation has been imposed, either by orders in council, the charters of their courts, or acts of parliament, that appeals are to be received upon petition to the council from all courts in the queen's dominions abroad, on the ground that it is the right of the subject, without express power, to appeal to the sovereign to redress all wrong done to them in any court of judicature.

With respect to the nature of the proceeding to be appealed against, it will be observed that the terms of the third section are comprehensive, and include not only final sentences, but all determinations, rules, and orders, which may be interlocutory or in the course of a suit. From a proceeding in England a writ of error in general only lies upon a judgment final or interlocutory, as a judgment by default; but this section is obviously more comprehensive, and whenever, independently of this statute, the particular constitution of a foreign court, or the law applicable to it, or the practice, has permitted an appeal from an interlocutory rule, order, or other proceeding, this statute clearly authorizes the continuance, and renders an appeal to the Judicial Committee in a similar case sustainable.

The course of proceedings in the Judicial Committee of the Privy Council varies according to the country and court from which the appeal has taken place. From the East Indies, from which of late the appeals brought to a hearing have been numerous, a perfect transcript of the proceedings in the local provincial courts and foreign courts of appeal, with the whole of the evidence, and the interlocutory and final decrees of the foreign court, is produced before the Judicial Committee. And, to facilitate a more ready attainment of the knowledge of the merits, cases are usually prepared, as well on behalf of the appellant as of the respondent, shortly analyzing the pleadings and proceedings, stating arguments and reasons on each, and drawing conclusions in favour of the party on whose behalf the statement is made. Both these cases are printed at length, and copies laid before the members of the judicial committee. On the appointed day counsel are heard on behalf of the appellant and respondent; and when the Judicial Committee, or the

majority, have formed their opinion, the same is reported by the presiding law lord in open court to the queen in council, who thereupon ultimately decides.

It seems that the decision of the Judicial Committee, or rather of the queen in council upon the report and recommendation of such committee, is final and conclusive, and no appeal lies to the House of Lords.

III. THE HOUSE OF LORDS.

The House of Lords has not, strictly speaking, any original jurisdiction over civil disputes or causes, and therefore no original suit can be commenced before this tribunal. But the appellate jurisdiction of the House, as well from the decision of superior courts of law (exercised by writ of error) as from the decrees and decisions of superior courts or equity (exercised by petition and appeal), is very extensive, though confined to decisions within England, Wales, Scotland, and Ireland. This court is composed of the lord chancellor and at least two other lords.

Notwithstanding the 1 Wm. IV. c. 70, there are still cases in which a writ of error lies directly from the Queen's Bench into the House of Lords, without the intervention of a judgment in the Exchequer Chamber. Thus, where there has been a judgment in the Queen's Bench upon a writ of error from an inferior court of record, a writ of error is still returnable directly into the House of Lords, because the 1 Wm. IV. c. 70 only applies to judgments of the courts of Queen's Bench, Common Pleas, and Exchequer, in actions originally commenced in one of those courts. So, if a writ of false judgment from the decision of an inferior court not of record be returnable in the Common Pleas, and by the decision there becomes matter of record, and then a writ of error upon the latter judgment be returnable, as it clearly may, in the Queen's Bench, then after judgment there must be a writ of error upon such latter judgment returnable in the House of Lords, without the intervening tribunal of the Exchequer Chamber. So, if a judgment of the Cinque Ports be affirmed or reversed in the Queen's Bench, a writ of error thereupon lies in the House of Lords. And upon a judgment of Queen's Bench on a writ of error from the Petty Bag, it has been supposed that a writ of error lies directly after judgment in the Queen's Bench to the Lords. At all events it seems that the legal propriety of the decision of the most inferior courts of law in England, whether of record or not, may ultimately be investigated as matter of right in this highest tribunal; subject nevertheless, as we shall presently see, to the necessity of finding bail, and some other qualifications introduced by express enactments. But in general the 1 Wm. IV. c. 70, § 8, will apply to all judgments of the Queen's Bench, Common Pleas, or Exchequer of Pleas, in actions commenced in those courts, and require the writ of error to be directed first to the Exchequer Chamber, and from thence to the Lords.

With respect to writs of error in fact, as upon the ground of the infancy or coverture of the defendant, or of death before verdict, it has been the general opinion that they are in no case sustainable either in the Exchequer Chamber or in the House of Lords. But it seems questionable whether exceptions do not exist, so that an objection might be advanced upon a writ of error returnable in the House of Lords, and

tried by transmitting the proceedings as regards the fact to the last preceding court that had jurisdiction to convene and try a fact by jury.

So there are some courts of law in England, from which no writ of error lies, because another remedy has been afforded, as from the Court of the Stannaries of the Duchy of Cornwall, for matters touching the Stannaries, there being an appeal to the warden of the Stannaries, and from him to the privy council of the Prince of Wales as Duke of Cornwall, and if there be no Prince of Wales, then to the judicial committee of the privy council.

No appeal lies to the House of Lords from an order of the Chancellor in matters of idiotcy or lunacy; but in these cases the proper course is to appeal to the queen in council; or, after the death of a lunatic, a bill in chancery must be filed. And it should seem, that from the decision of the vice-chancellor of Lancaster the appeal is to the chancellor of the Duchy Court at Westminster.

So before the recent Bankruptcy Act, 1 & 2 Wm. IV. c. 56, § 37, there was no appeal to the Lords from an order of the chancellor in matters of bankruptcy; but now an appeal to the Lords in certain cases is given.

No appeal to the Lords is sustainable from the decision of an ecclesiastical or maritime or prize court in England, nor from any court martial, nor from the decision of any foreign court, even of the British islands of Man, Jersey, Guernsey, Sark, or Alderney, or from the colonies. All appeals from those islands and colonies must be to the privy council, and from a court martial to the queen in person. It should seem also that the proceeding appealed from to the Lords must have been a final decree or decision, or of that nature, and not merely an order or interlocutory proceeding. And where a decree has been made with consent of counsel, it has been considered that, like a reference and award with such consent, it will be binding, and cannot be appealed against; and it has been doubted whether an appeal is sustainable merely in respect of an improper decree relating to costs.

It seems to be settled, that from the judgment or decision of no court out of the United Kingdom can a writ of error or petition of appeal in parliament be returnable, but that, if there be any remedy, it is in the privy council.

The mode of obtaining the interposition of this supreme court is by *writ of error* from a court of common law, and by *petition in the nature of an appeal* from a court of equity. The principal difference between the two proceedings is, that a writ of error can only be brought upon a final and definitive judgment, whereas an appeal may be brought from an interlocutory order as well as from a final decree or sentence.

On writs of error the Lords uniformly pronounce the judgment; and the same practice now prevails as regards appeals; though formerly, it is said, they gave directions to the court below to rectify, and in what respect, its own decisions.

A *writ of error* is a writ in the nature of a commission, which issues out of chancery, at the instance of a party who thinks himself aggrieved by an erroneous judgment of a court of law and of record, authorizing a superior court to examine the proceedings, and thereupon to affirm or reverse the judgment according to law. The 10 & 11 Wm. III. c. 4,

requires the writ to be issued within twenty years after judgment signed or entered of record.

The 6 Geo. IV. c. 6, in almost all cases of writs of error upon judgments, whether after verdict or by default or otherwise, in any personal action, requires bail to enter into a recognizance, in substance resembling that required by the 3 Jac. I. c. 8, viz., in double the sum adjudged to be recovered, conditioned to prosecute the writ of error with effect, and to satisfy and pay, if the judgment be affirmed, the debt, damages, and costs thereby adjudged to be paid, and also all costs and damages to be awarded for the delay of execution.

The Lords do not confine themselves to any certain rule respecting costs, but give large or small or no costs to the defendant in error, as they think fit, upon affirming a judgment in his favour. They usually give 100*l.* and seldom more than 150*l.*, although on one occasion they gave 400*l.* costs upon an affirmation, and in another case 350*l.* costs, because there was a current of decisions on the point. In all cases, as there is no officer of the house to tax the costs, their lordships themselves fix the amount, giving a round sum.

An *appeal* can only be from a decision, although it may be founded not only upon a decree, but upon an order absolute; in which respect appeals in equity differ, as we have seen, from proceedings at law, where there must have been a final judgment. If from a decree, then the decree itself must in all cases have been signed by the chancellor; and although a cause has been heard before the master of the rolls or vice-chancellor, or judges sitting for the chancellor, yet the decree is considered as the chancellor's, and must be signed by him. From decrees of the master of the rolls or vice-chancellor there may be an appeal either direct to the House of Lords or to the chancellor, but it is not usual to appeal to the Lords in the first instance, unless the decree has been signed and enrolled, in which case the appeal may be directly to the lords, and cannot then, it is said, be reheard before the chancellor. Of late the chancellor has frequently recommended an appeal direct from the decree of the master of the rolls or vice-chancellor to the lords; and it seems that such direct appeal lies notwithstanding there has been a rehearing by the master of the rolls.

Petitions of appeal are limited in time, and must be presented within five years; and a recognizance in 400*l.* is required for securing costs.

On appeals from the decrees or decisions of courts of equity no new evidence is to be read or insisted upon. And in Scotch appeals it is a rule of the House not to hear even arguments upon grounds not noticed in the courts below; which practice is analogous to that of not hearing points arising upon the face of a bill of exceptions unless they were formally raised and tendered to the judge on the trial. But if the evidence has been rejected in the court below, and such rejection there expressly objected to, then the case may be discussed in the Lords.

As to costs on appeals, the House of Lords exercise a discretionary jurisdiction, like a court of equity, so as not to be governed merely by the result; and frequently much less than the actual costs are obtained, so as not too much to encourage appeals.

BOOK IV.

OF CRIMES AND THEIR PUNISHMENTS.

CHAPTER I

Of Crimes in general.—Who are capable of committing them.— Principals and Accessories.

A CRIME OR MISDEMEANOR is the commission or omission of an act in violation of a public law forbidding or commanding it. In this sense *crimes* and *misdemeanors* may be considered synonymous terms. But, in legal language, the word *misdemeanor* is confined to indictable offences not amounting to felony.

A *felony* is such a crime as, independently of other punishment, occasioned at common law a total forfeiture of lands or goods, or of both; and as such forfeiture most frequently occurred where the crime was punishable with death, a felony generally carries with it the idea of a *capital* crime.

Felonies are punishable with death, 1st, Where the offence was excluded from "benefit of clergy" before or on the 14th November, 1826; and 2dly, Where since that day they have been made punishable with death; provided that in neither case the capital punishment has been taken away by a subsequent statute.¹

In other cases, they are punishable either in the particular manner described by the statute particularly relating to such felony; or, if no punishment is so provided, at the discretion of the court, by transportation for seven years, or by imprisonment not exceeding two years, and, if a male, whipping (if the court think fit) in addition to the imprisonment, and with or without hard labour and solitary confinement for the whole or any portion of the imprisonment.²

A *misdemeanor* is generally punishable with fine and imprisonment.

Misprisions and *contempts* are a high species of misdemeanor, being such as affect the queen, or her government, or courts of justice. But misprision, in its more ordinary sense, is that particular kind of misdemeanor which consists in the knowledge or concealment of a felony committed, or to be committed, by another person, without assent; for if with express assent, the party becomes either a principal or an accessory.

The punishment of misprision of felony is, in a common person, fine and imprisonment; in an officer, such as a sheriff or bailiff of liberties, imprisonment for a year, and ransom at the queen's pleasure.

¹ 7 & 8 Geo. IV. c. 28, § 7.

² Id. §§ 8, 9. With regard to *solitary confinement*, the period during which offenders may be subjected to it has been since limited by the 7 Wm. IV. & 1 Vict. c. 90. See *post*, PUNISHMENTS, 1203.

All persons are capable of committing crimes, with some few exceptions, as—

Infants.—Under seven, an infant cannot be guilty of felony. Under fourteen, he is *primâ facie* incapable of guilt, but subject to the maxim, *malitia supplet ætatem*. At fourteen, he is liable for felony without the benefit of any presumption from his age, and for any notorious breach of the peace, as riot, battery, or the like; and he is liable to outlawry. So he is liable for perjury or cheating.

Insane Persons.—An idiot or insane person cannot be guilty of a crime, if it be proved that he was incapable of distinguishing right from wrong. But whether *compos* or not is a question for the jury.

By 39 & 40 Geo. III. c. 94, § 1, if, upon any trial for treason, murder, or felony, insanity at the time of committing the offence be given in evidence, and the jury acquit, they must be required to find specially whether insane at the time of the commission of the offence, and whether he was acquitted on that account; and if they find in the affirmative, the court must order him to be kept in custody till her majesty's pleasure be known.

And, by section 2, if a person indicted for any offence appear insane, the court may, on his arraignment, order a jury to be impanelled to try the sanity; and if they find him insane, may order the finding to be recorded, and the insane person kept in like manner. And if a person charged with any offence be brought up to be discharged for want of prosecution, and appear to be insane, the court may order a jury to be impanelled to try the sanity, and if they find him insane, may order him to be kept confined in like manner.

And, by section 3, if any person shall be discovered and apprehended under circumstances that denote a derangement of mind, and a purpose of committing some crime for which, if committed, he would be liable to be indicted, and any justice before whom such person may be brought shall think fit to issue a warrant for committing such person as a dangerous person suspected to be insane (such cause of commitment being plainly expressed in the warrant), the person so committed shall not be bailed, except by two justices, one whereof shall be the justice who issued such warrant, or by the quarter sessions, or by one of the judges, or the lord chancellor, lord keeper, or commissioners of the great seal.

Drunken Persons.—Persons *voluntarily* drunk are liable for the consequences of all crimes committed by them. But insanity, though caused by habitual drunkenness, will excuse.

Femes Covert.—In general a wife is not liable for felony committed in the presence of her husband. But it is otherwise if in his absence; or where she was acting voluntarily, and was principally instrumental; or in treason; or in murder or manslaughter; or in any misdemeanor, if found guilty *with* her husband.

Persons *acting under threats* inducing fear of death or other bodily harm, are in general excused from crimes so committed; but not in case of murder.

Neither extreme *want*, nor *ignorance* of the law, is any excuse.

A **PRINCIPAL** is either the actual perpetrator of the crime, or a person present aiding and abetting; but in some cases a man may be a principal without being present, as where poison was laid by a person not present when it is taken.

A principal *in the first degree* is the actual perpetrator. A principal *in the second degree* is a person present or sufficiently near to be aiding and abetting; though it must involve some participation. Mere presence without opposition would not suffice, if no act whatever were done in concert, and no confidence intentionally imparted by such presence to the perpetrators.

In case of duelling, the seconds are, in strictness, principals in the second degree.

Principals in the second degree may be arraigned and tried with, before, or after the principal in the first degree; and may be convicted, though the principal in the first degree is acquitted.

So they may be indicted in general as principals in the first degree, provided the offence permit of participation; or they may be indicted specially as aiders and abettors. Where the punishment is different, however, they must be indicted as aiders and abettors.

In general, the punishment of principals in the first and second degrees is the same; and it is expressly so provided as to larceny and certain other offences connected therewith by 7 & 8 Geo. IV. c. 29; as to malicious injuries to property, by 7 & 8 Geo. IV. c. 30; as to offences relating to the coin, by 2 Wm. IV. c. 34; as to forgery, by 1 Wm. IV. c. 66, and 2 & 3 Wm. IV. c. 123; and as to offences against the person, by 9 Geo. IV. c. 31. Similar provisions are contained in the 7 Wm. IV. & 1 Vict. cc. 84 to 91.

But upon the wording of particular statutes it has been held, that none but principals in the first degree are punishable with death upon such statutes, and that principals in the second degree are not so punishable; as where the statute imposes the punishment of death upon the persons committing an offence, and not on the offence itself by name.

In cases, however, where, upon construction of the statute, principals in the second degree are not punishable with death, they are punishable (unless otherwise provided) under 7 & 8 Geo. IV. c. 29, §§ 8, 9, by transportation for seven years, or by imprisonment, with or without hard labour, and with or without solitary confinement, and, if a male, with whipping in addition to the imprisonment.

An Accessory is a person not present, but concerned in some manner in a felony, either before or after its commission.

If a person be actually present aiding and abetting, he cannot be indicted as an accessory, for he is then a principal.

Accessories before the fact are persons absent at the time of the felony committed, but procuring, counselling, commanding, or abetting the committal of felony. Mere concealment of a felony to be committed, or mere tacit acquiescence, does not make a man an accessory, though he is guilty of misprision of felony, which is a misdemeanor. If A advise one crime, and B intentionally commit another, or advise a crime as to one person or object, and B intentionally commit a crime as to another person or object, A is not accessory. But if A advise a crime, and B commit the crime in substance, though varying in circumstances (as if, on a command to poison, he shoot), A is accessory. Accessories before the fact may be indicted as such with the principal, or after the conviction of the principal, though the principal be acquitted, or be not amenable to justice.

If the general issue be pleaded, the jury shall be charged to inquire first as to the principal, and if they find him not guilty, then to acquit the accessory; but if they find him guilty, then to inquire of the accessory.

In treason there are no accessories, but all are principals. And, by the 9 Geo. IV. c. 31, accessories before the fact to murder shall suffer death as felons.

Accessories before the fact to offences against the person, under 9 Geo. IV. c. 31, not otherwise punishable thereunder, may be transported for not more than fourteen years nor less than seven, or imprisoned, with or without hard labour, in the common gaol or house of correction, not exceeding three years; and every person counselling &c. a misdemeanor under that act is punishable as a principal.

Accessories before the fact to larceny and other offences under the 7 & 8 Geo. IV. c. 29, are punishable with death or otherwise in the same manner as the principal. So as to malicious injuries to property under 7 & 8 Geo. IV. c. 30; as to offences against the coin, and forgery, under 2 Wm. IV. c. 34, § 18, 11 Geo. IV. & 1 Wm. IV. c. 66, § 25, and 2 & 3 Wm. IV. c. 123; and as to all those offences for which the punishment is mitigated by 7 Wm. IV. & 1 Vict. cc. 84, 85, 86, 87, 88, 89, 90, 91.

Accessories before the fact, in cases not otherwise provided for, are punishable under 7 & 8 Geo. IV. c. 28, §§ 8, 9, and may be transported for seven years, or imprisoned for any term not exceeding two years, and, if males, may be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to the imprisonment; and the imprisonment may be with hard labour or solitary confinement, or both.

In crimes under the degree of felony, accessories before the fact are properly principals, and must be indicted as such.

Accessories after the fact are persons who, knowing a felony to have been committed by another, receive, relieve, comfort, or assist the felon, so as to hinder public justice, whether such felon be principal or accessory before the fact. But merely suffering to escape does not make a party an accessory.

Accessories after the fact cannot be tried before the conviction or attainder of their principal, unless they consent. But they may be tried with their principal; or separately, after he has been convicted.

Receivers of goods feloniously stolen may be indicted either as accessories after the fact to felony, or for a substantive felony. In other cases receivers may be indicted for a misdemeanor, or may be punished upon summary conviction.

In crimes less than felony there are no accessories after the fact, though a rescue or the like is indictable as a misdemeanor.

In treason there are no accessories after the fact, for they are punishable as principals; but they must be indicted specially for the receipt &c., and not as principals.

Accessories after the fact to murder are not guilty of capital felony, but may, by 9 Geo. IV. c. 31, § 3, be transported, for life, or imprisoned (with or without hard labour) in the common gaol or house of correction for any term not exceeding four years. Such accessories to other felonies against the person under that act are punishable by imprisonment, with or without hard labour, for not exceeding two years.

Such accessories to larceny and other felonies under 7 & 8 Geo. IV. c. 29, (except receivers of stolen property) are punishable by imprisonment for not exceeding two years; so if to malicious injuries under 7 & 8 Geo. IV. c. 30, § 26; or to offences against the coin, or to forgery.

Receivers of property feloniously stolen are punishable with transportation for not more than fourteen nor less than seven years, or imprisonment for not exceeding three years, with or without hard labour, and with or without solitary confinement for the whole or any part of the imprisonment, and, if males, may be once, twice, or thrice publicly or privately whipped, in addition to the imprisonment, if the court think fit. And in cases of misdemeanor, the receiver's punishment is the same, except that the transportation is for seven years only, and the imprisonment for two years.

Where not otherwise provided for, accessories after the fact are punishable under 7 & 8 Geo. IV. c. 28, § 8, that is, they may be transported for seven years, or imprisoned for any term not exceeding two years, and, if males, may be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to the imprisonment, and with hard labour or solitary confinement, or both, at the discretion of the court.

CHAPTER II.

Of Offences against God and Religion.

1. **BLASPHEMY** is a misdemeanor at common law, punishable by fine and imprisonment, or other infamous corporal punishment.

By 9 & 10 Wm. III. c. 32, if any person having been educated in, or at any time having made profession of the Christian religion, within this realm, shall, by writing, printing, teaching, or advised speaking, deny any one of the persons in the Holy Trinity to be God, or assert or maintain that there are more Gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority, and be convicted by two or more witnesses, he shall for the first offence be disabled to hold any office, ecclesiastical, civil, or military, and such as he holds at the time shall be void; and, upon a second conviction, he shall be disabled to sue, or to be guardian or executor or administrator, or to take a legacy or deed of gift, and suffer imprisonment for three years. But as to words, it is provided, that information of the offence must be laid before the magistrate within four days, and the prosecution must be within three months after the information; and also, that on the first offence the offender shall be discharged from all penalties and disabilities upon renunciation in court within four months after conviction.

But by 53 Geo. III. c. 160, § 2, so much of the 9 & 10 Wm. III. as relates to persons denying the Holy Trinity is repealed.

A *blasphemous libel*, which is a publication in writing or print of blasphemous matter, may be prosecuted as an offence at common law;

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and by 60 Geo. III. & 1 Geo. IV. c. 8, all copies of blasphemous or seditious publications may, by order of the court or a judge, be seized after conviction of the offenders.

2. **REVILING THE ESTABLISHED CHURCH.**—By 1 Edw. VI. c. 1, and 1 Eliz. c. 1, whosoever reviles the Sacrament of the Lord's Supper shall be punished by fine and imprisonment. And by 1 Eliz. c. 2, if any minister that ought to use the Book of Common Prayer &c. shall speak any thing in derogation thereof, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second; and if beneficed, shall for the first offence be imprisoned for six months, and forfeit a year's value of his benefice; for the second offence be deprived and suffer one year's imprisonment; and for the third, shall in like manner be deprived and suffer imprisonment for life. And if any person whatever shall, in plays, songs, or other open words, speak any thing in derogation, depraving, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be used in its stead, he shall forfeit for the first offence 100 marks; for the second, 400; and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life.

3. **NONCONFORMITY.**—By 1 Eliz. c. 2, 23 Eliz. c. 1, and 3 Jac. I. c. 4, continued neglect to attend divine worship is punishable by fine.

By the Corporation Act, 13 Car. II. st. 2, c. 1, no person could be legally elected to any office relating to the government of any city or corporation, unless within a twelvemonth before he had received the sacrament of the Lord's supper according to the rites of the Church of England; and he is also enjoined to take the oaths of allegiance and supremacy at the time that he takes the oath of office, or in default thereof the election is declared void.

By the Test Act, 25 Car. II. c. 2, all officers civil and military, are directed to take the oaths, and make the declaration against transubstantiation in any of the courts at Westminster, or at the quarter sessions, within six calendar months after their admission, and also within the same time to receive the sacrament of the Lord's Supper according to the usage of the church of England, in some public church &c., under forfeiture of 500*l.*, and disability to hold the office.

And by statutes 1 Geo. I. st. 2, c. 13, 2 Geo. II. c. 31, and 9 Geo. II. c. 26, all ecclesiastical persons promoted to benefices, members of colleges who have attained eighteen years of age, teachers of scholars or pupils, dissenting ministers, practisers of the law, and others, must, within six months after their appointment, take the oaths mentioned in the Test and Corporation Acts.

By statutes 30 Car. II. st. 2, and 1 Geo. I. c. 13, every member of parliament was required, in the presence of the House, to take the oaths of allegiance, supremacy, and abjuration, and subscribe and repeat the declaration against transubstantiation, the invocation of saints, and the sacrifice of the mass; and by the 7 & 8 Wm. III. c. 27, before any person could vote at elections for members of the House of Commons, he must have taken the oaths of allegiance and supremacy.

But by the Toleration Act, 1 Wm. & M. st. 1, c. 18 (confirmed by 10 Anne, c. 2), 19 Geo. III. c. 44, and 52 Geo. III. c. 155, these rigorous, though at the time salutary, laws were considerably mitigated.

And by 9 Geo. IV. c. 17, such parts of the Corporation and Test Acts as require the persons therein described to receive the sacrament for the purposes therein expressed, are repealed; and a form of declaration is provided to be used in lieu of the sacramental test, to the effect that, upon the true faith of a christian, the party will never exercise any power, authority, or influence which he may possess by virtue of the office, to injure, weaken, or disturb the English church.

And it enacts, that if persons elected to any office within the act, or persons admitted to any office under the crown, which heretofore required the taking of the sacrament, shall neglect to make the declaration in the Court of Chancery or King's Bench, or at the quarter sessions, within six months, their election or appointment shall be void. But naval and military officers below the rank of rear-admiral or major-general, or of colonel in the militia, and also certain officers of the revenue, are exempted from making the declaration.

By various statutes, heavy disabilities and penalties were imposed on persons professing popery, popish recusants convict, and popish priests.

But by 18 Geo. III. c. 60, 31 Geo. III. c. 32, and 43 Geo. III. c. 30, the restrictions and penalties theretofore imposed on Roman Catholics were removed, on their qualifying by declaration, oath, &c.

And then came the 10 Geo. IV. c. 7, called the Catholic Emancipation Act, by which all enactments requiring the declaration against transubstantiation and the invocation of saints and the sacrifice of the mass, as a qualification, were repealed, and Roman Catholics are enabled to sit in parliament upon taking and subscribing, instead of the oaths of allegiance, supremacy, and abjuration, an oath prescribed in that act.

And by the 9 & 10 Vic. c. 59, her majesty's subjects professing the Jewish religion are placed on the same footing as Protestant dissenters, and various acts relating to them were repealed.

4. PROFANE SWEARING AND CURSING.—By the 19 Geo. II. c. 21, every labourer, sailor, or soldier convicted of swearing forfeits 1s.; every other person under the degree of a gentleman, 2s.; and every gentleman or person of superior rank, 5s. to the poor of the parish; on a second conviction double, and for every subsequent offence treble the sum, with all charges; and in default of payment shall be sent to the house of correction for ten days. Any justice may convict upon his own hearing or on the testimony of one witness; and any officer upon his own hearing may secure any offender and carry him before a justice. The conviction must be within eight days after. If the justice omits his duty, he forfeits 5*l.*, and the constable, in the like case, 40*s.*

And by the 3 Jac. I. c. 21, if in any kind of theatrical representation the name of the Holy Trinity is profanely used, the offender forfeits 10*l.*, one half to the queen, the other to the informer.

5. RELIGIOUS IMPOSTURE.—Persons pretending an extraordinary commission from heaven, and the like, are punished with fine, imprisonment, and infamous corporal punishment.

And by the statute 9 Geo. II. c. 5, persons pretending to use witchcraft, and the like, are guilty of a misdemeanor, and punishable with a year's imprisonment, and formerly the pillory also.

And by the 5 Geo. IV. c. 8, § 4, such persons are deemed rogues and vagabonds, and punished with imprisonment and hard labour.

6. **SIMONY.**—By 31 Eliz. c. 6, both the giver and taker forfeit two years value of the benefice or dignity, one moiety to the queen and the other to the informer; and for corruptly resigning or exchanging benefices each party forfeits double the value of the consideration passing.

7. **SABBATH-BREAKING.**—By 27 Hen. VI. c. 5, no fairs or markets shall be held on Sundays or Good Friday, upon pain of forfeiture of all the goods to the lord of the franchise or liberty.

By the 1 Car. I. c. 1, all sports and pastimes on the Lord's-day are prohibited, under a penalty for every offence of 3*s.* 4*d.* to the poor, to be levied by distress, or, in default of distress, confinement in the stocks for three hours.

By the 3 Car. I. c. 1, no carrier, waggoner, drover, or the like, with horses, carts, or cattle, shall travel on the Lord's day, on pain of 20*s.* And no butcher shall kill or sell, under a penalty of 6*s.* 8*d.* The conviction may be at any time within six months, before one justice, or the mayor or other head officer of a city or town corporate, on oath of two witnesses; the penalty to be levied by distress and sale, and to be applied to the use of the poor, except such part as the justice &c. shall award to the informer, not exceeding one third.

By 29 Car. II. c. 7, no person shall do or exercise any worldly labour, business, or work of their ordinary calling, upon the Lord's day or any part thereof (works of necessity and charity only excepted), under 5*s.* penalty; and all fruit, herbs, goods or chattels whatsoever, exposed for sale on Sunday are forfeitable. And by the same statute no person shall execute process on the Lord's day, except in treason, felony, or breach of the peace.

Driving a stage-coach is not within the prohibition of these statutes. It has also been decided, that they are confined to labours in the course of a man's ordinary calling, and therefore that a contract of hiring with a servant on a Sunday is legal.

By the 2 Geo. III. c. 15, fish carriages travelling on Sundays, whether laden or returning empty, are exempted from the above penalties.

By the 21 Geo. III. c. 49, § 1, any house &c. which shall be opened or used for public entertainment, or for publicly debating on Sundays, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house &c., and the keeper thereof shall forfeit 200*l.* for every day that such house &c. shall be so opened or used, to such person as shall sue for the same; and be otherwise punishable as the law directs in cases of disorderly houses; and the person managing or conducting such entertainment, or acting as master of the ceremonies there, or as moderator, president, or chairman of any such meeting, shall also for every such offence forfeit 100*l.* to any person who shall sue for the same. And every door-keeper servant, or other person who shall collect or receive money or tickets, shall also forfeit 50*l.* to any person who shall sue for the same.

By the 7 & 8 Geo. IV. c. lxxv. a limited number of watermen are permitted under certain regulations to ply upon the Thames, within certain specified limits, on Sundays.

By the 1 & 2 Wm. IV. c. 32, § 3, killing game on a Sunday subjects the party to a penalty not exceeding 5*l.* for each offence, upon conviction before two justices of the peace.

CHAPTER III.

Of Offences against the Law of Nations.

1. IN case of the VIOLATION OF SAFE CONDUCTS OR PASSPORTS, or committing acts of hostility against foreigners in amity, the lord chancellor, with any of the justices of the Queen's Bench or Common Pleas, may cause full restitution and amends to be made to the party injured.

2. The INFRINGEMENT OF THE RIGHTS OF AMBASSADORS may be classed under this head; but this subject has been already considered. (See *ante*, p. 458.)

3. **PIRACY.**—By the common law, piracy consists in committing upon the high seas, or elsewhere within the jurisdiction of the admiralty, such acts of robbery and depredation as if committed on land would amount to felony. Piracy in a subject was a species of treason at common law, being held to be contrary to his natural allegiance; though in an alien it was only felony. But now, since the Statute of Treasons, 25 Edw. III. c. 2, it is held to be felony only in a subject.

By the 28 Hen. VIII. c. 15, § 4, the case of taking victual &c. (compelled by necessity) from any ship that can spare it, so it be paid for out of hand in such way as the act provides, is declared not piracy.

By the 11 & 12 Wm. III. c. 17 (made perpetual by the 6 Geo. I. c. 19, if any natural-born subject commit any act of hostility upon the high seas against others of her majesty's subjects under colour of a foreign commission, it is piracy, felony, and robbery.

And, by the same statute, any commander or seaman betraying his trust, and running away with his ship, or any boat, ordnance, ammunition, or goods, or yielding them up voluntarily to a pirate, or conspiring to do those acts; or any person assaulting the commander of a vessel, to hinder him from fighting in defence of his ship, or confining him, or making or endeavouring to make a revolt on board, shall for any of these offences be adjudged a pirate, felon, and robber, whether he be principal or merely accessory by setting forth such pirates, or abetting them before the fact, or receiving or concealing them or their goods after it. And by the 4 Geo. I. c. 11, and 8 Geo. I. c. 24, offenders under this act are excluded from the benefit of clergy.

By 8 Geo. I. c. 24, trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in any wise consulting, combining, confederating, or corresponding with them, or the forcibly boarding a merchant vessel, though without seizing or carrying her off, and destroying or throwing any of the goods overboard, is piracy.

By 18 Geo. II. c. 30, any natural-born subject or alien who in time of war commits hostilities at sea, or within the admiralty jurisdiction, against any of his fellow-subjects, or assists an enemy, is a pirate.

The *punishment* of piracy, until the passing of the 7 Wm. IV. & 1 Vict. c. 88, was in all cases death; but that act, repealing so much of the before-mentioned acts as relates to the punishment of the crime of piracy, or of any offence by any of them declared to be piracy, at-

taches that punishment only to cases in which the offence is attended with violence or assaults by which life is endangered. It enacts, (sect. 2) that whosoever, with intent to commit or at the time of or immediately before or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault with intent to murder any person being on board of or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act by which the life of such person may be endangered, shall be guilty of felony, and being convicted thereof shall suffer death as a felon.

And, by sect. 3, whosoever shall be convicted of any offence which by any of the acts thereinbefore referred to amounts to the crime of piracy, and is thereby made punishable with death, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

CARRYING AWAY PERSONS AS SLAVES.—By the 5 Geo. IV. c. 113, § 9, if any person shall (except in cases by that act permitted) within the jurisdiction of the admiralty, convey or assist in conveying away persons as slaves, or ship them for that purpose, he shall be deemed guilty of piracy, felony, and robbery, and by that act was punishable with death. But now, by the 7 Wm. IV. & 1 Vict. c. 91, he shall, at the discretion of the court, be transported beyond the seas for life, or imprisoned for any term not exceeding three years.

CHAPTER IV.

Of Treason,

AND OTHER OFFENCES AGAINST THE PERSON OF THE QUEEN.

UNDER the 25 Edw. III. c. 2, confirmed by 36 Geo. III. c. 7, and made perpetual by 57 Geo. III. c. 6, § 9, the offence of treason consists of six branches.

1. To compass or imagine the death of the king, of the queen, or of their eldest son and heir.

The king intended is the sovereign in possession, whether *de jure* or *de facto*. But not one who has resigned his crown with the sanction of parliament.

The act of designing constitutes the treason; the overt act is considered only as the means made use of to effectuate the treason. But there can be no conviction either for designing the death of the sovereign or for the three next mentioned species of treason, unless an overt act be alleged and proved by two witnesses. Every thing wilfully or deliberately done or attempted, whereby the life of the sovereign may be endangered, is an overt act of compassing his death; as conspiring to imprison him by force, or to depose him, or to get his person into the power of the conspirators. So writings, if published, inciting a person to kill him, or words persuading to kill him, are overt acts of treason; but not words (nor, perhaps, writings) if merely speculative, and not with a specific design.

Treason.

2. Violation of the king's wife, with or without force, or his eldest daughter unmarried, or the wife of the king's eldest son and heir, is treason in both parties, if both be consenting. But to violate a queen dowager or princess dowager is not so.

3. Taking arms against the king in his realm, not only to dethrone him, but under pretence to reform religion or the laws, or remove evil counsellors or other grievances, either real or pretended, or by an insurrection with a *general* design, as to throw down *all* inclosures, and the like. But not with a *private and particular* design, as to pull down a particular inclosure.

4. "If a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere." This may be by giving them intelligence, sending them provision, selling them arms, treacherously surrendering a fortress, or the like. And the same aid to our fellow-subjects in actual rebellion at home would be treasonable.

5. "If a man counterfeit the great or privy seal."

6. "If a man slay the chancellor, treasurer, or the justices of the one bench or the other, justices in eyre or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices." The statute only extends to an actual killing, and not to a mere attempt; and it does not extend to the barons of the exchequer.

Many other offences were made treason by subsequent acts of parliament; but all these new treasons, and misprisions of treason, were totally abrogated by the 1 Mary, st. 1, c. 1, when the 25 Edw. III. again became the only standard of treason. Since the 1st of Mary, however, many new treasons have been again created.

By the 5 Eliz. c. 1, to defend the pope's jurisdiction, formerly claimed in this realm, is for the first time a misdemeanor, and after conviction for the first offence, treason. So 27 Eliz. c. 2, and 3 Jac. I. c. 4, which were framed to guard against popery, declare certain offences to be treason.

By 1 Anne, stat. 2, c. 17, the endeavour to deprive or hinder the person next in succession to the crown according to the Act of Settlement from succeeding thereto, by any overt act, is treason.

By 6 Ann. c. 7, maliciously, advisedly, and directly to write or print any thing maintaining and affirming that any person hath any right or title to the crown otherwise than according to the Act of Settlement, or that the kings of this realm, with the authority of parliament, are not able to make laws to bind the crown and the descent thereof, is treason.

By 36 Geo. III. c. 7 (made perpetual by the 57 Geo. III. c. 6) if any person shall compass, imagine, or intend death, destruction, or any bodily harm to the king, or to depose him, or to levy war within his realm, in order by force to compel him to change his measures or counsels, or to overawe either house of parliament, or to excite an invasion of any of his majesty's dominions, and shall express, utter, or declare such intentions by publishing any printing or writing, or by any overt act, every such offender shall be adjudged a traitor.

The bare knowledge and concealment of treason committed or to be committed, and not revealing it as soon as conveniently may be to some judge of assize or justice of the peace, was at common law treason; but by 1 & 2 P. & M. c. 10, it is now only misprision of treason and a

high misdemeanor, the punishment of which is loss of the profits of lands during life, forfeiture of goods, and imprisonment for life. Any probable circumstances of assent, however, will make it treason.

As in prosecutions for high treason the accused has the whole power and influence of the crown to contend against, the law has humanely provided certain helps and indulgences which do not extend to other crimes. Thus, in cases of treason whereby corruption of blood may ensue, or misprision of such treason, it is enacted by the 7 Wm. III. c. 3, that no person shall be tried for the same (except an attempt to assassinate the king) unless the indictment be found within three years after the offence committed; that the prisoner shall have a copy of the indictment, and of the panel of jurors, delivered to him a certain time before his trial (which time has been since extended by 7 Ann. c. 21 and 6 Geo. IV. c. 50, as hereafter mentioned); that he shall have the same process to compel witnesses to appear for him as was usual to compel the appearance of witnesses against him; and that he may make his full defence by counsel (not exceeding two) to be named by him, and assigned by the court or judge. This last-mentioned privilege is, by 20 Geo. II. c. 30, extended to parliamentary impeachments for the like offences.

And by 7 Anne, c. 21, every person indicted for treason, or misprision thereof, shall have, not only a copy of the indictment, but a list of all the witnesses to be produced and of the jurors impanelled, with their professions and places of abode, delivered to him ten days before the trial, in presence of two witnesses, the better to enable him to make his challenges and defence.

And by 6 Geo. IV. c. 50, when any person is indicted for treason or misprision thereof in any court except the Queen's Bench, a list of the petty jury, with their names, professions, and places of abode, shall be given at the same time that the copy of the indictment is delivered, which shall be ten days before his arraignment, and in the presence of two or more credible witnesses. And when any person is so indicted in the Queen's Bench, a copy of the indictment shall be delivered within the time and in the manner aforesaid; but the list of the petty jury may be delivered to the party indicted at any time after the arraignment, so that it be ten days before trial.

But by 39 & 40 Geo. III. c. 93, these provisions of the 7 Wm. III., 7 Anne, and 6 Geo. IV. c. 50, shall not extend to any indictment for high treason in compassing and imagining the *death* or destruction of the queen, nor, by 5 & 6 Vict. c. 57, to any indictment for high treason in compassing and imagining any *bodily harm* tending to the death or destruction, maiming or wounding of the queen, or for misprision of such treason, where the overt act alleged in the indictment is the assassination or killing of the queen, or any attempt to injure in any manner whatsoever the person of the queen; but in all such cases the party accused shall be indicted, arraigned, tried, and attainted in the same manner, and according to the same course and order of trial in every respect, and upon the like evidence, as if such person stood charged with murder; though, upon conviction upon such indictment, judgment shall be nevertheless given, and execution done, as in other cases of high treason.

The benefit of those provisions were also taken away, by 6 Geo. III. c. 53, from treasons for counterfeiting the royal seals.

Any number of overt acts may be laid in an indictment for treason; but if any one sufficient overt act be proved, it is enough. No evidence is admitted of any overt act not laid in the indictment; but it may be given in evidence to prove another overt act laid.

Two witnesses are required to convict of treason or misprision thereof, unless the accused willingly confess. But this does not extend to the treasons excepted, as above, from the privileges before mentioned. Confession out of court before a competent authority will suffice.

By 34 Geo. III. c. 146 (which applies to males only), the punishment of treason is as follows:—The traitor is to be drawn on a hurdle to the place of execution, and there be hanged by the neck until he be dead; and afterwards his head shall be severed from his body, and the body divided into four quarters, which are to be at the disposal of her majesty. But her majesty may, after sentence, by warrant under her sign manual, countersigned by a principal secretary of state, change the whole sentence into beheading, and may direct in what manner the head and quarters shall be disposed of.

The punishment of a woman convicted of treason is, that she shall be drawn to the place of execution and hanged by the neck until she be dead.

By attainder in treason, the traitor forfeits to the crown all his lands and tenements of inheritance, whether fee simple or in tail, and all his rights of entry on lands and tenements, which he had at the time of the offence committed or at any time afterwards, and also the profits of all lands and tenements which he had in his own right for life or years. His goods and chattels are forfeited immediately upon conviction.

By attainder for treason his blood is also corrupted; which imports that he can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent; but they escheat to the lord of the fee, subject to the crown's superior right of forfeiture. Formerly also the person attainted for ever obstructed all descents to his posterity, where they were obliged to derive a title through him from a remote ancestor; but now, by 3 & 4 Wm. IV. c. 106, such attainder is no obstruction where the descent takes place after the death of the attainted person.

The corruption of blood is now peculiar to treason and murder, being abolished in other cases by 54 Geo. III. c. 145. It extends to females as well as males, as does also the forfeiture of lands, &c.

OTHER OFFENCES AGAINST THE PERSON OF THE QUEEN.—By 5 & 6 Vict. c. 51, sect. 2, if any person shall wilfully discharge or attempt to discharge, or point, aim, or present, at or near to the person of the queen, any gun, pistol, or any other description of fire-arms or of other arms whatsoever, whether the same shall or shall not contain any explosive or destructive material; or shall discharge or cause to be discharged, or attempt to discharge or cause to be discharged, any explosive substance or material near to the person of the queen; or if any person shall wilfully strike or strike at, or attempt to strike or to strike at, the person of the queen with any offensive weapon, or in any other manner whatsoever; or if any person shall wilfully throw or attempt to throw any substance, matter, or thing whatsoever at or

upon the person of the queen, with intent in any of the cases aforesaid to injure the person of the queen, or to break the public peace, or whereby the public peace may be endangered, or to alarm her majesty; or if any person shall, near to the person of the queen, wilfully produce or have any gun, pistol, or any other description of fire-arms or other arms whatsoever, or any explosive, destructive, or dangerous matter or thing whatsoever, with intent to use the same to injure the person of the queen, or to alarm her majesty; every such person so offending shall be guilty of a high misdemeanor, and being convicted thereof in due course of law, shall be liable, at the discretion of the court before which the said person shall be so convicted, to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, for any period not exceeding three years, and during the period of such imprisonment to be publicly or privately whipped, so often and in such manner and form as the said court shall order and direct, not exceeding thrice.

But, by sec. 2, nothing herein contained shall be deemed to alter in any respect the punishment which by law may now be inflicted upon persons guilty of high treason or misprision of treason.

CHAPTER V.

Of Offences injurious to the Royal Prerogative, or affecting the Government.

1. OFFENCES RELATING TO THE COIN.—Previous to the 2 & 3 Wm. IV. c. 32, the offence of counterfeiting, and certain other offences relating to the coin, were high treason, punishable with death. But by this act all previous statutes on the subject were repealed from the 30th April, 1832, and the whole law is consolidated and amended.

Gold and Silver Coin.—To make or counterfeit any coin resembling the current gold or silver coin, although the same be not finished and in a fit state to be uttered;—to *gild* or *silver*, or *wash*, *colour*, or *case over* any coin, or piece of silver or copper, or coarse gold or silver, or any metal or mixture of metals, of a fit size and figure to be coined, and with intent that the same shall be coined to resemble or pass for gold or silver coin;—to *gild*, *wash*, or *case over* any silver or copper coin, or to *file* or *alter* such, with intent to make the same resemble or pass for gold or silver coin;—to *impair*, *diminish*, or *lighten* any of the gold or silver coin, with intent to make the coin so impaired &c. pass for gold or silver coin;—to *buy*, *sell*, *receive*, *pay*, or *put off*, or offer to do so, any counterfeit coin intended to resemble or pass for gold or silver coin, at a lower rate than the same imports or was coined for;—to *import* into the United Kingdom any false or counterfeit coin, intended to resemble or pass for gold or silver coin, knowing the same to be counterfeit, are felonies, punishable with transportation for life or not less than seven years, or imprisonment not exceeding four years.

To *tender*, *utter*, or *put off* any counterfeit coin intended to resemble gold or silver coin, knowing the same to be counterfeit, is for the first

offence a misdemeanor punishable with imprisonment not exceeding one year ; but if the person so uttering &c. shall at the time have in his possession any other pieces of counterfeit gold or silver coin, or shall within ten days tender or utter any other counterfeit gold or silver coin, he shall be imprisoned for not exceeding two years. And a *second conviction* of either of these offences is felony, punishable by transportation for life or not less than seven years, or imprisonment for not exceeding four years.

To *have in possession* three or more pieces of counterfeit gold or silver coin, knowing the same to be counterfeit, and with intent to utter the same, is a misdemeanor, punishable by imprisonment for not exceeding three years ; and a second offence is felony, for which the punishment is transportation for life or seven years, or imprisonment for four years.

A copy of the previous indictment and conviction, signed by the clerk of the court or his deputy, shall be sufficient evidence of a previous conviction ; for which a fee of 6s. 8d. may be taken. Any clerk, officer, or deputy, certifying or uttering a false copy, knowing the same to be false ; or any other person certifying a copy as such clerk, officer, or deputy, or uttering any copy with such false or counterfeit signature, shall be guilty of felony, and transported for life or not exceeding fourteen nor less than seven years, or imprisoned for not exceeding two years.

Coining Tools.—Knowingly and without lawful authority to make or mend, or buy or sell, or have in possession any puncheon, counter puncheon, matrix, stamp, die, pattern, or mould, on which shall be made or impressed, or which shall be intended to make or impress, both or either of the sides of the gold or silver coin, or any part of either of such sides ; or, without lawful authority, to make or mend, or buy or sell, or have in possession any edger, edging tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those of the gold or silver coin, knowing the same to be so adapted ; or, without lawful authority, to make or mend, or buy or sell, or to have in possession any press for coinage, or any cutting engine for cutting by force of a screw or other contrivance round blanks of metal, knowing such press to be a press for coinage, or such engine to be intended for the counterfeiting of the gold or silver coin ; or, without lawful authority, knowingly to convey out of any of her majesty's mints any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging tool, collar, instrument, press, or engine used in the coining of money, or any useful part of such, or any coin, bullion, metal or mixture of metals, are each of them felonies punishable by transportation for life or seven years, or imprisonment not exceeding four years.

Copper Coin.—To make or counterfeit any of the copper coin ; or knowingly and without lawful authority to make or mend, or buy or sell, or have in possession any instrument, tool, or engine adapted and intended for counterfeiting the copper coin ; or to buy, sell, receive, pay, or put off, or offer so to do, any counterfeit copper coin, at a lower rate than the same imports, is felony, for which the punishment is transportation for life or not exceeding seven years, or imprisonment not exceeding two years.

To tender, utter, or put off any counterfeit copper coin, knowing the same to be counterfeit; or to have in possession three or more pieces, knowing the same to be counterfeit, and with intent to utter the same, is a misdemeanor, punishable by imprisonment for not exceeding one year.

Cutting Counterfeit Coin.—Any person may cut, break, or deface any gold or silver coin tendered to him, which he shall suspect to be counterfeit, or to be diminished otherwise than by reasonable wear; and if such pieces so broken, cut, or defaced shall appear to be counterfeit, or to be diminished otherwise than by reasonable wear, the person tendering the same shall bear the loss; but if the same shall appear to be lawful coin, or to be of due weight, the person cutting, breaking, or defacing the same shall receive the same at the rate it was coined for; and any dispute thereon may be determined by a justice of the peace in a summary manner. Tellers at the exchequer, and their deputies and clerks, and receivers general of the revenue, are required to cut, break, or deface all counterfeit or unlawfully diminished gold or silver coin tendered to them in payment of the revenue.

Seizure of Counterfeit Coin and Coining Tools.—Any person finding any counterfeit gold, silver, or copper coin in any place or in the possession of any person, or any instrument, tool, or engine for counterfeiting any such, is required to seize and forthwith carry the same before a justice of the peace. And any justice of the peace, upon the oath of a credible witness that there is reasonable cause to suspect that any person has been concerned in counterfeiting the gold, silver, or copper coin, or has in his possession any such counterfeit coin, or any instrument, tool, or engine for counterfeiting such, may, by warrant, cause any place belonging to or in the occupation of such person to be searched either in the day or in the night, and any counterfeit coin, or any such instrument, tool, or engine there found to be seized and brought before him or some other justice, and, when seized, to be secured for the purpose of being produced in evidence. And all such counterfeit coin, instruments, tools, or engines, shall afterwards be delivered up to the officers of the Mint, or their solicitor or other person authorized by them to receive the same.

In felonies under this act, principals in the second degree and accessories *before* the fact are punishable as principals in the first degree. Accessories *after* the fact to any such felony are punishable by imprisonment for not exceeding two years.

By 14 Geo. III. c. 42 (revived and made perpetual by the 39 Geo. III. c. 75), if any silver coin exceeding the sum of 5*l.*, purporting to be the silver coin of the realm, but below the standard of the Mint in weight or fineness, is imported into Great Britain and Ireland, the same becomes forfeited in equal moieties to the crown and prosecutor.

The 37 Geo. III. c. 126, § 2, 3, and 43 Geo. III. c. 139, § 3, contain provisions against counterfeiting *foreign* coin and uttering the same here.

2. **SERVING FOREIGN STATES.**—By the 59 Geo. III. c. 69, § 2, if any natural-born subject shall, without the licence of her majesty under the sign manual, or signified by order of council or royal proclamation, take or accept any commission or otherwise enter into the naval or military service of any foreign prince, state, &c.; or if any person shall

retain or procure, or endeavour to hire or engage, any others to enlist or be employed in any such foreign service, he shall be guilty of a misdemeanor, punishable by fine and imprisonment, or either of them, at the discretion of the court.

Any vessel, in any port or place in her majesty's dominions, having on board any persons so enlisted may be detained and prevented from proceeding; and masters of vessels taking on board any persons known to be so enlisted forfeit 50*l.* for each person.

The fitting out armed vessels to aid in military operations with foreign powers without licence, or aiding the warlike equipment of vessels of foreign states, is also forbidden, by the same act, under heavy penalties.

3. **DESERTION FROM THE QUEEN'S ARMIES** in time of war, whether by land or sea, in England or in parts beyond the seas, is, by 18 Hen. VI. c. 19, and 5 Eliz. c. 5, made felony; exclusive of the annual acts of parliament, to punish mutiny and desertion, already noticed.

4. **INCITING TO MUTINY.**—By the 37 Geo. III. c. 70, if any person shall maliciously and advisedly endeavour to seduce any person serving in her majesty's service by sea or land from his duty and allegiance, or to incite any person to commit any act of mutiny or mutinous practice, he is guilty of felony. But the punishment of death is now taken away by the 7 Wm. IV. & 1 Vict. c. 91; and persons convicted of any of these offences are liable, at the discretion of the court, to be transported beyond the seas for life or not less than fifteen years, or to be imprisoned for any term not exceeding three years. These crimes, wherever committed, may be tried in any county.

5. **DESTROYING OR EMBEZZLING THE QUEEN'S ARMOUR OR STORES.**—By 12 Geo. III. c. 24, to set on fire, burn, or destroy any of her majesty's ships of war, whether built, building, or repairing, or any of the queen's arsenals, magazines, dockyards, roperyards, or victualling offices, or materials thereto belonging, or military, naval, or victualling stores or ammunition, or causing, aiding, procuring, abetting, or assisting in any such offence, is felony without benefit of clergy.

By 4 Geo. IV. c. 53, any person stealing or embezzling her majesty's ammunition, sails, cordage, or naval or military stores, or being accessory to any such offence, shall be transported for life or for any term not less than seven years, or be imprisoned only, or be imprisoned and kept to hard labour, in the common gaol or house of correction, for any term not exceeding seven years.

Other embezzlements, falling under this denomination, are punishable under the following statutes;—9 & 10 Wm. III. c. 41; 1 Geo. I. c. 25; 9 Geo. I. c. 8; 17 Geo. II. c. 40; 9 Geo. III. c. 30; 39 & 40 Geo. III. c. 89; 54 Geo. III. cc. 60, 159; 55 Geo. III. c. 127; 56 Geo. III. c. 80; 1 & 2 Geo. IV. c. 75.

6. **DESTROYING THE MARKS ON THE QUEEN'S STORES, OR USING SUCH MARKS WITHOUT AUTHORITY,** is punishable under the 39 & 40 Geo. III. c. 89, and 59 Geo. III. c. 127.

7. **MAL-ADMINISTRATION OF PUBLIC TRUSTS.**—This is usually punished by parliamentary impeachment, wherein such penalties short of death are inflicted as the House of Peers thinks proper; usually transportation, imprisonment, fines, or perpetual disability.

To this head may be referred the embezzlement by public officers of money or securities for money issued for public services, which by 50 Geo. III. c. 52, was a misdemeanor punishable by transportation; but by 2 & 3 Wm. VI. c. 4, it is enacted, that if any person employed in the public service of her majesty, and entrusted by virtue of such employment with the receipt, custody, management, or control of any chattel, money, or valuable security, shall embezzle the same or any part thereof, or in any manner fraudulently apply or dispose of the same or any part thereof to his own use or benefit, or for any purpose whatsoever except for the public service, every such offender shall be guilty of felony, and in Scotland of a high crime and offence, and being thereof convicted shall be liable, at the discretion of the court to be transported beyond the seas for any term not exceeding seven years, or to be imprisoned, with or without hard labour, as to the court shall seem meet, for any term not exceeding three years.

8. **PRÆMUNIRE.**—The offence of præmunire was originally the setting up the papal authority of this realm in derogation of that of the crown. It derived its name from the word *præmunire* (to forewarn) in the writ issued preparatory to the prosecution of it.

In the 35th of Edw. I., was made the first statute against papal provisions, the foundation of all the subsequent statutes of præmunire. In the 27th Edw. III. was enacted the Statute of Provisors. Other enactments were passed in opposition to papal abuses in the reign of Richard II.; and, among the rest, the 16 Rich. II. c. 5, usually called the Statute of Præmunire, which enacts, "that whoever shall procure at Rome, or elsewhere, any translations, processes, excommunications, bulls, instruments, or other things which touch the king, against him, his crown or realm, and all persons aiding or assisting therein, shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council; or process of *præmunire facias* shall be made out against them, as in other cases of provisors.

And by the 2 Hen. IV. c. 23, 24 Hen. VIII. c. 12, 25 Hen. VIII. c. 19, 20, 21, 5 Eliz. c. 1, 13 Eliz. c. 2, and 27 Eliz. c. 2, the penalties of præmunire are attached to certain other offences relating to the encouragement of the papal power in this country.

Subsequently, however, the penalties of præmunire were applied to other offences, some of which have more and some less relation to the original offence, and some no relation at all. Thus, 1. The offence of acting as a broker or agent in any usurious contract, when above ten per cent interest is taken, is (that is, incurs the penalty of) a præmunire by 13 Eliz. c. 10. 2. To obtain any stay of proceedings other than by arrest of judgment or writ of error, in a suit for a monopoly, is a præmunire by 25 Jac. I. c. 3. 3. To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, is a præmunire by 16 Car. I. c. 21, and 1 Jac. II. c. 8. 4. On the abolition of purveyance and pre-emption in the reign of Charles II., the exertion of any such power in future was made liable to the penalties of præmunire by 12 Car. II. c. 24. 5. Maliciously to assert that either or both houses of parliament have any legislative authority without the queen, is a præmunire by 18 Car. II.

c. 1. 6. By the Habeas Corpus Act it is a præmunire, and incapable of the royal pardon, besides other heavy penalties, to send any subject of this realm prisoner into parts beyond sea. 7. By 6 Ann. c. 7, maliciously to maintain, by word of mouth, that any other person than according to the Acts of Settlement and Union hath a right to the throne of these kingdoms, or that the queen and parliament cannot make laws to limit the descent of the crown, incurs a præmunire. 8. By 6 Ann. c. 23, if the peers of Scotland, being met to elect their sixteen representatives, presume to treat of any other matter save only the election, they incur a præmunire. Lastly, any persons wilfully concerned in the prohibited marriage of a member of the royal family, are subject to the penalties of præmunire by 12 Geo. III. c. 11.

What these penalties are is thus summed up from the foregoing statutes by Sir Edward Coke: "The party convicted shall be out of the king's protection, and forfeit his lands and tenements, goods and chattels to the king, and his body shall remain in prison at the king's pleasure, or during life." These forfeitures, by the way, do not constitute the offence a felony, being inflicted by the statute, not by the common law.

It was formerly considered lawful even to kill a person attainted in a præmunire;—a mistaken notion, obviated by 5 Eliz. c. 1. But still such delinquent, though protected (as part of the public) from public wrongs, can bring no action for any private injury, how atrocious soever, being so far out of the protection of the law that it will not guard his civil rights, nor remedy any evil which, as an individual, he may suffer. And no man, knowing him to be guilty, can with safety give him aid, comfort, or relief.

Prosecutions for a præmunire do not now occur. There is an instance of one in the State Trials, for refusing to take the oath of allegiance, in the reign of Charles II.

9. CONCEALING TREASURE TROVE.—Treasure trove belongs to the queen or her grantees by her prerogative, and the concealment of it is a misprision, punishable by fine and imprisonment.

10. CONTEMPTS AGAINST THE QUEEN'S PREROGATIVE.—Refusing to assist her for the good of the public, in council, or in war or rebellion; neglecting to join the *posse comitatûs*, being thereto required by the sheriff or justices, according to 2 Hen. V. c. 8, which is a duty incumbent on all under the degree of nobility that are fifteen years old and able to travel; taking a pension from any foreign prince without the consent of the queen; disobeying the queen's lawful commands; disobeying an act of parliament, where no particular penalty is assigned, are contempts, punishable by fine and imprisonment.

11. CONTEMPTS AND MISPRISIONS AGAINST THE QUEEN'S PERSON OF GOVERNMENT.—Seditiously speaking or writing against the queen or her government so as to weaken her authority, or giving out scandalous stories concerning her, may be punished at common law as misdemeanors, by fine and imprisonment and infamous corporal punishment.

12. CONTEMPTS AGAINST THE QUEEN'S TITLE.—Denying the queen's right to the crown in common and unadvised discourse is a contempt, punishable by fine and imprisonment; if by advisedly speaking, it is in some cases a præmunire. By 13 Eliz. c. 1, if any person shall in any wise

hold, affirm, or maintain, that the common law of this realm, not altered by parliament, ought not to direct the right of the crown of England, it is a misdemeanor, punishable with forfeiture of goods and chattels.

13. REFUSING OR NEGLECTING TO TAKE THE OATHS OF ALLEGIANCE, SUPREMACY, AND ABJURATION, in certain cases, is punishable by 13 Car. II. st. 2, c. 1; 25 Car II. c. 2; 1 Geo. I. st. 2, c. 13; and 9 Geo. II. c. 26. Every session, however, an act of parliament, is passed to indemnify persons who have not complied with the requisitions of these acts, provided they qualify themselves within a time specified, and provided also that judgment has not been obtained against them for the omission.

Quakers and Moravians, in lieu of these oaths, make a declaration of fidelity and affirmation and a profession of Christian belief. But Quakers (except in the colonies) cannot hold any office or place of profit under government.

14. CONTEMPTS AGAINST THE QUEEN'S COURTS OF JUSTICE.—A stroke or blow in the queen's superior courts of justice at Westminster, or at the assizes; or assaulting a judge sitting in a court by drawing a weapon, without any blow struck, is punishable with loss of the right hand, imprisonment for life, and forfeiture of the goods and chattels and the profits of the lands of the offender during life. A rescue of a prisoner from any of the said courts is also punishable with perpetual imprisonment, and the forfeiture of goods and the profits of lands during life. Using threats or reproachful words to any judge sitting in such courts, is a high misprision, and punishable with fine, imprisonment, and corporal punishment. And even in the inferior courts of the queen, an affray or contemptuous behaviour is punishable with a fine by the judges there sitting. If a man assault or threaten his adversary for suing him, a counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in custody; or endeavour to dissuade a witness from giving evidence; or disclose an examination before the privy council; or advise a prisoner to stand mute; or if a grand juror disclose to any person indicted the evidence that appeared against him, he is guilty of a high misprision, and liable to be fined and imprisoned.

An attempt to stifle evidence is an indictable offence.

15. SELLING PUBLIC OFFICES.—By 49 Geo. III. c. 126, persons buying or selling, or receiving or paying money or reward for any office in the gift of the crown &c. (with certain exceptions), and persons receiving or paying money for soliciting or obtaining any such office, or making any negotiation or pretended negotiation relating thereto, and persons opening or advertising houses for transacting business relating to the sale of any such office, are respectively guilty of a misdemeanor.

The 6 Geo. IV. cc. 82, 83, prohibits the sale of public offices in the Queen's Bench and Common Pleas.

16. ADMINISTERING UNLAWFUL OATHS, AND BEING ENGAGED IN UNLAWFUL SOCIETIES.—By 37 Geo. III. c. 123, administering or causing to be administered, or being present at and consenting to the administering of or taking any oath, or entering into an engagement intended to bind in any mutinous or seditious purpose, or to belong to any seditious society or confederacy, or to obey any committee or any person not having legal authority for that purpose, or not to give evidence against

any confederate or other person, or not to discover any unlawful combination or illegal act, or illegal oath or engagement, is felony, and subject to transportation for seven years.

The act is not confined to oaths administered for seditious purposes; and compulsion is no excuse, unless the party, within four days after he has an opportunity, disclose the whole of the case to a magistrate, or, if a soldier or seaman, to his commanding officer. Offences under it may be tried in any county.

By 39 Geo. III. c. 79, corresponding societies therein described, and all other corresponding societies, are suppressed as unlawful. And every society, of which the members are required to take an oath not authorized by law, or to subscribe or assent to any test or declaration not required by law, or where the names of the members or the committees or presidents chosen are not known to the society at large, and every society which shall consist of different branches either acting separately or having separate presidents or other officers, are deemed unlawful combinations, and every person who shall become a member or correspond with them, or aid or support them with money or otherwise, is guilty of an unlawful combination. The act, however, contains exceptions as to declarations approved by two justices and registered as in the act provided, and also as to regular lodges of Freemasons.

Persons offending against this statute may be proceeded against either in a summary way before one justice, and fined 20*l.* or imprisoned for three calendar months; or they may be prosecuted by indictment, and upon conviction the court may transport for seven years, or imprison for any time not exceeding two years. The 51 Geo. III. c. 65, § 2, enables magistrates to mitigate the penalty to any sum not less than 5*l.* exclusive of costs.

By 52 Geo. III. c. 104, administering or assisting in the administration of any oath to bind the party sworn to the commission of any treason, murder, or capital felony, is felony, and was punishable with death. But the capital punishment is now taken away by 7 Wm. IV. & 1 Vict. c. 91, and any person convicted thereof is liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

By the same act (52 Geo. III. c. 104), every person taking such oaths, not being compelled, shall be adjudged guilty of felony, and transported for life, or for such time as the court may decide. And persons compelled to take such oaths are not exonerated unless they discover the same within fourteen days.

By 57 Geo. III. c. 19, societies established or thereafter to be established taking unlawful oaths &c. within the 37 Geo. III. c. 123, or 52 Geo. III. c. 104, or requiring oaths, tests, or declarations not required by law, or electing committees, delegates, &c., and persons becoming members of such societies, shall be deemed guilty of unlawful combination within the 39 Geo. III. c. 79, and proceeded against accordingly.

By 60 Geo. III. & 1 Geo. IV. c. 1, all meetings for practising military exercise are prohibited under pain of transportation for seven years or imprisonment for two years, and persons attending such meetings are liable to fine and imprisonment for not exceeding two years.

17. PRINTING AND PUBLISHING NEWSPAPERS CONTRARY TO LAW.—

Every person printing or publishing a newspaper without having made the declaration at the Stamp Office required by the 6 & 7 Wm. IV. c. 76, or without having entered into the requisite securities for payment of the advertisement duties, is liable in the former case to a penalty of 50*l.*, and in the latter of 100*l.*, for every day such newspaper is published; and any false statement or omission of the name, addition, or place of abode of the printer, publisher, and proprietors required to be set forth in such declaration, is a misdemeanor. A certified copy of such declaration, for production on any proceeding civil or criminal, may be had on payment of 1*s.*

Any person printing or publishing, selling or exposing to sale, or otherwise disposing of or distributing any newspaper not duly stamped, or knowingly having any such in possession, is liable to a forfeiture of 20*l.* for every copy; and any officer of stamps may apprehend and take the offender before a justice of peace, who may commit him for any time not exceeding three calendar months nor less than one month, unless the penalty be sooner paid.

Any person sending or carrying any newspaper not duly stamped out of the United Kingdom, or doing any act towards or with the intent of causing the same to be so sent or carried, forfeits for every such offence the sum of 50*l.*

A justice of peace may grant a warrant to search the premises of any person suspected of being engaged in printing, publishing, or vending unstamped newspapers; and if any such be found, or any printing machine, press, types, &c. which have been used in printing any such newspaper, the same may be seized, with all other materials for printing on the same premises, and shall be forfeited, in like manner as goods seized under the excise or customs laws. Doors may be broken open in the day time for the purpose of such search; and persons obstructing are liable to a penalty of 20*l.*; and peace officers refusing to assist, to a forfeiture of 10*l.*

By 39 Geo. III. c. 79, every place for lecturing, debating, or reading books, newspapers, &c. where money shall be paid, &c., is deemed a disorderly house, unless licensed, and the parties paying or receiving the money shall forfeit 20*l.*

Every person having a printing press or types shall give notice to the clerk of the peace, and obtain a certificate, under a penalty of 20*l.* So of letter-founders and printing-press makers.

Every person printing any paper or book meant to be published must print on the front of every paper if printed on one side only, and upon the first and last leaves of any paper or book consisting of more than one leaf, his name and place of abode, on penalty of 20*l.*; and must keep a copy of every such paper &c., and write or print thereon the name of his employer, under penalty of 20*l.* for neglecting so to do, or for refusing to produce the same to a justice of peace.

If a magistrate, from information on oath, have reason to suspect that any printing press or types are used or kept contrary to the act, he may, by warrant, direct any constable &c. to enter the house &c. to search for the same, and seize and carry away every printing press found therein, and types and other articles, and all printed paper.

CHAPTER VI.

Of Offences against Public Justice.

1. **STEALING OR OBLITERATING RECORDS.**—By 7 & 8 Geo. IV. c. 29, § 21, to steal, or for any fraudulent purpose to take from its place of deposit for the time being, or from any person having the lawful custody thereof, or unlawfully and maliciously to obliterate, injure, or destroy any record, writ, return, panel, process interrogatory, deposition, affidavit, rule, order, warrant of attorney, or any original document whatsoever of or belonging to any court of record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order, or decree, or any original document whatsoever of or belonging to any court of equity, or relating to any cause begun, depending, or terminated in any such court, is a misdemeanor, and, at the discretion of the court, punished by transportation beyond the seas for the term of seven years, or such other punishment, by fine and imprisonment, or both, as the court shall award. It is not necessary, in any indictment for such offence, to allege that the article is the property of any person or is of any value. And the imprisonment for any indictable offences under this act may be with or without hard labour, in the common gaol or house of correction, and the offender may be also kept in solitary confinement as to the court may seem meet; but as to this, see *post*, 1203.

2. **FALSIFYING PROCEEDINGS IN A COURT OF JUDICATURE.**—Acknowledging recognizances or bail, or causing any fine, recovery, cognovit, judgment, or deed to be enrolled in the name of a person not privy to the same, is, by the 11 Geo. IV. & 1 Wm. IV. c. 66, § 11, a felony, punishable with transportation for life or not less than seven years, or by imprisonment for not exceeding four nor less than seven years.

3. **OBSTRUCTING THE EXECUTION OF LEGAL PROCESS.**—Upon all process this is a high offence; but upon criminal process, a party opposing becomes an accessory in felony, and a principal in treason.

To assist a person pursued by the officers of justice, to enable him to avoid arrest, seems to be a misdemeanor.

By 9 Geo. IV. c. 31, § 25, where any person is convicted, *as of a misdemeanor*, of assault upon any person, with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, for any offence for which he may be liable to be apprehended or detained, the court may sentence the offender to imprisonment, with or without hard labour, in the common gaol or house of correction, for not exceeding two years, and may also fine him, and require sureties to keep the peace.

By 8 & 9 Wm. III. c. 27, 9 Geo. I. c. 29, 11 Geo. I. c. 22, persons opposing the execution of any process in certain pretended privileged places within the bills of mortality, or abusing any officer in his endea-

vours to execute his duty, so that he receives bodily hurt, are guilty of felony, and transportable for seven years; and persons in disguise joining in or abetting any riot or tumult on such account, or opposing any process, or assaulting and abusing any officer executing or for having executed the same, are felons without benefit of clergy.

4. **ESCAPE FROM CRIMINAL PROCESS.**—In the party himself, escape is an offence punishable by fine or imprisonment. An officer, or any person having the temporary custody, suffering through negligence an escape, is punishable by fine; if by consent, it amounts to the same kind of offence for which the prisoner was in custody, and is punishable in the same degree, whether it be for treason, felony, or misdemeanor. But he cannot be arraigned as for felony till the party himself has been attainted of the crime charged (except in case of treason), though he may be punished before that event by fine and imprisonment as for a misdemeanor. Persons aiding the escape of prisoners of war are subject to transportation, by 52 Geo. III. c. 156.

5. **BREACH OF PRISON.**—Breach of prison by a party lawfully committed for treason or felony, is felony, but not capital; and upon inferior charges it is a misdemeanor, punishable by fine and imprisonment.

6. **RESCUE.**—Rescue is the forcibly freeing another from arrest or imprisonment, and amounts to an offence equal to that for which the party imprisoned was liable. However, by 1 & 2 Geo. IV. c. 8, § 1, rescuing a felon is punishable with seven years transportation, or imprisonment with or without hard labour for not less than one year and not more than three years. Persons under sentence of death by a court-martial, and having obtained a conditional pardon, escaping out of custody, and all persons aiding such escape, are punishable as felons. If five or more persons assemble to rescue any retailers of spirituous liquors, or to assault the informers against them, it is felony, and subjects them to transportation for seven years. To deliver instruments of escape to a prisoner, or to aid his attempt to escape from prison, is a felony punishable with fourteen years transportation.

To attempt to rescue from prison any person committed for or found guilty of murder, or going to execution, or during execution, is felony without benefit of clergy; and to rescue, or attempt to rescue, the body of a murderer from the sheriff after execution is a felony, punishable with transportation for seven years.

7. **RETURNING FROM TRANSPORTATION.**—By 5 Geo. IV. c. 84, § 22, any offender having been sentenced to be transported, or having agreed to transport or banish himself on certain conditions, being afterwards found at large, without lawful cause, before the expiration of his term, was punishable with death. But the capital punishment was removed by the 4 & 5 Wm. IV. c. 57; and persons convicted of such offence, or of aiding, counselling, or procuring the commission thereof, are now liable to be transported beyond the seas for life, and, previously to transportation, to be imprisoned with or without hard labour for not exceeding four years. See *post*.

8. **TAKING A REWARD UNDER PRETENCE OF HELPING THE OWNER TO HIS STOLEN PROPERTY.**—By 7 & 8 Geo. IV. c. 29, § 58, every person who shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any

chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen &c., shall (unless he cause the offender to be apprehended and brought to trial for the same) be guilty of felony, and be liable, at the discretion of the court, to be transported beyond the seas for life or not less than seven years, or to be imprisoned for not exceeding four years, with or without hard labour, and with or without solitary confinement, at the discretion of the court, during any portion or the whole of such imprisonment,¹ and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to such imprisonment.

9. ADVERTISING REWARD FOR RETURN OF STOLEN PROPERTY.—By the 7 & 8 Geo. IV. c. 29, § 59, if any person shall publicly advertise a reward for the return of any property whatsoever which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked; or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property; or shall promise or offer to return to any pawnbroker or other person who may have bought or advanced money upon any property stolen or lost the money so paid or advanced, or any other sum of money or reward, for the return of such property; or if any person shall print or publish any such advertisement; every such person shall forfeit 50*l.* for every such offence to any person who shall sue for the same by action of debt, to be recovered with full costs of suit.

10. COMPOUNDING OF FELONIES AND INFORMATIONS ON PENAL STATUTES.—Compounding of felony consists of taking a reward for forbearing to prosecute a felony. One species of it is *theft bote*, or receiving back stolen goods or other amends upon an agreement not to prosecute. Compounding of felony is a misdemeanor at common law, punishable by fine and imprisonment at the discretion of the court.

As to compounding of informations upon penal statutes, the 18 Eliz. c. 5 provides, that if any common informer, under pretence of any penal law, make any composition without leave of the court, or take any money or promise from the defendant to excuse him, he shall forfeit 10*l.*, stand two hours in the pillory,² and be for ever disabled to sue on any popular or penal statute.

But this act has been held not to extend to cases cognizable only by magistrates; and to apply only to common informers, and not to cases where the penalty is given to the party aggrieved.

In some cases of misdemeanor more immediately injuring an individual, as batteries and libels, the court will sometimes permit a reference, or allow the defendant, even after conviction, to *speak* (as it is termed) with the prosecutor, before any judgment is pronounced; and a trivial punishment, generally a fine of 1*s.*, is inflicted if the prosecutor declares himself satisfied.

And upon summary proceedings before a magistrate (as for certain

¹ As to the limitation of the period of solitary confinement, see *post*.

² The punishment of the pillory is now entirely abolished. It was removed from

all offences except perjury and subornation of perjury, by the 56 Geo. III. c. 138; and from these also by the 7 Wm. IV. and 1 Vict. c. 23.

injuries to personal or real property), he is in some cases authorized, by 7 & 8 Geo. IV. c. 29, § 68, and c. 30, § 34, to discharge the offender after conviction on his making satisfaction.

11. **COMMON BARRETRY** consists in frequently stirring up suits and quarrels between the queen's subjects either, at law or otherwise. A single act is not sufficient to constitute the offence; for the indictment must charge the offender with being a *common barretor*. Nor can a man be guilty of it in respect of any number of false actions brought by him in his own right.

This offence is a misdemeanor at common law, punishable by fine and imprisonment. And by 12 Geo. I. c. 29, if any one who has been convicted of forgery, perjury, subornation of perjury, or common barretry, shall practise as an attorney, solicitor, or agent in any suit, the court upon complaint shall examine it in a summary way, and, if proved, shall direct the offender to be transported for seven years.

12. **MAINTENANCE**.—This consists in the officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend. But acts done in respect of an interest in the thing in dispute, or in respect of kindred or affinity, or in respect of other relations (as landlord and tenant, master and servant), or in respect of charity, or in respect of the profession of the law, do not amount to such offence. It is a misdemeanor, punishable at common law by fine and imprisonment; and by statute 32 Hen. VIII. c. 9, by a forfeiture of 10*l.*, one moiety to the queen and the other to the informer.

13. **CHAMPERTY** consists in bargaining with a plaintiff or defendant to divide with him the land or other matter sued for, whereupon the champertor is to carry on the party's suit at his own expence. It is a misdemeanor at common law.

By 32 Hen. VIII. c. 9, no one shall buy or sell any pretended right or title to land, unless the vendor hath been in possession of the same, or the reversion or remainder thereof, or taken the rents or profits thereof, for one whole year before such grant, on pain that both purchaser and vendor shall each forfeit the value of such land to the queen and the prosecutor.

14. **CONSPIRACY** consists in any confederacy of two or more persons to injure an individual, or to do any other unlawful act prejudicial to the community. The offence is committed not only whenever a confederacy is entered into for an illegal purpose, but also where it is to effect a legal purpose by illegal means, whether the purpose is effected or not. One of the chief species of this offence is conspiring to indict an innocent man of felony. The offence of conspiracy is a misdemeanor, punishable by fine and imprisonment.

But by 6 Geo. IV. c. 129, § § 4, 5, persons entering into agreement for fixing the rate of wages which they shall demand or pay in any manufacture or business, or the times for working therein, are not liable to prosecution for so doing.

15. **SENDING THREATENING LETTERS, OR ACCUSING PARTIES, WITH A VIEW TO EXTORT MONEY, &c.**—By the 10 & 11 Vic. c. 66 (extending the provisions of the 7 & 8 Geo. IV. c. 29 so far as relates to the offences of sending threatening letters, and of the 7 Wm. IV. & 1 Vic. c. 87 so far as relates to the offence of accusing persons of unnatural

crimes) it is enacted, that if any person shall knowingly send, or deliver, or utter to any other person, any letter or writing accusing or threatening to accuse either the person to whom such letter or writing shall be sent or delivered, or any other person, of any crime punishable by law with death or transportation, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any crime in and by the said first-mentioned act defined to be an infamous crime, with a view or intent to extort or gain, by means of such threatening letter or writing, any property, money, security, or other valuable thing from any person whatever, or any letter or writing threatening to kill or murder any other person, or to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, or shall knowingly procure counsel aid, or abet the commission of the said offences or either of them, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

And if any person shall accuse or threaten to accuse either the person to whom such accusation or threat shall be made or any other person of any of the crimes hereinbefore specified, with the view or intent in any of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused, or from any other person whatever, any property, money, security, or other valuable thing, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

16. **PERJURY AND SUBORNATION OF PERJURY.**—Perjury consists in swearing wilfully, absolutely, and falsely, in a matter material to the point in question, the oath being lawfully administered in some judicial proceeding; and subornation of perjury is the procuring another person to commit perjury. These are misdemeanors at common law, punishable with fine, imprisonment, and pillory, and perpetual disability to bear testimony. And by 5 Eliz. c. 9, the offender (if prosecuted under that act) is punishable with six months imprisonment, disability as a witness, and a fine of 40*l.*, or to have both ears nailed to the pillory.

Perjury and subornation of perjury were the only offences to which, since the 56 Geo. III. c. 138, the punishment of the pillory was applicable; but that mode of punishment is now altogether abolished. The 7 Wm. IV. & 1 Vict. c. 23 enacts, that after the passing of that act judgment shall not be given and awarded against any person or persons convicted of any offence that such person or persons do stand in or upon the pillory; any law, statute, or usage to the contrary notwithstanding. Provided, that nothing herein contained shall extend or

be construed to extend in any manner to change, alter, or affect any punishment whatsoever which may now be by law inflicted in respect of any offence, except only the punishment of the pillory.

By 2 Geo. II. c. 25, § 2, the judge may order the party to be transported, or sent to the house of correction with hard labour, for a term not exceeding seven years. And by 3 Geo. IV. c. 114, the court, on conviction for perjury, may sentence to imprisonment with hard labour, either in addition to or in lieu of any other punishment.

An indictment found at the quarter sessions for perjury at common law is void, the sessions having no jurisdiction over the offence; and if an indictment is found, and removed by certiorari, and the case comes down for trial at Nisi Prius, the judge will not try it.

By 3 & 4 Wm. IV. cc. 49 and 82, Quakers and Moravians, and the sect called Separatists, may make solemn affirmation in all cases where an oath is required, and are subject to the penalties of perjury in case of a wilfully false affirmation.

17. **BRIBERY** consists in the taking by or offering to a judge or any other officer, judicial or ministerial, any undue reward to influence his behaviour in his office. And he who offers is guilty of the offence, though the bribe be not taken. It is a misdemeanor, punishable at common law with fine and imprisonment, both in him who takes and in him who offers. And all judges and officers of the queen convicted of bribery forfeit treble the bribe, and may be punished at the queen's will, and discharged from the queen's service for ever.

As to bribery at elections, which was a misdemeanor at common law, punishable by fine and imprisonment, see *ante*, p. 30.

18. **EMBRACERY** consists in attempting to influence a jury corruptly to one side, by promises, money, or the like, and is a misdemeanor at common law. The juror's wilfully consenting thereto is a misdemeanor, punishable by fine and imprisonment.

19. **NEGLIGENCE OF OFFICERS OF JUSTICE.**—Any sheriff, coroner, constable, or the like, neglecting his duty, is guilty of a misdemeanor, punishable with fine and imprisonment; and in very notorious cases his office, if a beneficial one, may be forfeited.

20. **OPPRESSION BY JUDGES AND MAGISTRATES.**—Oppression by a judge or magistrate, or other misconduct in his office, proceeding from improper motives, is a misdemeanor, and is prosecuted by impeachment in parliament or information in the Queen's Bench, according to the rank of the offender, and is punishable with forfeiture of office, fine, imprisonment, or other discretionary censure.

21. **EXTORTION** consists in any public officer unlawfully taking, by colour of his office, any money or the like that is not due to him, or more than is due, or before it is due. It is a misdemeanor at common law, punishable by fine and imprisonment, and sometimes by forfeiture of office. By 1 & 2 Wm. IV. c. 56, any judge or other officer in bankruptcy taking other than his lawful fees, forfeits 500*l.*, and becomes incapable of holding office.

22. **NOT OBEYING THE ORDERS OF A MAGISTRATE** is a misdemeanor, punishable with fine and imprisonment.

CHAPTER VII.

Offences against the Public Peace.

1. **RIOTING AFTER PROCLAMATION TO DISPERSE.**—By 1 Geo. I. st. 2, c. 5 (commonly called the Riot Act), if twelve or more persons are riotously assembled, to the disturbance of the peace, and any justice of the peace, sheriff, under-sheriff, mayor, or head officer of a town, command them by proclamation to disperse, and they riotously continue together for one hour afterwards, it is felony without benefit of clergy. And if any person going to make such proclamation be opposed with force, or wilfully hindered from the making of it, the parties so opposing are felons without benefit of clergy; and all persons to whom such proclamation ought to have been made, and knowing of such hindrance and not dispersing in one hour after, are felons without benefit of clergy. But, by 7 Wm. IV. & 1 Vict. c. 91, the punishment of death is now removed from these offences, and any person being thereof convicted is liable to be transported for life or not less than fifteen years, or to be imprisoned for not exceeding three years.

The peace-officers and their assistants are indemnified if any of the mob should be killed in their endeavour to disperse them.

2. **RIOTOUSLY DEMOLISHING BUILDINGS OR MACHINERY.**—By 7 & 8 Geo. IV. c. 30, § 8, if any persons riotously and tumultuously assembled together to the disturbance of the public peace shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy, any church or chapel, house, &c., or other such buildings or machinery as in the act are mentioned, every such offender is guilty of felony, and was by that act punishable with death. But the capital punishment is now taken away by 4 & 5 Vict. c. 56; and any person convicted of any of these offences (whether as principal, or as principal in the second degree, or as accessory before the fact) shall be liable to be transported beyond the seas for not less than seven years, or to be imprisoned for not exceeding three years.

By 7 & 8 Geo. IV. c. 31, if any church or chapel, house, &c., or such other buildings or machinery as in the act are mentioned, be wholly or in part demolished by persons riotously and tumultuously assembled together, the hundred shall be liable to yield full compensation, provided the persons damnified, or the servants who had the care of the property, shall, within seven days, go before a justice of the peace, and state upon oath the names of the offenders, if known, and submit to examination touching the circumstances, and become bound by recognizance to prosecute, and provided also that the action against the hundred be commenced within three calendar months.

Where the damage does not exceed 30*l.*, it may be recovered by a summary proceeding before justices at a special petty session.

The mere breaking of windows on an illumination night, without any attempt to do more, has been held not to be within the act.

3. **SENDING THREATENING LETTERS.**—By 4 Geo. IV. c. 54, § 3, to send any letter or writing, with or without a name or signature subscribed thereto, or with a fictitious name or signature, threatening to

kill or murder any of the queen's subjects, or to burn or destroy their houses &c., is made felony, and punishable, at the discretion of the court, with transportation for life or for a term not less than seven years, or imprisonment, with or without hard labour, for a term not exceeding seven years. See also *ante*.

4. **AFFRAYS.**—This offence consists in the fighting of two or more persons in some public place, to the terror of her majesty's subjects, as prize fights or duels, where no fatal consequence ensues; for if death ensue, it is murder. It is a misdemeanor, punishable with fine or imprisonment.

But if the fighting be in private, it is no affray, but an assault. Words alone are not sufficient to constitute this offence; though a constable may, at the request of the party threatened, carry the person who threatens to beat him before a justice, in order to find sureties.

An affray may be suppressed by any private person present, especially by a peace officer, who may break open doors to suppress it. A constable present at an affray may arrest the parties, and either carry them before a justice, or imprison them by his own authority for a convenient space till their heat is over. But it seems that he has no power to arrest if done out of his own view, without a warrant, unless in case of a felony, or apprehension thereof. Though if the wrong-doer be arrested by private persons present, and delivered by them to him, the constable may take him before a magistrate.

By 5 & 6 Edw. IV. c. 4, if any person shall, by words only, quarrel, chide, or brawl in a church or churchyard, the ordinary shall suspend him, if a layman, *ab ingressu ecclesiæ*, and if a clerk in orders, from the ministration of his office during pleasure; and if any person in a church or churchyard shall smite or lay violent hands upon another, he shall be excommunicated *ipso facto*.

5. **RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.**—An *unlawful assembly* is when three or more assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren or the game therein, and part without doing it, or making any motion towards it. Or, as it seems, any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the queen's subjects. And it has been ruled in recent cases, that an assembly of great numbers of persons, which, from its general appearance and accompanying circumstances, is calculated to excite terror, is generally criminal and unlawful.

As to unlawful societies, see 39 Geo. III. c. 79; 57 Geo. III. c. 19; 60 Geo. III. & 1 Geo. IV. c. 1; and *ante*.

A *route* is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common or of way, and make some advances to it.

A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cause of quarrel, as if they beat a man, or hunt and kill game in another's park, chase, warren, or liberty, or do any other unlawful act with force and violence, or even do a lawful act (as removing a nuisance) in a violent and tumultuous manner. If several meet together at a fair or wake, and a quarrel ensue, they will be guilty of an *affray*; but if they form parties under

pledge of mutual assistance, and engage in any tumultuous proceedings, it will amount to a riot.

Unlawful assemblies, routs, and riots, are misdemeanors, punishable with fine and imprisonment. And by the 3 Geo. IV. c. 114, the court may also, in case of riot, sentence to hard labour with imprisonment, either in addition to or in lieu of any other punishment.

By the 13 Hen. IV. c. 7, any two justices, together with the sheriff or undersheriff of the county, may come with the *posse comitatús*, if need be, and suppress any such riot, assembly, or rout, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction, which record alone shall be sufficient conviction of the offenders. In the interpretation of this statute it has been holden that all persons, noblemen and others (except women, clergymen, decrepit persons, and infants under fifteen), are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and that any battery, wounding, or killing the rioters, which may happen in suppressing the riot, is justifiable.

6. **TUMULTUOUS PETITIONING.**—By the 13 Car. II. st. 1, c. 5, not more than twenty names shall be signed to any petition to the queen or either house of parliament for any alteration of matters established by law in church or state, unless the contents thereof be previously approved, in the country, by three justices or the majority of the grand jury at the assizes or quarter sessions, and in London by the lord mayor, aldermen, and common council; and no petition shall be delivered by a company of more than ten persons; on pain, in either case, of incurring a penalty not exceeding 100*l.* and three months imprisonment.

By the 57 Geo. III. c. 19, § 23, it shall not be lawful for any person to convene or give notice of convening any meeting consisting of more than fifty persons, or for any number of persons exceeding fifty to meet, in any street, square, or open space in the city or liberties of Westminster or county of Middlesex, within the distance of a mile from the gate of Westminster Hall (except such parts of the parish of St. Paul, Covent Garden, as are within such distance), for the purpose of considering of or proposing any petition &c. for alteration of matters in church or state, on any day on which the two houses or either house of parliament shall meet and sit, or on any day on which the courts shall sit in Westminster Hall; and any such meeting is by the act made an unlawful assembly. But there is a provision that the enactments shall not apply to any meeting for the election of members of parliament, or to persons attending upon the business of either house of parliament or any of the said courts.

7. **FORCIBLE ENTRY AND DETAINER OF LANDS.**—These offences consist in violently taking possession, or, after taking, violently keeping possession of lands or tenements, with menaces, force, and arms, and without the authority of the law.

At common law an indictment lies for a forcible entry, where the party entering has no title, and it is a misdemeanor punishable by fine and imprisonment. But not at common law, if the party entering had been disseised. For, by the common law, a man disseised of lands or tenements might legally regain possession by force, unless his right of entry

was gone by neglecting to enter in proper time. But as this often gave occasion for serious disturbances of the public peace, it was enacted by the 5 Ric. II. st. 1, c. 8, that all forcible entries should be punished with imprisonment and ransom at the king's will. And by the several statutes of 15 Ric. II. c. 2; 9 Hen. IV. c. 9; 31 Eliz. c. 11; and 12 Jac. I. c. 15, upon any forcible entry, or forcible detainer after peaceable entry, into any lands or benefices of the church, one or more justices of the peace, taking sufficient power of the county, may go to the place, and there record the force upon his own view, as in cases of riot; and, upon such conviction, may commit the offender to gaol until he make ~~fine~~ and ransom to the king. And moreover, the justice or justices have power to summon a jury, to try the forcible entry or detainer complained of; and if the same be found by that jury, then, besides the fine on the offender, the justices shall make restitution by the sheriff of the possession, without inquiring into the merits of the title; for the force is the only thing to be tried, punished, and remedied by them. And the same may be done by indictment at the general sessions.

An indictment on the statutes for forcible entry may be sustained, whether the defendant had a right of entry or not. It may be sustained where the prosecutor had an estate of freehold (though a freehold by wrong), or of leasehold, or where his estate is in joint tenancy, or tenancy in common with the defendant. But not where he had only the bare custody of the premises for the defendant.

An entry through an open window, or by opening the door with a key, or by mere trick, or by threat to the goods and not to the person, is not considered a forcible entry. But where the entry is forcible, it is within the statute, whether any person is within the house or not, especially if a dwelling-house.

The restitution provided for by the statutes does not apply to a case where the defendant has been permitted to remain quietly in possession for three years immediately previous to the finding of the indictment.

Generally, to maintain an indictment for forcible detainer, it should be shown that the prosecutor was seised or possessed, that defendant entered upon him (whether peaceably or not is immaterial), and held the premises from him by force and violence. And where a tenant under lease holds over by force after the expiration of the lease, it is said to be a forcible detainer; but merely refusing possession is not so; nor keeping out by force a person claiming common upon the land.

8. RIDING OR GOING ARMED WITH DANGEROUS OR UNUSUAL WEAPONS.—By 2 Edw. III. c. 3 (commonly called the Statute of Northampton) this is a misdemeanor, punishable with forfeiture of the arms, and imprisonment during the pleasure of the crown.

9. SPREADING FALSE NEWS.—This, if done to make discord between the queen and nobility, or concerning any great man of the realm, is a misdemeanor at common law, punishable with fine and imprisonment: and the common law is confirmed by statutes of Westm. 1, 3 Edw. I. c. 34; 2 Ric. II. st. 1, c. 50; and 12 Ric. II. c. 11.

10. FALSE AND PRETENDED PROPHECIES, WITH INTENT TO DISTURB THE PEACE.—By 5 Eliz. c. 15, the penalty for the first offence is a fine of 10*l.*, and one year's imprisonment; for the second, forfeiture of all goods and chattels, and imprisonment during life.

11. CHALLENGES TO FIGHT.—To challenge to fight, either by word or letter, or to be the bearer of such challenge, is a misdemeanor, punishable by fine and imprisonment; though no fighting follows. So is the endeavour, by an insulting letter or otherwise, to provoke a challenge. And it is no excuse of such offence, that the offender has received provocation.

12. LIBELS.—A libel is a malicious defamation, expressed in printing or writing, or by signs, pictures, or the like, of an illegal or immoral tendency, tending to asperse the reputation of a person alive, or the memory of one that is dead.

A libel may be either prosecuted criminally by *indictment* or *information*, or redress for it may be sought by a *civil action*. In a *civil action* the libel must appear to be false as well as scandalous; for if the charge be true, the plaintiff has no ground to demand compensation for himself, whatever offence it may be against the public peace; and therefore in a civil action for damages, the truth may be pleaded in bar of the suit. But in *criminal* prosecutions, as the direct tendency of a libel is a breach of the public peace, by stirring up the objects of it to revenge, and perhaps to bloodshed, it is immaterial whether the matter in it be true or false, since the provocation, not the falsity of it, is the subject of penal visitation; and therefore the defendant, on an indictment for libel, is not allowed to allege the truth of it by way of justification.

But the Court of Queen's Bench will refuse leave to file a criminal information in the Crown Office, without a positive affidavit from the party of the *falsity* of the charge contained in the libel, which if the party declines to make, he must proceed by bill of indictment in the usual course. Where, however, the party slandered is abroad, or the allegations of the libel are to general character and not particular facts (in which case the charge, from its very nature, can hardly be negatived on oath), or contains a charge against the prosecutor for language which he has held in parliament, this affidavit will be dispensed with.

Though malice is an essential requisite in every criminal libel, yet the act of publication is deemed presumptive evidence of malice.

If the writing reflect on the clergy of a particular diocese, it is libellous.

If a writing reflect on the memory and character of the dead, with an intention to bring dishonour on a living descendant, it is libellous.

Hanging up or burning in effigy, to expose an individual to contempt, is an offence of the same nature as libel.

The communication of a libel to one person is a publication, and therefore sending a libellous private letter amounts to the publishing of a libel so as to support an indictment. So delivering a libel sealed in one county for the purpose of being opened and published by a third person in another county, is a publication. The sale of a libel by a servant in the shop is *prima facie* evidence of publication against the master.

It is not a libel to publish a correct copy of the reports or resolutions of the two houses of parliament, or a true account of the proceedings of a court of justice, though to the discredit of an individual. But

this does not apply if the publishing be before the trial is concluded; nor to an account of *ex parte* proceedings before a police magistrate, though the account be correct.

All concerned in composing, writing, or publishing a libel, are guilty of a misdemeanor, punishable with fine and imprisonment; provided there be a publication of the libel.

It has been decided that a justice has authority to grant a warrant to arrest a person charged with the publication of a libel, and upon the person neglecting to find sureties may commit him to prison.

In a criminal prosecution for a libel, it was long held by the Court of Queen's Bench, that the only questions to be submitted to the jury were the fact of the publication and the truth of the innuendos inserted in the proceedings; that if they believed these, they were bound to find the defendant guilty; and that the court alone was competent to decide on the libellous character of the matter charged. But the statute 32 Geo. III. c. 60 declares and enacts, that, on trials for libels, the jury may give a general verdict of Guilty or Not guilty upon the whole matter in issue, without being required or directed by the court to find the defendant guilty merely on the proof of the publication by such defendant of the paper charged to be a libel, and of the sense ascribed to the same in the indictment or information. But the court may give its opinion to the jury, and the jury may find a special verdict, as in other criminal cases; and the defendant, if found guilty by the jury, may move in arrest of judgment on such ground and in such manner as he might have done before the passing of the act.

The judgment in libel is usually fine, imprisonment, and sureties to keep the peace after the offender is set at liberty.

When the defendant, after conviction for libel, is brought up for judgment, he cannot, in mitigation of punishment, read affidavits alleging that the prosecutor was guilty of the crimes imputed. He may, however, in mitigation, read his own affidavit, stating that at the time of publishing he believed the charges to be true, and setting forth reasonable grounds for that belief; and affidavits may be read for him in mitigation, or against him in aggravation, grounded on the course of conduct he has pursued subsequently to conviction.

By 60 Geo. III. & 1 Geo. IV. c. 9, § 16, if a person charged with printing or publishing any blasphemous, seditious, or malicious libel, be brought up to give bail, the court, judge, or justice of the peace, may make it part of the condition of the recognizance, that he shall be of good behaviour during the continuance of the recognizance

CHAPTER VIII.

Of Offences against Public Trade.

1. **SMUGGLING.**—The offences under this head have been already considered; see *ante*, p. 82—85. It is, however, to be noticed that

from some of the offences there described the punishment of death has been removed by a recent act. By the 3 & 4 Wm. IV. c. 53, §§ 58, 59, three or more persons being assembled together, armed with fire-arms or other offensive weapons, in order to assist in the illegal landing, &c. of prohibited or run goods, or in rescuing such goods after seizure, or to rescue or prevent the apprehension of any person guilty of any felonious offence against the Customs Acts,—and persons maliciously shooting at any vessel or boat belonging to her majesty's navy or in the service of the revenue within 100 leagues of the coast, or maliciously shooting at, maiming, or dangerously wounding any officer of the army, navy, or marines, employed for the prevention of smuggling, or any revenue officer,—and all persons aiding or assisting therein, are guilty of felony, and were punishable with death as felons. But now, by the 7 Wm. IV. & 1 Vict. c. 91, such persons shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

2. FRAUDS UNDER THE BANKRUPT LAWS, which fall under this class of offences, have also been already treated of.

3. USURY.—This offence consists in an unlawful contract, upon the loan of money, to receive the same again with exorbitant interest.

By 12 Anne, st. 2, c. 16, all contracts of this description are totally void, and the lender forfeits treble the money borrowed, one half of the penalty being given by the statute to the prosecutor and one half to the queen; which may be enforced by a *qui tam* action of debt within one year after the offence committed.

It is doubtful whether an indictment lies upon this statute; at least an indictment for usury, if maintainable, is not an ordinary mode of proceeding. It is clear that no indictment lies for making an usurious contract only, where there has been no loan or receipt of interest upon it. It seems, too, that the quarter sessions have no jurisdiction over the offence.

By the same statute (12 Anne, st. 2, c. 16), if any scrivener or broker takes more than 5s. per cent procuration money, or more than 12d. for making a bond, he shall forfeit 20l. with costs, and suffer imprisonment for half a year.

By 53 Geo. III. c. 141, § 8, procuring or soliciting any person under twenty-one to grant an annuity, or advancing or procuring to be advanced money to him on consideration of an annuity after twenty-one, is a misdemeanor, punishable by fine, imprisonment, or other corporal punishment. And, by section 9, to take more than 10s. per cent. for procuring any money to be advanced on any life annuity within the act, is a misdemeanor, punishable with fine and imprisonment.

See farther as to usury, *ante*, 396.

4. CHEATING.—The offence of cheating, at common law, is the fraudulently obtaining the property of another by any deceitful and illegal practice or token (short of felony), which affects or may affect the public. But it seems that it must be such as common prudence could not have guarded against. An imposition on an individual, in a merely private transaction, is not indictable at common law. The offence is a misdemeanor, punishable with fine and imprisonment.

Some cases of fraud are particularly provided against by statute, among which are the following:—

Selling by False Weights and Measures.—This offence is a misdemeanor at common law, punishable with fine and imprisonment; and also punishable by statute, in certain cases, with pecuniary forfeiture.

False Pretences.—By 7 & 8 Geo. IV. c. 29, § 53, if any person shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such person shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment by fine or imprisonment, or both, as the court shall award. Provided always, that if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no such indictment shall be removable by certiorari; and no person tried for such misdemeanor shall be liable afterwards to be prosecuted for larceny upon the same facts.

In some cases the fraud practised is ground for a civil action only, and no indictment as for a false pretence can be supported.

Offences as to Characters of Servants.—By 32 Geo. III. c. 56, personating a master and giving a false character of a servant, or asserting in writing that a servant has been hired for a period of time or in a station, or was discharged at a time, or has not been hired in a previous service, contrary to truth; and any person offering himself as a servant, pretending to have served where he has not served, or with a false certificate of character, or altering a certificate, or pretending not to have been in any previous service, contrary to truth, are offences punishable, on conviction before two justices, by a forfeiture of 20*l*.

5. **FORESTALLING THE MARKET** is described by the repealed act of 5 & 6 Edw. VI. c. 14, as the buying or contracting for any merchandize coming on the way to market, or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the price when there. It is a misdemeanor at common law, punishable with fine and imprisonment.

6. **REGRATING** is described by the same statute to be the buying of corn or other dead victual in any market, and selling it again in the same market or within four miles of the place. This is also a misdemeanor at common law, punishable by fine and imprisonment.

7. **ENGROSSING** is described by the same statute as the getting into one's possession or buying up large quantities of corn or other dead victual, with intent to sell them again. This is also a misdemeanor at common law, punishable with fine and imprisonment.

8. **MONOPOLIES.**—A monopoly is a licence or privilege allowed by the crown for the sole buying and selling, making, working, or using of any thing whatsoever, whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before.

By 21 Jac. I. c. 3, such monopolies are declared to be contrary to law, and void, except as to patents not exceeding the grant of fourteen

years to the authors of new inventions, and except also patents concerning printing, saltpetre, gunpowder, great ordnance, and shot; and monopolists are punished with the forfeiture of treble damages and double costs to those whom they attempt to disturb; and if they procure any action brought against them for these damages to be stayed by any extra-judicial order, other than of the court wherein it is brought, they incur the penalties of a *præmunire*.

9. **UNLAWFUL INTERFERENCE WITH JOURNEYMEN OR MANUFACTURERS.**—By 6 Geo. IV. c. 129, § 2, persons compelling journeymen to leave their employment, or to return work unfinished, preventing them from hiring themselves, compelling them to belong to clubs &c., or to pay fines, or forcing manufacturers to alter their mode of carrying on their business, are punishable with imprisonment, with or without hard labour, for any time not exceeding three months, on conviction in a summary way before justices of the peace. See *ante*, p. 277.

10. **ASSAULTS TO THE OBSTRUCTION OF TRADE.**—The 9 Geo. IV. c. 31, § 25, enacts, that persons convicted of any assault committed in pursuance of any conspiracy to raise wages, may be sentenced to be imprisoned, with or without hard labour, in the common gaol or house of correction, for not exceeding two years; and may also be fined, and required to find sureties for keeping the peace.

And by § 26, if any person shall unlawfully and with force hinder any seaman, keelman, or caster from exercising his lawful trade, business, or occupation, or use any violence to him, with intent to deter or hinder him therefrom; or if any person shall beat, wound, or use any other violence to any person with intent to deter or hinder him from selling or buying any grain, flour, meal, or malt; or shall beat, wound, or use any other violence to any person having the care of any grain, flour, meal, or malt, whilst on its way to or from any place, with intent to stop the conveyance of the same, every such offender, being convicted thereof before two justices of the peace, may be imprisoned and kept to hard labour in the common gaol or house of correction for not exceeding three calendar months.

CHAPTER IX.

Of Offences against Public Health and the Public Police or Economy.

1. **OFFENCES AGAINST THE QUARANTINE ACTS.**—Ships coming from infected countries are required to perform quarantine. The 6 Geo. IV. c. 78 (the Quarantine Act) empowers the privy council, in case of any infectious disease appearing in the United Kingdom, to make such orders, in order to cut off all communication between any person infected and the rest of her majesty's subjects, as shall appear expedient. Places are to be appointed, by proclamation, for ships to

perform quarantine; or the privy council may order vessels to repair to certain places to be examined, without being liable to quarantine. Masters of vessels liable to quarantine, on meeting other vessels at sea, or being within two leagues of the United Kingdom, are to hoist the yellow flag, on penalty of 100*l*. Masters refusing to answer interrogatories relative to the state of their vessels forfeit 200*l*.; for omitting to disclose that they have touched at any infected place, 300*l*.; for refusing to convey their vessels to the place appointed for quarantine, or quitting them, or suffering any other person to quit them, 400*l*. Persons arriving in any infected vessel, or going on board and quitting it before they are discharged from quarantine, are to suffer six months imprisonment, and forfeit 300*l*. Persons forging or uttering false certificates are guilty of felony.

2. **SELLING UNWHOLESOME PROVISIONS** is a misdemeanor at common law, and is prohibited by several statutes (as 51 Hen. III. st. 6; 12 Car. II. c. 25, § 11; 1 W. & M. st. 1, c. 24, § 20; 31 Geo. II. c. 29, § 21; and 37 Geo. III. c. 98, § 21) under heavy penalties.

3. **CLANDESTINE OR IRREGULAR MARRIAGES.**—By the 4 Geo. IV. c. 76, and 5 & 6 Wm. IV. c. 85, any person solemnizing a marriage in England (except by special licence, and except marriages where both parties are either Quakers or Jews) in any other place than a church or chapel in which marriages may be solemnized according to the rites of the Church of England, or than a registered building or office specified in a notice entered and certificate granted under the last-mentioned act, is guilty of felony.

And any person solemnizing a marriage in any such registered building or office in the absence of a registrar is guilty of felony.

And any person solemnizing a marriage (except by licence) within twenty-one days after the entry of the notice to the superintendent registrar, or if the marriage is by licence within seven days after such entry, or after three calendar months after such entry, is guilty of felony.

And any superintendent registrar who shall knowingly and wilfully issue any licence or any certificate for marriage *after* the expiration of *three calendar months* after the proper notice shall have been entered, or any certificate for marriage by licence *before* the expiration of *seven days*, or for a marriage without licence before the expiration of *twenty-one days* after the entry of the notice, or any certificate the issue of which has been forbidden by any person authorized so to do, or who shall knowingly and wilfully solemnize in his office, or shall register, any marriage by the act declared to be null and void, shall be guilty of felony.

And every person who shall knowingly and wilfully make any false declaration or sign any false notice or certificate required by the act for the purpose of procuring a marriage, and every person who shall forbid the issue of a superintendent's registrar's certificate by falsely representing himself or herself to be a person whose consent is required by law, knowing such representation to be false, shall suffer the penalties of perjury.

And any person making or causing to be made any false entry in any register book of marriages, or in any marriage licence,

or altering, forging, or counterfeiting, or assisting in altering &c. or causing to be altered &c. any such entry or licence, or destroying or causing to be destroyed any such register book, is guilty of felony, and liable to transportation for life or not less than seven years, or to imprisonment for not exceeding four nor less than two years.

Prosecutions under these acts must be commenced within three years.

4. **BIGAMY.**—By 9 Geo. IV. c. 31, § 22, if any person being married shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or elsewhere, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction for not exceeding two years; and any such offence may be dealt with, inquired of, tried, determined, and punished in the county where the offender shall be apprehended or be in custody, as if the offence had been actually committed in that county. But this does not extend to any second marriage contracted out of England by any other than a subject of her majesty, or to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time; or to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage; or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

The first wife is not a competent witness; but the second wife is.

The prosecutor must prove a valid celebration, as well as cohabitation. The evidence of a person present will suffice.

To constitute this offence, both must be valid marriages in other respects; a merely *voidable* marriage is not sufficient. See *ante*, p. 309.

5. **COMMON NUISANCES** are offences against the public order and economical regimen of the state, to the annoyance of the queen's subjects in general, either by doing a thing which tends to the annoyance of the community, or by neglecting to do any thing which the common good requires. They are misdemeanors, and in general punishable with fine and imprisonment.

If the annoyance is only to some particular person, and not to the community in general, it is a *private* nuisance, and a subject of civil action only, and not a crime.

Annoyances in highways, bridges, and public rivers, arise by rendering them inconvenient or dangerous to pass, either positively by actual obstruction, or negatively by want of repair.

For the former, the party obstructing is liable to indictment.

For want of repairing highways, such individuals as are liable may be indicted, or such township or other district as may lie under that obligation; and in default of these, the parish at large.

For not repairing bridges, if within a city or town corporate, the inhabitants are liable; if within a riding, the inhabitants of the riding; in all other cases, the county at large, unless they can show a liability in some individual or in a particular district.

To support an indictment for *offensive or dangerous trades or manufactures*, it is not necessary to prove that they are offensive to health, if they are offensive to the senses, and render the dwellings of the inhabitants uncomfortable. If the annoyance is only to a few inhabitants of a particular place, no indictment lies. Length of time is generally a good defence.

And if a man sets up a noxious trade remote from houses &c., and afterwards new houses &c. are built, he may lawfully continue the trade, though a nuisance to the new comers.

The 1 & 2 Geo. IV. c. 41, respecting furnaces to steam-engines, enacts, that if it shall appear to the court by which judgment ought to be pronounced in case of conviction on any such indictment, that the grievance may be remedied by altering the construction of the furnace, the court may, without the consent of the prosecutor, make such order touching the premises as shall be thought expedient for preventing the nuisance in future, before passing final sentence upon the defendant.

Exposing a person infected with contagious disease in a public thoroughfare has been held to be a misdemeanor.

The keeping of *disorderly houses, bawdy houses, or gaming houses, stage plays, unlicensed booths and stages for rope-dancers, mountebanks*, and the like, are prohibited by various acts of parliament.

Keeping a gaming or bawdy house is a misdemeanor at common law. And by the 3 Geo. IV. c. 114, the court may sentence the offender to imprisonment, with hard labour, for any term not exceeding the term for which such court may now imprison for such offence, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders by any law in force. And by 58 Geo. III. c. 70, overseers are required to prosecute the keepers of bawdy houses.

By the 10 Geo. II. c. 28, all places for the exhibition of stage entertainments must be licensed.

Lotteries.—By 42 Geo. III. c. 119, all lotteries called *little-goes* are declared to be public nuisances; and if any one keep an office or place to exercise, or expose to be played, any such lottery, or any lottery whatever not authorized by parliament, or knowingly suffer it to be exercised or played at in his house, he shall forfeit 500*l.*, and be deemed a rogue and vagabond. And if any one promise to pay any money or goods on any contingency relative to such lottery, or publish any proposal respecting it, he shall forfeit 100*l.*

Justices of the peace, upon complaint, may empower any person by day, and in the night in the presence of a constable, to break open doors and apprehend offenders; and if any one resist, he shall be deemed a rogue and vagabond.

The *making, selling, or firing squibs and other fireworks* is prohibited by the 9 & 10 Wm. III. c. 7, which enacts, that if any person shall make or sell, or offer for sale, any squibs, rockets, serpents, or other fireworks, or implements for making the same, he shall forfeit, upon conviction on oath of two witnesses before a magistrate, 5*l.*, one half to the informer and the other to the poor. And if any person shall permit or suffer any squibs &c. to be thrown or fired out of or in his house, shop, or habitation, or place thereto belonging or adjoining, into any public street or highway, house, or place whatsoever, or if any person

shall throw or fire any squibs &c. into any public street, house, shop, river, highway, road, or passage, he shall forfeit 20s. in like manner.

Erecting powder mills or keeping powder magazines near to a town is a nuisance at common law.

By 12 Geo. III. c. 61, places for making gunpowder must be licensed; as to which, and the carriage of gunpowder, see *ante*, p. 297.

Eaves-dropping, which consisted in listening under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, is a misdemeanor, indictable at sessions, and punishable by fine and finding sureties for good behaviour.

And lastly, a woman that is a *common scold* is a public nuisance to her neighbourhood, and may be indicted and punished.

6. VAGRANCY.—By the 5 Geo. IV. c. 83 (which repeals all former acts on the subject), vagrants are distinguished into three classes: 1. Idle and disorderly persons; 2. Rogues and vagabonds; and 3. Incorrigible rogues.

1. *Idle and Disorderly Persons*.—Every person being able wholly or in part to maintain himself or herself and family, by work or other means, and wilfully refusing or neglecting so to do, by which he or she or any of his or her family shall have become chargeable to any parish, township, or place;—every person returning to and becoming chargeable to any parish from whence he or she shall have been legally removed, unless he or she shall produce a certificate of the church-wardens and overseers of the poor of some other parish, thereby acknowledging him or her to be settled there;—every petty chapman or pedlar wandering abroad and trading, without being duly licensed or authorized by law;—every common prostitute wandering in the public streets or highways, or in any place of public resort, and behaving in a riotous or indecent manner;—and every person wandering abroad, or placing himself or herself in any public place to beg or gather alms, or causing or procuring or encouraging any child or children so to do, shall be deemed an *idle and disorderly person*. And any justice of the peace may commit such offender to the house of correction, there to be kept to hard labour for any time not exceeding one calendar month.

2. *Rogues and Vagabonds*.—Every person committing any of the offences hereinbefore mentioned after having been convicted as an idle and disorderly person;—every person pretending to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of her majesty's subjects;—every person wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself or herself;—every person wilfully exposing to view in the street, road, highway, or public place, any obscene print, picture, or other indecent exhibition;¹—every person wilfully, openly, lewdly, and obscenely exposing his person in any street, road, or public highway, or in the view thereof, or in any place of

¹ By the 1 & 2 Vict. c. 83, the exposing or causing to be exposed to public view in the window or other part of any shop or other building in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition, shall be deemed an exposing within the meaning of this act.

public resort, with intent to insult any female;—every person wandering abroad and endeavouring by the exposure of wounds or deformities to obtain or gather alms;—every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence;—every person running away and leaving his wife or children chargeable to any parish;—every person playing or betting in any street, road, highway, or other open and public place, at or with any table or instrument of gaming, at any game or pretended game of chance;—every person having any picklock key, crow, jack, bit, or other implement, with intent feloniously to break into any dwelling-house, warehouse, coach-house, stable, or out-building, or being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or having upon him or her any instrument, with intent to commit any felonious act;—every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose; every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony;—and every person apprehended as an idle and disorderly person, and violently resisting any constable or other peace officer so apprehending, and being subsequently convicted of the offence for which he or she shall have been so apprehended, shall be deemed a *rogue and vagabond*. And any justice of the peace may commit such offender to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months; and every such picklock key, crow, jack, bit, and other implement, and every such gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, and every such instrument as aforesaid, shall become forfeited.

3. *Incorrigible Rogues*.—Every person breaking or escaping out of any place of legal confinement before the expiration of the term for which he or she shall have been committed by virtue of this act;—every person committing any offence against this act which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be, and duly convicted thereof;—and every person apprehended as a rogue and vagabond, and violently resisting any constable or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended, shall be deemed an *incorrigible rogue*. And any justice of the peace may commit such offender to the house of correction, there to remain until the next general or quarter sessions of the peace; and every such offender shall be there kept to hard labour during the period of his or her imprisonment.

Any person may apprehend vagrants; and all constables and other persons refusing to assist are liable to a forfeiture of 5*l*.

Any justice of the peace, upon oath made before him that any person hath committed or is suspected to have committed any offence against this act, may issue his warrant to apprehend and bring before him the person so charged.

Any constable, peace officer, or other person apprehending any person charged with being an *idle and disorderly person*, or a *rogue and vagabond*, or an *incorrigible rogue*, may take any horse, mule, ass, cart, car, caravan, or other vehicle, or goods in the possession or use of such person, and may take the same as well as such person before some justice of the peace; who may order the offender to be searched, and his trunks, boxes, bundles, parcels, or packages to be inspected, and may order any money which may be found to be applied towards the expence of apprehending and maintaining such offender during the time for which he shall be committed; and if money sufficient be not found, may order a part or the whole of such other effects then found to be sold, and the produce applied as aforesaid; and the overplus, after deducting the charges of such sale, shall be returned to the offender.

When any justice shall commit any *incorrigible rogue* to the house of correction till the next sessions, or when any *idle and disorderly person*, *rogue and vagabond*, or *incorrigible rogue* shall give notice of his intention to appeal, the justice shall require the person by whom such offender was apprehended, and the persons whose evidence shall appear material to prove the offence, to become bound in recognizances to appear at the sessions; and the sessions may order the treasurer of the county to pay such sums as shall seem reasonable to reimburse their expences and loss of time. If they refuse to enter into such recognizance, the justice may commit them to the common gaol.

When any *incorrigible rogue* shall have been committed until the next sessions, the sessions may examine into the circumstances of the case, and order such offender to be further imprisoned and kept to hard labour for not exceeding one year, and, if they think fit, to be punished (not being a female) by whipping.

Any constable or other peace officer neglecting his duty, or any person disturbing or hindering any constable or other peace officer in the execution of this act, shall forfeit not exceeding 5*l*.

Any justice of peace, upon information on oath that any person hereinbefore described to be an *idle and disorderly person*, or a *rogue and vagabond*, or an *incorrigible rogue*, is suspected to be concealed in any house kept for the reception, lodging, or entertainment of travellers, may authorize any constable or other person to enter at any time into such house, and apprehend every such offender found therein.

Any person aggrieved by the determination of a justice may appeal to the next sessions, giving notice thereof within seven days, and entering into a recognizance with sufficient surety to prosecute such appeal. And by 1 & 2 Vict. c. 38, in case any person who has appealed and been discharged out of custody, shall not appear and prosecute such appeal, the sessions or any justice of peace may issue a warrant for the apprehension and committal of such person for such period of time as, together with the days during which he shall have been imprisoned (if any) previous to his being discharged, shall complete the full term for which he was adjudged to be imprisoned at the time of his conviction.

Nothing herein is to prevent any visiting justice from granting a certificate enabling any person discharged from prison to receive alms or relief upon his route to his place of settlement; provided such certificate be made under the direction of the acts for the regulation of

gaols, &c. But if any person having such certificate shall act contrary to the directions thereof, or shall loiter upon his route, or deviate therefrom, he shall be deemed a *rogue and vagabond*.

No justice of peace &c. shall grant to any other than persons entitled thereto under the 43 Geo. III. (intituled "An act for the relief of soldiers, sailors, and marines, and of the wives of soldiers," &c.) any certificate or other instrument enabling such persons to ask alms or relief in their route to any place, or for any other purpose whatever: and persons asking alms or relief under any certificate hereby prohibited are liable to be declared idle and disorderly persons.

Every person convicted under this act shall be deemed to be actually chargeable to the parish, and shall be liable to be removed to the place of his last legal settlement by the order of two justices.

7. GAMING.—Gaming is not restrained by the common law, unless it be so practised as to become injurious to public morals. But the legislature has, in many instances, laid it under particular restraints.

Wagers in general by the common law were lawful contracts, and might be recovered in a court of justice, if they were not made upon games, or were not such as were likely to disturb the public peace, or to encourage immorality, or to affect the interests, characters, and feelings of persons not parties to the wager, or were not contrary to sound policy or the general interests of the community.

But wagers relating to the present or future price of stocks were declared illegal and void by the 7 Geo. II. c. 1.

And now, by 8 & 9 Vic. c. 109, § 18, it is enacted, "That all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

Wagers being thus rendered void and irrecoverable, it became necessary to set aside the practice of trying questions in the courts of law by means of feigned issues. Sec. 19, reciting that "whereas many important questions are now tried in the form of feigned issues, by stating that a wager was ~~made~~ made between two parties interested in respectively maintaining the affirmative and the negative of certain propositions, but that such questions may be as satisfactorily tried without such form," enacts, that in every case where any court of law or equity may desire to have any question of fact decided by a jury, it shall be lawful for such court to direct a writ of summons to be sued out by such person or persons as such court shall think ought to be plaintiff or plaintiffs, against such person or persons as such court shall think ought to be defendant or defendants therein, in the form set forth in the schedule to the act, with such alterations as the court may think proper; and thereupon all the proceedings shall go on in

the same manner as is now practised in proceedings under a feigned issue.

Divers statutes have been passed from time to time to restrain *excessive* as well as *deceitful* gaming; the chief of which, indeed, have been lately repealed by the act already quoted, 8 & 9 Vic. c. 109, but a short recapitulation of their principal provisions will be necessary for the proper elucidation of the law as it now exists.

By the 16 Car. II. c. 7, any person losing more than 100*l.* at one time at any game, upon tick or credit, or otherwise than for ready money, was not compellable to pay the same, and the winner forfeited treble the value, one half to the owner and the other to the informer.

By 9 Ann. c. 14, if any person at one time or sitting lost more than 10*l.*, and had paid it or any part thereof, he might recover it back from the winner with costs; and in case the loser did not sue within three months, any other person might sue for and recover the same and treble value with costs, half to the person suing and half to the poor. The forfeitures of this act (as amended by 18 Geo. II. c. 34) might be recovered in a court of equity; and every person liable to be sued was compelled to answer on oath any bill preferred against him for discovering the sum of money or other thing so won. All securities given for money won or lost at play were declared by this act utterly void; but the 5 & 6 Wm. IV. c. 41 enacts that such securities shall not be considered absolutely void, but as given for an illegal consideration.

And by the same act, 9 Ann. c. 14, any person winning any sum of money or valuable thing by any *fraud* or *ill practice* in playing at cards, dice, &c., or winning at any one time or sitting more than 10*l.*, was liable, on being convicted upon indictment or information, to forfeit five times the value, and in case of such ill practice, to be deemed infamous, and to suffer corporal punishment as in cases of perjury; and such penalty might be recovered by any person suing for the same by action.

Again, by 18 Geo. II. c. 34, any person winning or losing at play, or by betting, the sum or value of 10*l.* at any one time, or of 20*l.* within twenty-four hours, was liable to be indicted within six months, either before the Queen's Bench, assizes, or gaol delivery, and fined five times the value.

It had been held that horse-races, foot-races, cock-fighting, cricket-matches, &c., were all games within the meaning of these statutes; and a number of actions were brought by common informers for the recovery of penalties amounting to many thousands of pounds on account of bets which had been made at such games, more especially at horse-races. To stay the proceedings upon these actions, it became necessary to pass an act of parliament, the 7 & 8 Vic. c. 3; and a committee of the House of Lords was appointed to revise the laws relating to gaming, which gave rise to the 8 & 9 Vic. c. 109, before referred to.

This act, reciting that the laws heretofore made in restraint of unlawful gaming had been found of no avail to prevent the mischiefs which may happen therefrom, and that they also applied to sundry games of skill from which the like mischiefs cannot arise, repeals

the before-mentioned statute 16 Car. II. c. 7 entirely; also so much of the 9 Anne, c. 14 as was not altered by the 5 & 6 Wm. IV. c. 41, and of the 18 Geo. II. c. 34 as related to the said act of Queen Anne, or as rendered any person liable to be indicted and punished for winning or losing at play, or by betting, at any one time, the sum or value of 10*l.*, or within the space of twenty-four hours the sum or value of 20*l.*; also so much of the 33 Hen. VIII. c. 9, whereby any game of mere skill, such as bowling, coytig, cloyshcayls, half bowl, tennis, or the like, is declared an unlawful game, or which enacts any penalty for playing at any such game of skill, with sundry other parts of the same act which will be presently mentioned. It then makes the offence of *cheating at play* punishable in the same manner as the obtaining money by false pretences; gives additional powers for the suppression of *common gaming houses*; and provides for the *licensing* of public billiard tables and bagatelle boards.

Cheating at Play.—By the 17th section of the 8 & 9 Vic. c. 109, “ Every person who shall, by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wages, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person, to himself or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and, being convicted thereof, shall be punished accordingly.”

Common Gaming-Houses.—The 33 Hen. VIII. c. 9, § 11, and 30 Geo. II. c. 24, enact, that no person, of what degree, quality, or condition soever, shall by himself or agent, for hire, gain, lucre, or living, keep any house for playing at any game prohibited by any statute, or any new unlawful game afterwards invented, on pain of 40*s.* a day, and 6*s.* 8*d.* for every person frequenting such house. But by the act before-mentioned, 8 & 9 Vic. c. 109, so much of the 33 Hen. VIII. c. 9 as requires the mayors, sheriffs, bailiffs, constables, and other head officers within every city, borough, and town, to make search weekly, or at the farthest once a month, in all places where houses, alleys, plays, or places of dicing, carding, or gaming shall be suspected to be had, kept, and maintained, and also so much of the said act as makes it lawful for any master &c. to license his servants or family to play at cards, dice, or tables, or any unlawful game, as therein more fully set forth, are repealed.

By sec. 3, the powers given by former acts to justices of peace &c. to enter any place where unlawful games are suspected to be holden may be exercised (except within the Metropolitan Police District) by constables under their warrant, who are thereby empowered to enter such places (and, if necessary, to use force for making such entry), and to arrest, search, and bring before a justice of peace all such persons found therein as might have been arrested by such justice of peace had he been personally present.

And by sec. 4, the owner or keeper of any common gaming-house, and every person having the care or management thereof, and also

every banker, croupier, and other person who shall act in any manner in conducting the business of any common gaming-house, shall, on conviction thereof, by his own confession, or by the oath of one or more credible witnesses, before any two justices of the peace, beside any penalty or punishment to which he may be liable under the provisions of the said act of Hen. VIII., be liable to forfeit and pay such penalty, not more than 100*l.*, as shall be adjudged by the justices before whom he shall be convicted; or, in the discretion of the justices before whom he shall be convicted, he may be committed to the house of correction, with or without hard labour, for any time not more than six calendar months; and on nonpayment of any penalty so adjudged, and of the reasonable costs and charges attending the conviction, the same shall be levied by distress and sale of the goods and chattels of the offender, by warrant under the hand and seal of one of the convicting justices. Provided always, that nothing herein contained shall prevent any proceeding by indictment against the owner or keeper or other person having the care or management of a common gaming-house; but no person who shall have been summarily convicted of any such offence shall be liable to be proceeded against by indictment for the same offence.

And by sec. 5, it shall not be necessary, in support of any information for gaming in, or suffering any games or gaming in, or for keeping or using or being concerned in the management or conduct of a common gaming-house, to prove that any person found playing at any game was playing for any money, wager, or stake.

In the Metropolitan Police District, the commissioners of police may authorize a superintendent with constables to enter any place reported to them as being kept or used as a common gaming-house, and to take into custody all persons there found, and to seize all tables and instruments of gaming, as also all moneys and securities for money found therein; and such police superintendent &c. may search all parts of the house, room, or place, where he shall suspect that tables or instruments of gaming are concealed, and all persons whom he shall find therein, and seize all tables and instruments of gaming which he shall so find.—Sec. 7.

And where any cards, dice, balls, counters, tables, or other instruments of gaming used in playing any unlawful game shall be found in any such house, room, or place suspected to be used as a common gaming-house, or about the person of any of those who shall be found therein, it shall be evidence, until the contrary be made to appear, that such house, room, or place is used as a common gaming-house, and that the persons found in the room or place where such tables or instruments of gaming shall have been found were playing therein, although no play was actually going on in the presence of the superintendent or constable entering the same, and the police magistrate or justices before whom any person shall be taken by virtue of the warrant or order, may direct all such tables and instruments of gaming to be forthwith destroyed.—Sec. 8.

For the more effectual prosecution of the keepers of common gaming-houses, it is enacted by sec. 9, That every person who shall have been concerned in any unlawful gaming, and who shall be ex-

amined as a witness before any police magistrate or justice of the peace, or upon trial of any indictment or information against the owner or keeper or other person having the care or management of any common gaming-house, touching such unlawful gaming, and who upon such examination shall make true and faithful discovery to the best of his or her knowledge of all things as to which he or she shall be so examined, and shall thereupon receive from the magistrate or justice of the peace or judge of the court by or before whom he or she shall be so examined a certificate in writing to that effect, shall be freed from all criminal prosecutions, and from all forfeitures, punishments, and disabilities, to which he or she may have become liable for any thing done before that time in respect of such unlawful gaming.

Subscription club-houses for gambling are declared by this act to be common gaming houses. Sec. 2, reciting that "doubts had arisen whether certain houses, alleged to be open for the use of the subscribers only, or not open to all persons desirous of using the same, are to be deemed common gaming-houses, declares and enacts, That, in default of other evidence proving any house or place to be a common gaming-house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming-house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play, or bet; and every such house or place shall be deemed a common gaming-house, such as is contrary to law and forbidden to be kept by the said act of King Henry the Eighth, and by all other acts containing any provision against unlawful games or gaming-houses.

Billiard Licences.—The justices at their General Annual Licensing Meeting for granting licences to innkeepers, &c., may grant billiard licences to fit and proper persons for the keeping of public billiard tables, bagatelle boards, or instruments used in any game of the like kind: such licences to be transferable in the same manner as victuallers' licences, and in force for one year, in Middlesex and Surrey from the 5th of April, and elsewhere from the 10th of October. Persons giving notice of their intention to apply for a licence are to receive notice of the licensing days, as in the case of licences for the sale of exciseable liquors; and the justices' clerk is entitled to 5s. for the licence, and 1s. for the notice. Penalty for demanding more, 5*l.*—8 & 9 Vic. c. 109, § 10.

Every person keeping any such public billiard table or bagatelle board, &c. without being duly licensed so to do, and not holding a victualler's licence for the premises where such billiard table &c. is kept or used, and also every person licensed under this act who shall not during the continuance of such billiard licence put and keep up the words "*Licensed for Billiards*," legibly painted in some conspicuous place near the door and on the outside of the house specified in the licence, shall be liable to be proceeded against as the keeper of a common gaming-house, and, beside any penalty or punishment to

which he may be liable if convicted of keeping a common gaming-house, shall, on conviction before any police magistrate or two justices of the peace, be liable to pay a penalty of not more than 10*l.* for every day on which such billiard table &c. shall be used, or he may be committed to the house of correction, with or without hard labour, for any time not more than one calendar month. But no person who shall have been thus summarily convicted shall be liable to be further proceeded against by indictment for the same offence.—§ 11.

Every person licensed under this act who shall be convicted of any offence against the tenor of his licence, shall be liable to the same penalties and punishments, in the case of a first, second, or third offence respectively, to which persons licensed under the act 9 Geo. IV. c. 61 are respectively liable for offences against the tenor of the licence granted to them, or as near thereunto as the nature of the case will allow; and all the provisions of the last-mentioned act with respect to convictions, penalties, and proceedings, are made applicable to offences against the tenor of the licences under this act.—§ 12.

Every person keeping any public billiard table, bagatelle board, &c., whether he be the holder of a victualler's licence or be licensed under this act, who shall allow any person to play at such table, board, &c. after one and before eight of the clock in the morning, or at any time on Sundays, Christmas Day, or Good Friday, or any day appointed to be kept as a public fast or thanksgiving; and every person holding a victualler's licence who shall allow any person to play at such table, board, or instrument kept on the premises specified in such victualler's licence at any time when such premises are not by law allowed to be open for the sale of wine, spirits, or beer, shall be liable to the penalties herein provided in the case of persons keeping such public billiard table, bagatelle board, or instrument as aforesaid for public use without licence. And during those times when play is not allowed by this act, every house licensed under this act, and every billiard room in every house specified in any victualler's licence, shall be closed; and the keeping of the same open, or allowing any person to play thereat, at any of the times or on any of the days during which such play is not allowed by this act, shall be deemed an offence against the tenor of the licence of the person so offending.—§ 13.

It shall be lawful for all constables and officers of police to enter into any house, room, or place where any public table or board is kept for playing at billiards, bagatelle, or any game of the like kind, when and so often as they shall think proper; and every person licensed under the said act 9 Geo. IV. c. 61, or under this act, who shall refuse to admit any such constable or officer of police into such house, room, or place shall, on conviction before a police magistrate or any two justices of the peace, be deemed guilty of an offence against the tenor of his licence, whether the same be a billiard licence or a victuallers' licence, and shall be punished accordingly.—§ 14.

An appeal from summary convictions under this act lies to the quarter sessions.—§ 15.

By 12 Geo. II. c. 28, 13 Geo. II. c. 19, and 18 Geo. II. c. 39, all *private lotteries* by tickets, cards, or dice, and particularly the games of *faro*, *basset*, *ace of hearts*, *hazard*, *passage*, *rolly-polly*, and other games

with dice (except backgammon) are prohibited, under a penalty of 200*l.* for him who shall erect such lotteries, and 50*l.* a time for the players. .

By 5 Geo. IV. c. 83, every person playing or betting in any public place, at or with any table or instrument of gaming, at any game or pretended game of chance, may be treated as a rogue and vagabond. See *ante*.

9. **DRUNKENNESS.**—By 4 Jac. I. c. 5, and 21 Jac. I. c. 7, §§ 1, 3, every person who shall be drunk, and shall thereof be convicted before a justice of peace, on view, confession, or oath of one witness, shall forfeit for the first offence 5*s.*, to be paid within one week after conviction to the churchwardens to the use of the poor, and on neglect or refusal it shall be levied by distress, and in case of his inability he shall be committed to the stocks for six hours.

By the same acts, any person, on a second conviction, shall be bound with two sureties in 100*l.* for his good behaviour.

10. **LEWDNESS.**—A publication of obscene matter, either in print, writing, or pictures, is a species of *libel*, and a misdemeanor, punishable at common law with fine and imprisonment. So any scandalous public indecency, such as the public exposure of the naked person, or the buying and selling of wivcs, is a misdemeanor, punishable at common law with fine and imprisonment. See also the Vagrant Act, *ante*.

For the laws relative to bastardy, see *ante*.

11. **CRUELTY TO ANIMALS.**—By the 5 & 6 Wm. IV. c. 59, the following provisions are enacted :—

Ill-treating or improperly driving Cattle, &c.—If any person shall wantonly and cruelly beat, ill-treat, abuse, or torture any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, dog, or other cattle or domestic animal, or if any person who shall drive any cattle or other animal shall, by negligence or ill-usage in the driving thereof, be the means whereby any mischief or injury shall be done by such cattle or animal, every such offender, being convicted before one justice of the peace, shall for every such offence forfeit and pay, over and above the amount of the damage or injury done thereby (which damage shall be determined by such justice), such a sum not exceeding 40*s.* nor less than 5*s.* with such costs as to the justice shall seem meet; or, in default of payment, be committed to the common gaol or house of correction for not exceeding fourteen days. But nothing in this act shall prevent any remedy by action against the employer of such offender where the amount of damage is not sought to be recovered by virtue of this act.

Keeping Places for Dog or Cock-fighting, Bull, Bear, or Badger baiting, &c.—If any person shall keep or use any house, room, pit, ground, or other place for the purpose of running, baiting, or fighting any bull, bear, badger, dog, or other animal (whether of domestic or wild nature), or for cock-fighting, or in which any bull, bear, badger, dog, or other such animal shall be baited, run, or fought, every such person shall be liable to a penalty not exceeding 5*l.* nor less than 10*s.* for every day in which he shall keep and use such house &c. for any of the purposes aforesaid. The person who shall act as manager of any such house &c., or who shall assist in such baiting, fighting, or

bull-running, shall be deemed to be the keeper, and liable to all the penalties by this act imposed.

Keeping Cattle Impounded without Food.—Every person who shall impound or confine, or cause to be impounded or confined, any horse, ass, or other cattle or animal, in any common pound, open pound, or close pound, or in any inclosed place, shall provide such horse, ass, and other cattle or animal, daily with good and sufficient food for so long as the same shall remain so impounded or confined; and shall recover from the owner not exceeding double the value of the food so supplied, by proceedings before any justice of the peace of the jurisdiction, in like manner as any penalty may be recovered under this act, and which value of the food so supplied such justice may ascertain and enforce as aforesaid. Every person who shall have supplied such food may, instead of proceeding for the recovery of the value as last aforesaid, after the expiration of seven clear days from the time of impounding the same, sell such horse, ass, or other cattle or animal, openly at any public market (after having given three days public printed notice thereof) for the most money that can be got for the same, and apply the produce in discharge of the value of such food so supplied and of the expences attending the sale, rendering the over-plus (if any) to the owner.

And in case any person so impounding or confining any horse, ass, or other cattle or animal, shall neglect to find and provide such daily good and sufficient food and nourishment, he shall, for every day during which he shall so neglect, forfeit and pay the sum of 5s., recoverable before any justice of the peace in like manner.

In case any horse, ass, or other cattle or animal shall remain impounded without sufficient food more than twenty-four hours, any person may enter such pound or other inclosed place as often as may be necessary, and supply such cattle or animal with food during so long as the same shall remain impounded or confined, without being liable to an action of trespass or other proceeding.

Slaughtering Horses, &c.—If any person keeping or using any house or place for slaughtering or killing horses or cattle, shall slaughter or kill any horse or cattle (not being for butchers' meat) without having previously taken out a licence, and affixed over the outer gate or entrance the board and inscription prescribed by the 26 Geo. III. c. 71 (for regulating houses and other places kept for the purpose of slaughtering horses), he shall for every such offence forfeit not exceeding 5l. nor less than 10s., or be liable to the punishment in the said act provided.

And every person keeping or using any house or place for slaughtering horses &c. shall kill every such horse or cattle within three days after the same shall have been purchased by or delivered to him for the purpose of slaughter, and shall in the meantime provide them with good and sufficient daily food and nourishment, and shall also, at the time of receiving such horse or cattle, enter in the book by the said act required to be kept, a correct description of the colour and gender of the horse, with the date of receiving the same. And if any such horse or other cattle so received shall be employed in any manner of work, or shall not be supplied with good and sufficient food during

the time he shall survive, every such person shall for every such offence forfeit any sum not exceeding 40s. nor less than 5s. for every day such offence shall be committed or continued.

Any constable or other peace officer, or the owner of the cattle or animal, upon view of the commission of any of the offences against this act, or upon the information of any other person who shall declare his name and place of abode, may seize and forthwith convey the offender before a justice of peace. And if the person apprehended refuse to discover his name and place of abode to the justice, he shall be conveyed to the common gaol or house of correction for not exceeding one calendar month.

The prosecution of every offence under this act shall be commenced within three calendar months; and the evidence of the parties complaining or informing, and also of any overseer or inhabitant of the parish, shall be admitted in proof thereof.

Where the sum awarded for the damage or injury done, or imposed as a penalty, shall not be paid either immediately or within the time appointed, the justice (unless where otherwise specially directed) may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for not exceeding fourteen days where the amount with costs shall not exceed 5*l.*, and for any term not exceeding two calendar months where the amount with costs shall exceed 5*l.*

All pecuniary penalties recovered before a justice of peace under this act shall be distributed, one moiety to the overseers of the poor and the other, with full costs, to the person who shall inform and prosecute, or to such other person as to the justice shall seem fit; and all sums ordered to be paid, as the amount of the damage or injury, shall be paid to the person who shall have sustained the same.

Persons dissatisfied with any adjudication or conviction of a justice of peace under this act may appeal to the quarter sessions.

The word "*cattle*," when used alone in this act, is to be understood and taken for any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, or lamb, or any other cattle, or domestic animal.

12. REFUSING TO SERVE AN OFFICE.—To refuse, without lawful excuse or exemption, to serve a public office (such as that of constable or overseer) is a misdemeanor at common law, punishable with fine and imprisonment.

13. TAKING UP DEAD BODIES.—This also is a misdemeanor punishable with fine and imprisonment. But by 2 & 3 Wm. IV. c. 75, § 7, executors and others having lawful possession of the body of a deceased person may in certain cases, and subject to certain restrictions, permit anatomical examination. See *ante*, p. 465.

14. OFFENCES RELATING TO GAME.—The 1 & 2 Wm. IV. c. 36, is now the principal act on the subject of game; for the statutes repealed by its first section comprised, in fact, the whole of the game laws previously in force, with the exception only of those relating to game certificates, and the 9 Geo. IV. c. 69, as to poaching in the night time. We shall first dispose of the subject of game certificates; that of night poaching will naturally follow the analogous provisions of the new act as to trespasses in pursuit of game in the day-time.

Game Certificates.—Although the 1 & 2 Wm. IV. c. 32 abolished the qualifications to kill game, it made no alteration in the law relative to certificates; and for any person to be entitled to kill game during the sporting season, it is necessary he should obtain a game certificate from the clerk of the peace of the county or district where he resides, otherwise he will be liable, under the 52 Geo. III. c. 93, § 12, to a penalty of 20*l.* over and above the full duty of 3*l.* 13*s.* 6*d.*

And to take or kill, in any part of Great Britain, any snipe, quail, landrail, woodcock, or rabbit, a certificate is necessary; except to take woodcocks or snipes with nets or springs, or rabbits by the proprietor in an inclosed ground, or by the tenant or his servant.

Tax collectors, gamekeepers, landlords, occupiers, and lessees of the land, are empowered to demand the certificate of sportsmen, which they may read or take a copy of. In case no certificate is produced, the person demanding it may require such person to declare his name, residence, and place where he took out his certificate; and if he refuse to show his certificate, or give a false certificate, or false name, residence, or place of assessment, he shall forfeit 20*l.*

And by 1 & 2 Wm. IV. c. 32, § 23, if any person shall kill or take any game, or use any dog, gun, net, or other engine or instrument for the purpose of searching for or killing or taking game, such person not being authorized so to do for want of a game certificate, he shall, on conviction before two justices, forfeit for every such offence such sum of money not exceeding 5*l.* as the justices shall seem meet, together with the costs of the conviction. And no person so convicted shall be thereby exempted from any penalty or liability under any statute relating to game certificates, but the penalty imposed by this act shall be deemed cumulative.

No gamekeeper's certificate, for which a less duty than 3*l.* 13*s.* 6*d.* is paid, protects him beyond the limits included in his appointment.

A person without a certificate may, under the 54 Geo. III. c. 141, assist, by beating the bushes or otherwise, a sportsman having a game certificate on his own account, and who does not sport by virtue of a deputation, and who uses *his own* dog and gun. But a person assisting a sportsman using *other dogs than his own* would be liable to the penalties of sporting without a certificate.

By 7 & 8 Geo. IV. c. 48, persons having paid the duty on game certificates in Great Britain are exempted from the duty in Ireland; and persons having taken out a certificate in Ireland may kill game in Great Britain upon paying the additional duty only.

NEW GAME ACT.—We now come to the act 1 & 2 Wm. IV. c. 32, which came into operation on the 1st November, 1831. The first section repeals the acts previously in force so far as they relate to England, to which part of the kingdom only the act applies. By the 2d section, the word *game*, as used in the act, includes hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards; which is also the interpretation applied to it by the 9 Geo. IV. c. 69.

Seasons for killing Game.—If any person shall take or kill any game, or use any dog, gun, net, or other instrument for the purpose of killing or taking game on a Sunday or Christmas-day, he shall, on conviction before two justices, forfeit for every offence such sum of

money not exceeding 5*l.* as to the justices shall seem meet, together with the costs of the conviction. And if any person shall kill or take any

<i>Partridge</i>	- - - - -	between	1st February	and	1st September;
<i>Pheasant</i>	- - - - -	—	1st February	—	1st October;
<i>Black Game</i>	in Somerset or Devon, or	}	—	10th December	— 12th August;
	in the New Forest, Southampton				
— or elsewhere	- - - - -	—	10th December	—	20th August;
<i>Grouse</i> , commonly called <i>Red Game</i>	- - - - -	—	10th December	—	12th August;
<i>Bustard</i>	- - - - -	—	1st March	—	1st September;

every such person shall, on conviction before two justices, forfeit for every head of game so killed or taken such sum not exceeding 1*l.* as to the justices shall seem meet, together with the costs of the conviction.

And if any person, with intent to destroy or injure any game, shall put or cause to be put any poison or poisonous ingredient on any ground (whether open or inclosed) where game usually resort, or in any highway, he shall, on conviction before two justices, forfeit such sum of money not exceeding 10*l.* as to the justices shall seem meet, together with the costs of the conviction.

And if any person *licensed* to deal in game by virtue of this act shall buy or sell, or knowingly have in his house, shop, stall, possession, or control, any bird of game after the expiration of ten days (one inclusive and the other exclusive) from the respective days on which it is unlawful to kill or take such birds; or if any person *not licensed* shall buy or sell any bird of game after the expiration of ten days, or shall knowingly have in his house, possession, or control, any bird of game (except birds kept in a mew or breeding-place) after the expiration of forty days (one inclusive and the other exclusive) from the respective days on which it is unlawful to kill or take such birds; every such person shall, on conviction before two justices, forfeit for every head of game so bought or sold, or found in his house, shop, possession, or control, such sum of money not exceeding 1*l.* as to the justices shall seem meet, together with the costs of the conviction.

Rights of Landlords and Tenants as to Game.—As a consequence of the repeal of all the former acts relating to game, though there is no express enactment in this act to the purpose, on all *future* leases the tenant is entitled to take the game on the land in his occupation, unless restricted by the terms of his lease; but as to then *existing* leases, the following provisions are made by the act.

Where any person shall occupy any land under any lease or agreement made before the passing of the act (except in the cases hereinafter next excepted), the lessor or landlord shall have the right of entering upon such land, or of authorizing any other persons having annual game certificates to enter upon such land, for the purpose of killing or taking the game thereon. And no person occupying any land on any lease or agreement, either for life or for years, made previously to the passing of this act, shall have the right to kill or take the game on such land, except where the right has been expressly granted or allowed to him by such lease or agreement, or except where upon the original granting or renewal of such lease or agreement a fine has been taken, or except where in the case of a term for years such lease or agreement has been made for a term exceeding twenty-one years.

But nothing in this act shall give any right to take the game where

by any agreement it hath been otherwise reserved or given, nor prejudice the rights of any lord of a manor, nor her majesty's forest rights, nor give to any owners of any cattlegates or rights of common any interest or privilege which they had not before.

And where the lessor or landlord shall have reserved to himself the right of killing the game, he may authorize any other person having game certificates to enter upon the land for the purpose of pursuing and killing game thereon.

Where the right of killing the game is by this act given to any lessor or landlord in exclusion of the right of the occupier, or where such exclusive right hath been specially reserved by or shall belong to the lessor, landlord, or any person other than the occupier of the land, then if the occupier shall pursue, kill, or take any game upon such land, or give permission to any other person so to do, without the authority of the landlord or other person having the right, he shall, on conviction before two justices, forfeit for such pursuit such sum of money not exceeding 2*l.*, and for every head of game so killed or taken such sum of money not exceeding 1*l.*, as to the justices shall seem meet, together with the costs of the conviction.

Gamekeepers.—Any lord of a manor, lordship, or royalty, or steward of the crown of any manor, lordship, or royalty appertaining to her majesty, may appoint gamekeepers to preserve or kill the game within the limits of any manor &c. for the use of such lord or steward, and may authorize them within the said limits to seize and take for the use of the lord or steward all such dogs, nets, and other engines and instruments as shall be used by any uncertificated person.

And any such lord of a manor &c., or steward of the crown, may appoint and depute any person (whether acting as a gamekeeper to any other person or not, or whether retained and paid for as the male servant of any other person or not) to be a gamekeeper for such manor &c., or for any division or district thereof, and authorize such person, as gamekeeper, to kill game within the same for his own use, or for the use of any other person or persons who may be specified in such appointment or deputation, and also give to such person all such powers as may by this act be given to any gamekeeper of a manor. And no person so appointed gamekeeper, and empowered to kill game for his own use or for the use of any other person so specified, and not killing any game for the use of the lord or steward, shall be deemed or be entered or paid for as the gamekeeper or male servant of such lord or steward.

Persons entitled to kill game on lands in Wales of the yearly value of 500*l.*, to which they are beneficially entitled in their own right, (if not within the bounds of a manor, or enfranchised) may appoint gamekeepers to preserve or kill game on such lands, and also on the lands in Wales of any other person who, being entitled to kill game thereon, shall by writing authorize them so to do.

Appointments and deputations of gamekeepers must be registered with the clerk of the peace.

Sale of Game.—Justices are to hold a special session in July for the purpose of granting annual *licences* to deal in game; and the majority of justices assembled may grant to any person being a householder or

keeping a shop or stall within their division (and not being an inn-keeper or victualler, or licensed to sell beer by retail, nor being the owner, guard, or driver of a mail coach or other public conveyance, nor being a carrier or higgler, nor in the employment of any of the above-named) a licence to buy game from any person who may lawfully sell game by virtue of this act, and also to sell the same at one house, shop, or stall only kept by him. Every licensed person must put up outside his house, shop, or stall, a board with his christian and surname and the words *Licensed to deal in Game* thereon.

Every licensed person shall annually, and before he deal in game under such licence, obtain a *certificate* on payment of a duty of 2*l.*, to be in force for the same period as his licence; such duty to be paid to the collectors of assessed taxes in like manner as the duties on game certificates are payable. The receipt for the duty to be free from stamp duty, and be delivered on payment of one shilling; which receipt is to be exchanged for a certificate, as is done with game certificates. Penalty for any licensed person dealing in game before he has obtained his certificate, 20*l.*

The collectors are to make out lists of persons, their names and places of abode, who have obtained annual licences and certificates, and to show the same to any person at seasonable hours, on payment of 1*s.* The duties on certificates, and the penalty of 20*l.* for dealing without a certificate, are recoverable in the same manner as duties and penalties on game certificates.

Partners carrying on business at one house or shop, need only take out one licence.

If any licensed person is convicted of any offence against this act, his licence is void.

Every certificated person may sell game to any person licensed to deal in game as above mentioned; except that gamekeepers paying a less duty than 3*l.* 13*s.* 6*d.* shall not sell any game, except on the account and with the written authority of their masters.

If any person not having obtained a game certificate (except he be licensed to deal in game according to this act) shall sell or offer for sale any game to any person whatsoever; or if any person authorized to sell game under this act by virtue of a game certificate shall sell or offer for sale any game to any person whatsoever, except to a person licensed to deal in game according to this act; every such offender shall, on conviction before two justices, forfeit for every head of game so sold or offered for sale such sum of money not exceeding 2*l.* as to the justices shall seem meet, together with the costs of the conviction.

But any innkeeper or tavernkeeper, without such licence may sell game for consumption in his own house, such game having been procured from some person licensed to deal in game, and not otherwise.

If any unlicensed person shall buy any game from any person whatsoever, except from a person licensed to deal in game according to this act, or *bonâ fide* from a person affixing to the outside of the front of his house, shop, or stall, a board as aforesaid, every such offender shall, on conviction before two justices, forfeit and pay for every head of game so bought such sum of money not exceeding 5*l.* as to the justices shall seem meet, together with the costs of conviction.

If any licensed person shall buy or obtain any game from any person not authorized to sell game for want of a game certificate, or for want of a licence to deal in game; or if any licensed person shall sell or offer for sale any game at his house, shop, or stall, without such board as aforesaid being affixed to the outside of the front of such house, shop, or stall at the time of such selling or offering for sale, or shall affix or cause to be affixed such board to more than one house, shop, or stall, or shall sell any game at any place other than his house, shop, or stall where such board shall have been affixed; or if any unlicensed person shall pretend, by affixing such board as aforesaid, or by exhibiting any certificate, or by any other device or pretence, to be a person licensed to deal in game; every such offender, being convicted before two justices, shall forfeit such sum of money not exceeding 10*l.* as to the justices shall seem meet, together with the costs of the conviction.

But the buying and selling of game by any person employed by a licensed dealer, and acting in the usual course of his employment and upon the premises where such dealing is carried on, shall be lawful where the same would have been lawful if transacted by such licensed dealer himself; and nothing herein shall prevent any licensed dealer from selling any game which shall have been sent to him to be sold on account of any other licensed dealer.

Destroying or taking the Eggs of Game, &c.—If any person not having the right of killing the game upon any land, nor having permission from the person having such right, shall wilfully take out of the nest, or destroy in the nest upon such land the eggs of any bird of game, or of any swan, wild duck, teal, or widgeon, or shall knowingly have in his house, shop, possession, or control any such eggs so taken, every such person shall, on conviction before two justices, forfeit for every egg so taken or destroyed, or so found in his house, shop, possession, or control, such sum of money not exceeding 5*s.* as to the justices shall seem met, with the costs of the conviction.

Trespassing in Pursuit of Game.—If any person shall commit any trespass by entering or being, *in the day-time*, upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or coney, such person shall, on conviction before a justice of the peace, forfeit and pay such sum of money not exceeding 2*l.* as to the justice shall seem meet, together with the costs of the conviction. And if any persons to the number of five or more together shall commit any trespass by entering or being, *in the day time*, upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or coney, each of such persons shall, on conviction before a justice of the peace, forfeit and pay such sum of money not exceeding 5*l.* as to the justice shall seem meet, together with the costs of the conviction. Any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass, save and except that the leave of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor, or other person shall have the right of killing the game upon such land by virtue of any reservation or otherwise as hereinbefore mentioned. But such landlord, lessor, or other person shall, for the purpose of prosecuting for each of the two of-

fences herein last before mentioned, be deemed to be the legal occupier, whenever the actual occupier shall have given such leave; and the lord or steward of the crown of any manor, lordship, or royalty shall be deemed the legal occupier of the wastes or commons within such manor &c.

And where any person shall be found on any land, or upon any of her majesty's forests, parks, chases, or warrens, *in the day-time*, in search or pursuit of game or woodcocks, snipes, quails, landrails, or coney, it shall be lawful for any person having the right of the game upon such land, or for the occupier, or for any gamekeeper or servant of either of them, or for any person authorized by either of them, or for the warden, ranger, verderer, forester, master-keeper, under-keeper, or other officer of such forest, park, chase, or warren, to require the person so found forthwith to quit the land, and also to tell his christian name and surname and place of abode; and in case such person shall offend by refusing to tell his real name or place of abode, or by giving such a general description as shall be illusory for the purpose of discovery, or by wilfully continuing or returning upon the land, it shall be lawful for the party so requiring, and also for any person acting by his order and in his aid, to apprehend such offender, and convey him as soon as conveniently may be before a justice of the peace; and such offender (whether so apprehended or not), upon being convicted of any such offence before a justice of the peace, shall forfeit such sum of money, not exceeding 5*l.*, as to the justice shall seem meet, together with the costs of the conviction. But no person so apprehended shall, on any pretence whatsoever, be detained for a longer period than twelve hours from the time of his apprehension until he be brought before some justice of the peace; and if he cannot, on account of the absence or distance of the residence of any such justice, or other reasonable cause, be brought before a justice of the peace within such twelve hours, then he shall be discharged, but may nevertheless be proceeded against by summons or warrant as if no such apprehension had taken place.

Persons found armed using violence, &c.—Where any persons, to the number of five or more together, shall be found on any land, or in any of her majesty's forests, parks, chases, or warrens, *in the day-time*, in search or pursuit of game, or woodcocks, snipes, quails, landrails, or coney, any such person being armed with a gun, and shall, by violence, intimidation, or menace, prevent or endeavour to prevent any person authorized as hereinbefore mentioned from approaching them for the purpose of requiring them to quit the land, or to tell their christian name, surname, or place of abode, respectively as hereinbefore mentioned, every person so offending and every person so aiding or abetting shall, upon being convicted before two justices, forfeit for every such offence such penalty not exceeding 5*l.* as to the justices shall seem meet, together with the costs of the conviction; which penalty shall be in addition to any other penalty to which any such person may be liable for any other offence against this act.

If any person whatsoever shall commit any trespass, by entering or being *in the day-time* upon any of her majesty's forests, parks, chases, or warrens, in search or pursuit of game, without being duly authorized so to do, such person shall, on conviction before a justice of the peace,

forfeit such sum of money not exceeding 2*l.* as to the justice shall seem meet, together with the costs.

Day-time, for the purposes of this act, shall be deemed to commence at the beginning of the last hour before sunrise, and to conclude at the expiration of the first hour after sunset.

But the aforesaid provisions against trespassers shall not extend to any person hunting or coursing with hounds or greyhounds, and being in fresh pursuit of any deer, hare, or fox already started upon any other land, nor to any person *bonâ fide* claiming any right of free warren or free chase, nor to any gamekeeper within the limits of any free warren or free chase, nor to any lord or any steward of the crown of any manor, lordship, or royalty, nor to any gamekeeper appointed by such lord or steward within the limits of such manor, &c.

Game may be taken from Trespassers.—When any person shall be found, *by day or by night*, upon any land, or in any of her majesty's forests, parks, chases, or warrens, in search or pursuit of game, and shall have in his possession any game which shall appear to have been recently killed, it shall be lawful for any person having the right of the game upon such land, or for the occupier, or for any gamekeeper or servant of either of them, or for any officer as aforesaid of such forest, park, chase, or warren, or for any person acting by the order and in aid of any of the said several persons, to demand from the person so found such game in his possession, and in case such person shall not immediately deliver up such game, to seize and take the same from him, for the use of the person entitled to the game upon such land, forest, &c.

All penalties, the application of which is not before provided for, shall be paid to the overseers of the poor, to the use of the general rate of the county.

In default of payment of any penalty, the offender shall be imprisoned, with or without hard labour, for not exceeding two calendar months, where the sum, exclusive of costs, shall not amount to 5*l.*, and for not exceeding three calendar months in any other case.

Every offence punishable upon summary conviction must be commenced within three calendar months. Justices may summon persons charged on oath before them, or may issue a warrant in the first instance, upon information on oath that they are likely to abscond.

It shall not be necessary to negative by evidence any certificate, licence, consent, authority, or other matter of exception or defence; but the party seeking to avail himself thereof shall prove the same.

Persons aggrieved may appeal to the sessions. But no conviction, or adjudication on appeal, shall be quashed for want of form, or be removed into any of the superior courts.

Nothing in this act shall prevent any person from proceeding by way of civil action to recover damages in respect of any trespass upon his land, whether committed in pursuit of game or otherwise, except that where any proceeding shall have been instituted against any person in respect of any trespass, no action shall be maintainable for the trespass by any person at whose instance or with whose concurrence or assent such proceedings shall have been instituted, but such proceedings shall in such case be a bar to any such action, and may be given in evidence under the general issue.

Poaching in the Night-time.—The foregoing provisions relate for the most part to trespasses committed in pursuit of game in the *day-time*; but offences of this description committed in the *night* are of a more serious nature.

By 9 Geo. IV. c. 69, if any person shall by night unlawfully take or destroy any game or rabbits upon any land, whether open or inclosed, [or on any public road, highway, or path, or the sides thereof, or at the openings, outlets, or gates from such land into such public road, highway, or path,¹] or by night unlawfully enter or be therein with any gun, net, engine, or other instrument for the purpose of taking or destroying game, he shall, on conviction before two justices, be committed to hard labour in the house of correction for not exceeding three calendar months, and at the expiration of that period find sureties, himself in 10*l.* and two others in 5*l.* each, or one surety in 10*l.*, not to offend again for the space of one year next following, and in case of not finding sureties, be further imprisoned and kept to hard labour for six calendar months, unless such sureties be sooner found. For a second offence, he shall be imprisoned and kept to hard labour for not exceeding six calendar months, and find sureties, himself in 20*l.* and two others in 10*l.* each, or one surety in 20*l.*, not to offend again for the space of two years next following, or, in case of not finding sureties, be further imprisoned for one year. The third offence is a misdemeanor, punishable with transportation for seven years, or imprisonment with hard labour in the house of correction for not exceeding two years. Persons offending in Scotland are liable to the same punishments.

The owner or occupier of the land, or any person having a right of free warren or free chase thereon, or the lord of the manor, and any gamekeeper or servant of the above, or his assistants, may apprehend offenders, either on the land or other place to which they may be pursued; and the offenders assaulting or offering violence with gun, club, stick, or other offensive weapon, shall be deemed guilty of a misdemeanor, and liable to transportation for not exceeding seven years, or imprisonment for not exceeding two years.

And if any persons, to the number of three or more together, shall by night unlawfully enter or be on any land, whether open or inclosed, for the purpose of taking game or rabbits, any of them being armed with any gun, cross-bow, fire-arms, bludgeon, or other offensive weapon, each of such persons shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported for any term not exceeding fourteen years nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years.

For the purposes of this act the *night* is considered to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise. The word *game* is deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.

The hunting, snaring, or killing of *deer*, taking or killing of *hares* or *coney*s in warrens, and of *house-doves* or *pigeons*, which are punishable under the Larceny Act, 7 & 8 Geo. IV. c. 29, will be noticed under the head of Larceny and other Offences against Property.

¹ The words between crotchets were added by the 7 & 8 Vic. c. 29.

CHAPTER X.

Of Homicide.

HOMICIDE, or the killing of any human creature, is of three kinds; justifiable, excusable, and felonious.

1. *Justifiable homicide* is of divers kinds:—

Such as is owing to some unavoidable *necessity*, without any will, intention, or desire, and without any inadvertence or negligence in the party killing, and without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death who has forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore is not only justifiable, but commendable, where the law requires it. But the law must *require* it, otherwise it is not justifiable; therefore wantonly to kill the greatest of malefactors, a felon or a traitor attainted or outlawed, deliberately, uncompelled, and extra-judicially, is murder. And further, if judgment of death be given by a judge not authorized by lawful commission, and execution be done accordingly, the judge is guilty of murder. Also such judgment, when legal, must be executed by the proper officer, or his appointed deputy, for no one else is required by law to do it; which requisition it is that justifies the homicide. If another person do it of his own head, it is held to be murder, even though it be the judge himself. It must, further, be executed according to the sentence of the court. If an officer behead one who is adjudged to be hanged, or *vice versâ*, it is murder; for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law.

Homicide committed for the *advancement of public justice*; as where an officer in the execution of his office, either in a civil or criminal case, kills a person that assaults or resists him; or if an officer, or any private person, attempts to take a man charged with felony, and is resisted, and in the endeavour to take him, kills him. And in case of a riot or rebellious assembly, the officers endeavouring to disperse the mob are justifiable in killing them.

Where the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he in his defence kill any of them, it is justifiable, for the sake of preventing an escape. If trespassers in forests, parks, chases, or warrens, will not surrender themselves to the keeper, they may be slain. But in all these cases there must be an apparent necessity on the officer's side, *viz.* that the party could not be arrested or apprehended, the riot could not be suppressed, or the prisoners could not be kept in hold, unless such homicide were committed; otherwise, without such absolute necessity, it is not justifiable.

Such homicide as is committed for the *prevention of any forcible and atrocious crime*, is justifiable by the law of nature as well as by the

law of England; as if a person attempt the robbery or murder of another, or to break open a house *in the night-time* (which extends also to an attempt to burn it), and be killed in such attempt, the slayer shall be acquitted and discharged.

This reaches not to any crime unaccompanied with force, as picking of pockets; or to the breaking open of any house *in the day-time*, unless it carry with it an attempt at robbery also. A woman also is justified in killing one who attempts to ravish her; and so, too, a husband or father may justify killing a man who attempts a rape upon his wife or daughter: but not if he take them in adultery by consent; for the one is forcible and felonious, and not the other.

II. *Excusable homicide* is when it is committed either by misadventure, or upon a principle of self-preservation.

Homicide by *misadventure* is, where a man doing a lawful act, without any intention of hurt, unfortunately kills another; as, where a man is at work with a hatchet, and the head flies off and kills a stander-by; or where a person qualified to keep a gun is shooting at a mark, and undesignedly kills a man; for the act is lawful, and the effect merely accidental.

So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal and happens to occasion his death, it is only a misadventure, for the act of correction was lawful; but if he exceed the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensue, it is manslaughter at least, and in some cases (according to the circumstances) murder, for the act of immoderate correction is unlawful.

Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he had done nothing unlawful; but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence. And, in general, if death ensue in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing; in these and similar cases, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts.

Homicide *in self-defence*, upon a sudden affray, is also excusable, rather than justifiable, by the English law. This self-defence is that whereby a man may protect himself from an assault or the like in the course of a sudden brawl or quarrel, by killing him who assaults him. This right of natural defence does not imply a right of attacking; for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defence but in sudden and violent cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant.

Under this excuse of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent

and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused, the act of the relation assisting being construed the same as the act of the party himself.

III. *Felonious homicide* is an act of a very different nature from the former; being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self or another man; which last species is again divided into *manslaughter* and *murder*.

1. **MANSLAUGHTER** is the unlawful killing of another without malice either express or implied. It may be either *voluntary* or *involuntary*.

Involuntary manslaughter is where a man doing an unlawful act, not felonious or tending to bloodshed, or doing a lawful act without proper caution, kills another undesignedly, as in the instances given under the head of *justifiable homicide*.

But if the act in which he was engaged was felonious or tending to bloodshed, he is guilty of murder.

Voluntary manslaughter is where one person kills another in heat of blood. One case of it arises from *fighting*.

If two persons quarrel and afterwards fight, and one kills the other, and there had not intervened between the quarrel and the fight sufficient time for passion to subside, this is manslaughter; otherwise, or if there is evidence of malice, it is murder; and this even though they should have gone out to fight in a field; and whether the party killing struck the first blow or not.

But if there had been a sufficient cooling time, it is not manslaughter, but murder. Therefore, in the case of duelling, if death ensue, it is murder; and it is murder both in the killer and his second. And even in the case of a quarrel where there has been no time to cool before the fight, yet if the case be attended with such circumstances as indicate malice in the killer, it will not be manslaughter, but murder.

If two persons fight on a sudden quarrel and are separated, and one of them afterwards, having provided himself with a deadly weapon, lies in wait for the other, to have an opportunity thus armed to renew the quarrel, and they accordingly meet, quarrel, and fight, and the man who is armed kills the other, this is murder.

Killing a person in a prize fight is manslaughter.

Another case of voluntary manslaughter arises upon *provocation*. If a man kills another upon considerable provocation and suddenly, it is manslaughter only, not murder; as if a man pull another's nose, or be taken in adultery with his wife. But the provocation must be considerable; for no mere words or gestures, however opprobrious, will be considered sufficient to reduce a case to manslaughter where an intent to kill appears, as where the killing was effected by a deadly weapon. Where the weapon which gave the fatal blow, however, was not likely to kill, there, though the provocation be less, the case will amount to manslaughter only.

In the particular case of killing an *officer of justice* in the regular execution of his duty, knowing him to be an officer, and with intent to oppose him in such his duty, the party killing, and those who aid him, are guilty of murder. And the case is the same as to killing private

persons lawfully interfering in affrays, felonies, &c., provided they expressly intimate their intention of so interfering.

An officer cannot in general break open an outer door. But this protects only the occupier or his family residing in the house, and not a stranger taking refuge there upon pursuit. And it extends to the outward door only, and not to an inner door ; nor to the case of an escape ; nor to criminal cases. But even in criminal cases it must be done by an officer acting under a magistrate's warrant ; and a demand and refusal of admittance, with a notification of authority, are first necessary. When an outer door or a window is *unlawfully* broken open, as if in the execution of defective process, and the officer is resisted and killed, it is manslaughter only, unless circumstances appear tending to prove express malice, and then it is murder.

Manslaughter is felony at common law.

By 9 Geo. IV. c. 31, § 9, every person convicted of manslaughter shall be liable at the discretion of the court to be transported for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, for not exceeding four years, or to pay such fine as the court shall award.

But, by § 10, no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony.

In manslaughter there can be no accessory before the fact, for the offence is sudden and unpremeditated. Accessories after the fact are punishable by imprisonment, with or without hard labour, for any term not exceeding two years.

2. MURDER is where a person of sound memory and of the age of discretion unlawfully kills any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied, so as the party die of the wound &c. within a year and a day after the same, and is felony at common law.

An idiot or lunatic, except during lucid intervals, or an infant of such an age as to be ignorant of the criminality of his act, cannot be guilty of murder. But if any person procure another person subject to such disability to commit murder, the procurer is guilty of murder, and guilty (whether present or not) as a principal.

If a man lay poison to the intent that B should take it, to be poisoned therewith, and C by mistake takes it, and death ensues, this is murder.

Doing an act of which the probable consequence may be and eventually is death, though the consequence be indirect only, is murder, if the case be such that a murderous intention must be inferred ; as where an apprentice was treated with such continued harshness and severity that his death was occasioned thereby, or where a woman delivered of a child left it in an orchard covered with leaves, and it was struck by a kite and died.

But when a person acting medically or surgically treats his patient with gross ignorance, negligence, or rashness, and thereby occasions his death, the case is not murder, but manslaughter.

In the computation of the year and a day, the whole day on which the hurt was done shall be reckoned the first.

If a person hurt by another die thereof within a year and a day, it is

no excuse that he might have recovered if he had not neglected to take care of himself, unless it clearly appears that the death was caused by improper applications to the wound, and not by the wound itself.

To kill a child in its mother's womb is not murder; but if it be born alive and die by reason of the potion or bruises it received in the womb, it seems to be murder, though there have been opinions to the contrary. And by 9 Geo. IV. c. 31, § 13, it is felony to administer a noxious thing, or use any instrument to procure the miscarriage of a woman quick with child; though the capital punishment has been removed by the 1 Vict. c. 85, § 6; see *post*, 1113.

The "malice aforethought" may be express or implied; express, as where the circumstances prove a direct intention against the individual; implied, as where a man discharges a gun among a multitude of people, and thereby kills one of them, or kills upon slight provocation, or kills an officer of justice in the execution of his duty, or intending to commit another felony undesignedly kills a man.

In general all homicide is malicious, and amounts to murder, unless it falls within one of the several cases above specified, of *justifiable* or *excusable homicide* or *manslaughter*. And all the circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out to the satisfaction of the court and jury; the latter of whom are to decide whether the circumstances alleged are proved to have actually existed; the former, how far they extend to take away or mitigate the guilt. For all homicide is presumed to be malicious until the contrary appears upon evidence.

By the 9 Geo. IV. c. 31, § 3, every person convicted of murder, or of being an accessory before the fact to murder, shall suffer death as a felon. And every accessory after the fact to murder shall be liable, at the discretion of the court, to be transported for life, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years.

And by section 4 it was enacted, that the body of every murderer should, after execution, either be dissected or hung in chains, as to the court should seem meet. But this is repealed by the 2 & 3 Wm. IV. c. 76, § 16, which enacts, that in every case of conviction for murder, the court shall direct the prisoner either to be hung in chains, or to be buried within the precincts of the prison, as to the court shall seem meet, and that the sentence of the court shall express which of the two the court shall order.

It was also enacted by the same section (9 Geo. IV. c. 31, § 4) that every person convicted of murder should be executed according to law on the next day but one after that on which the sentence should be passed, unless the same should happen to be a Sunday, and in that case on the Monday following; that sentence should be pronounced immediately after the conviction, unless the court should see reasonable cause for postponing the same; that such sentence should express, not only the usual judgment of death, but also the time thereby appointed for the execution thereof, provided that after such sentence should have been pronounced it shall be lawful for the court or judge to stay the execution thereof if such court or judge should so think fit; and that every person convicted of murder should after

judgment be fed with bread and water only, and with no other food or liquor, except in case of receiving the sacrament, or in case of any sickness or wound, in which case the surgeon of the prison might order other necessaries to be administered; and that no person but the gaoler and his servants, and the chaplain and surgeon of the prison, should have access to any such convict without the permission in writing of the court or judge before whom such convict should have been tried, or of the sheriff or his deputy; provided, that in case the court or judge should think fit to respite the execution of such convict, such court or judge might, by a licence in writing, relax during the period of the respite all or any of the restraints or regulations thereinbefore directed to be observed. But these provisions are now repealed by the 6 & 7 Wm. IV. c. 30, and it is enacted, that sentence of death may be pronounced after conviction for murder in the same manner, and the judge shall have the same power in all respects, as after convictions for other capital offences.

Persons convicted of murder shall after judgment be confined in some safe place within the prison apart from all other prisoners. 9 Geo. IV. c. 31, § 4.

By 25 Geo. II. c. 37, § 9, if any person shall by force set at liberty or rescue, or attempt to rescue or set at liberty, any person out of prison who shall be committed for or found guilty of murder, or shall rescue or attempt to rescue any person convicted of murder going to execution, or during execution, every person so offending is guilty of felony, and, by 1 Vict. c. 91, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than fifteen years, or to be imprisoned for not exceeding three years.

By 9 Geo. IV. c. 31, § 7, if any of her majesty's subjects shall be charged in England with any murder or manslaughter, or with being accessory before the fact to any murder, or after the fact to any murder or manslaughter, the same being respectively committed on land out of the United Kingdom, whether within the queen's dominions or without, he may be tried under a commission of oyer and terminer in any county or place that shall be appointed by the lord chancellor, or lord keeper, or lords commissioners of the great seal. Provided, that persons entitled to privilege of peerage may, if indicted under such commission, be tried by their peers.

And by section 8, where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt in England, or being feloniously stricken, poisoned, or otherwise hurt at any place in England, shall die of such stroke, poisoning, or hurt upon the sea or at any place out of England, every offence committed in respect of any such case, whether the same amount to the offence of murder or of manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in England in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place.

3. SUICIDE consists in a man's deliberately putting an end to his own existence, or committing any unlawful malicious act, the consequence of which is his own death, as if, in attempting to kill another by shooting, the gun bursts and kills himself. But the act must be strictly his own; for if a man desire another to kill him, who complies, the person killed is not *felo de se*, though the killer is a murderer. So he must be of years of discretion, and in his senses.

There may be an accessory before the fact to self-murder; for if a man persuades another to kill himself, and he does so, the adviser is guilty of murder as an accessory before the fact. But if the adviser be also present and abetting at the self-murder, he is guilty of murder as a principal.

As to the burial of suicides, see *ante*, p. 238.

By self-murder all the chattels, real and personal, which the *felo de se* had in his own right are forfeited, and also all chattels real whereof he was possessed either jointly with his wife or in her right, and also all bonds and other personal things in action belonging solely to himself, and also all personal things in action, and, as some say, entire chattels in possession to which he was entitled jointly with another on any account except that of merchandize. But it is said that he shall forfeit a moiety only of such joint chattels as may be severed, and nothing at all of what he was possessed of as executor or administrator. His lands of inheritance are not forfeited, nor his wife barred of dower.

No part of his personal estate vests in the crown before the self-murder is found by some inquisition. But, after inquisition, it is forfeited from the time of the act done.

CHAPTER XI.

Of Other Offences against the Person.

1. ATTEMPTS TO MURDER, &c. — By 1 Vict. c. 85, § 2, whosoever shall administer to or cause to be taken by any person any poison or other destructive thing, or shall stab, cut, or wound any person, or shall by any means whatsoever cause to any person any bodily injury dangerous to life, with intent in any of the cases aforesaid to commit murder, shall be guilty of felony, and being convicted thereof shall suffer death.

And by sect. 3, whosoever shall attempt to administer to any person any poison or other destructive thing, or shall shoot at any person, or shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent in any of the cases aforesaid to commit the crime of murder, shall, although no bodily injury shall be effected, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

And by sect. 7, in the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree. And every accessory after the fact shall, on conviction, be liable to be imprisoned for any term not exceeding two years.

And by sect. 8, where any person shall be convicted of any offence punishable under this act for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any one time, and not exceeding three months in any one year, as to the court in its discretion shall seem meet. But, by sect. 9, nothing herein shall extend to the repeal or alteration of any of the provisions of the 5 & 6 Wm. IV. c. 38, and 4 Geo. IV. c. 64, for the regulation of gaols.

And by sect. 10, where any felony punishable under this act shall be committed within the jurisdiction of the Admiralty, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other felony committed within that jurisdiction.

And by sect. 11, on the trial of any person for any of the offences in the act mentioned, or for any felony whatever where the crime charged shall include an assault against the person, it shall be lawful for the jury to *acquit of the felony, and to find a verdict of guilty of assault* against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found, the court shall have power to imprison the person so found guilty of an assault for any term not exceeding three years.

2. STABBING, CUTTING, OR WOUNDING, WITH INTENT TO MAIM OR DISFIGURE.—By the same act, sect. 4, whosoever unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall stab, cut, or wound any person, with intent in any of the cases aforesaid to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not exceeding three years.

As to accessories, see sect. 7, *supra*. Sections 8 to 11, also, above quoted, extend to these offences.

3. SENDING EXPLOSIVE SUBSTANCES, OR THROWING DESTRUCTIVE MATTER.¹—By the same act, sect. 5, whosoever shall unlawfully and maliciously send or deliver to or cause to be taken or received by any person any explosive substance, or any other dangerous or noxious thing, or shall cast or throw upon or otherwise apply to any person any corrosive fluid or other destructive matter, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, and whereby in any of the cases aforesaid any person shall be burned, maimed, disfigured,

¹ See also 9 & 10 Vic. c. 25, *post*.

or disabled, or receive some other grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

Sections 7 to 11 (see *supra*) apply to these offences also.

4. **ATTEMPTING TO PROCURE ABORTION.**—By the same act, sect. 6, whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

Sections 7 to 11 (see *supra*) apply to these offences also.

5. **CONCEALING THE BIRTH OF A CHILD BY SECRETING ITS DEAD BODY.**—By 9 Geo. IV. c. 31, § 14, if any woman shall be delivered of a child, and shall, by secret burying or otherwise disposing of the dead body of the said child, endeavour to conceal the birth thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years.

And it shall not be necessary to prove whether the child died before, at, or after its birth.

And if any woman tried for the murder of her child shall be acquitted thereof, it shall be lawful for the jury by whose verdict she shall be acquitted to find, in case it shall so appear in evidence, that she was delivered of a child, and that she did, by secret burying or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence as if she had been convicted upon an indictment for the concealment of the birth.

As no provision was made by the 9 Geo. IV. c. 31 for the payment of the costs of prosecutions for such misdemeanors, the 1 Vict. c. 44 enacts, that where any prosecutor or other person shall appear before any court, on recognizance or subpœna, to prosecute or give evidence against any person upon any charge of having so endeavoured to conceal the birth of any child, every such court is authorized (whether any bill of indictment for such charge shall or shall not be actually preferred) to order payment of the costs and expences of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as in cases of prosecution for felony.

6. **UNNATURAL OFFENCES.**—By 9 Geo. IV. c. 31, § 15, every person convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall suffer death as a felon.

And by § 18, the offence shall be deemed complete upon proof of penetration only.

And by § 31, accessories before the fact to this offence are liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be

imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years. And every accessory after the fact to this offence is liable to be imprisoned, with or without hard labour, in the common gaol or house of correction for any term not exceeding two years.

7. **RAPE.**—By 9 Geo. IV. c. 31, § 16, it was enacted, that every person convicted of the crime of rape should suffer death as a felon; but now, by 4 & 5 Vict. c. 56, § 3, every such offender shall be liable to be transported beyond the seas for the term of his natural life.

The provisions of § 18 apply to this offence also; as do likewise the provisions of § 31 as to accessories before and after the fact.

An infant under fourteen is presumed by law incapable of committing this offence. Nor can he be convicted of an assault with intent to commit rape. But he may be a principal in the second degree, as aiding and assisting.

A husband may be convicted as principal in the second degree, or as accessory, in a rape on his wife committed by another.

The woman may be a witness in all cases, even against her husband.

The accused may give evidence of her notoriously bad character for want of chastity or common decency, or that she had been connected with himself before the alleged rape.

What the woman said so recently after the fact as to preclude the possibility of her being practised upon, is admissible evidence as part of the transaction; but the particulars of her complaint are not evidence of the truth of her statement.

8. **CARNALLY ABUSING FEMALE CHILDREN.**—By 9 Geo. IV. c. 31, § 17, if any person shall unlawfully and carnally know and abuse any girl under the age of ten years, every such offender shall be guilty of felony, and being convicted thereof was liable to suffer death as a felon; but now, by 4 & 5 Vict. c. 56, § 3, shall be transported beyond the seas for the term of his natural life.

The provisions of § 31, as to accessories before and after the fact, apply to this offence.

By 9 Geo. IV. c. 31, § 17, if any person shall unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction for such term as the court shall award.

And by § 31, every person who shall counsel, aid, or abet the commission of this offence, is liable to be proceeded against and punished as a principal offender.

The provisions of § 18 apply to both these offences also.

9. **FORCIBLE ABDUCTION OF HEIRESSSES OR WOMEN OF PROPERTY.**—By 9 Geo. IV. c. 31, § 18, where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive or next of kin to any one having such interest, if any person shall from motives of lucre take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person, every such offender, and

every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof shall be liable to be transported, beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years.

And every accessory after the fact to this offence is liable to be imprisoned, with or without hard labour, in the common gaol or house of correction for any term not exceeding two years. § 31.

10 UNLAWFUL ABDUCTION OF GIRLS.—By 9 Geo. IV. c. 31, § 20, if any person shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to suffer such punishment by fine or imprisonment, or by both, as the court shall award.

And every person who shall counsel, aid, or abet the commission of this offence is liable to be proceeded against and punished as a principal offender. § 31.

11. CHILD STEALING.—By 9 Geo. IV. c. 31, § 21, if any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, or detain any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or if any person shall, with any such intent as aforesaid, receive or harbour any such child, knowing the same to have been by force or fraud led, taken, decoyed, enticed away, or detained as hereinbefore mentioned; every such offender and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned with or without hard labour, in the common gaol or house of correction for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

Provided, that no person who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue hereof on account of his getting possession of such child, or taking such child out of the possession of the mother or any other person having the lawful charge thereof.

And every accessory after the fact to this offence is liable to be imprisoned, with or without hard labour, in the common gaol or house of correction for any term not exceeding two years. § 31.

12. KIDNAPPING.—The forcible abduction or the stealing away of a man, woman, or child from their own country, and sending them into another, is a misdemeanor at common law, punishable with fine and imprisonment.

By 31 Car. II. c. 2, the sending any subject of this realm a prisoner into parts beyond the seas is punishable with the pains of *præmunire*.

By 9 Geo. IV. c. 31, § 30, if any master of a merchant vessel shall,

during his being abroad, force any man on shore or wilfully leave him behind in any of her majesty's colonies or elsewhere, or shall refuse to bring home with him again all such of the men whom he carried out with him as are in a condition to return when he shall be ready to proceed on his homeward-bound voyage, every such master shall be guilty of a misdemeanor, and being lawfully convicted thereof shall be imprisoned for such term as the court shall award. And all such offences may be prosecuted by indictment, or by information at the suit of her majesty's attorney-general in the Court of Queen's Bench, and may be alleged in the indictment or information to have been committed at Westminster in the county of Middlesex; and the said court is hereby authorized to issue one or more commissions, if necessary, for the examination of witnesses abroad.

And every person who shall counsel, aid, or abet the commission of this offence is liable as a principal offender.

The 5 & 6 Wm. IV. c. 19 (to consolidate and amend the laws relating to merchant seamen) also contains provisions against masters of British merchant ships forcing on shore or otherwise wrongfully leaving behind any of the crew in foreign parts; and the offence is made punishable by fine or imprisonment, or both, and may be prosecuted in any court of criminal jurisdiction in her majesty's dominions either at home or abroad where the master shall happen to be, although the place where the offence was committed may be out of the local jurisdiction of such court.

13. ASSAULTS, BATTERIES, AND WOUNDING.—An assault and battery or wounding is a misdemeanor, punishable at common law with fine and imprisonment.

By 9 Geo. IV. c. 31, § 23, if any person shall arrest any clergyman upon any civil process while he shall be performing divine service, or shall, with the knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall suffer such punishment by fine or imprisonment, or by both, as the court shall award.

And every person who shall counsel, aid, or abet therein, shall be liable to be proceeded against and punished as a principal offender.

By the same statute, § 24, if any person shall assault and strike or wound any magistrate, officer, or other person whomsoever lawfully authorized, on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, every such offender, being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction for such term as the court shall award.

And every person who shall counsel, aid, or abet the commission of this offence, is a principal offender.

By the same statute, § 25, where any person shall be charged with and convicted of any of the following offences as misdemeanors,—that

* By 7 & 8 Vic. c. 112, discharging a seaman abroad, or abandoning or leaving him behind without the sanction of the governor or other chief officer, or of the consul, is a misdemeanor on the part of the captain.—§ 46. Forcing seamen on shore, or leaving them behind on shore or at sea, is also a misdemeanor.—§ 47.

is to say, of any assault with intent to commit felony; of any assault upon any peace officer or revenue officer in the due execution of his duty, or upon any person acting in aid of such officer; of any assault upon any person with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, for any offence for which he or they may be liable by law to be apprehended or detained; or of any assault committed in pursuance of any conspiracy to raise the rate of wages,—in any such case the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and may also (if it think fit) fine the offender, and require him to find sureties for keeping the peace.

And every person who shall counsel, aid, or abet the commission of any of these offences is liable as a principal offender.

By the same statute, § 26, assaults on any seaman, keelman, or caster, to prevent him from working at or exercising his lawful trade, business, or occupation, or assaults on any person with intent to obstruct the buying or selling of grain &c., or to obstruct its free passage, are punishable, before two magistrates, with imprisonment and hard labour in the common gaol or house of correction for not exceeding three calendar months. But, by § 34, the prosecution must be commenced within three calendar months after the offence is committed.

By the same statute, § 27, persons committing any common assault or battery may be proceeded against before two justices, according to the provisions in the act set forth, and shall pay a fine not exceeding (together with the costs) 5*l.*, to the use of the poor. And by § 28, such proceedings shall, in certain cases, be a bar to any other proceeding, civil or criminal, for the same cause.

But, by § 29, the justices shall, in assaults accompanied by attempts to commit felony, or being otherwise a fit subject for indictment, abstain from adjudication, and deal with the case as before the act. And it is also provided that they shall determine no case in which any question shall arise as to the title to any lands, tenements, hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice. See these sections more particularly recited, and the subject fully considered, *ante*, p. 896.

By 5 & 6 Wm. IV. c. 19, the summary jurisdiction provided by the above-mentioned act of 9 Geo. IV. c. 31, for the punishment of persons guilty of common assaults and batteries, is extended to similar offences committed on board British merchant ships in any place at sea or out of her majesty's dominions.

By 3 & 4 Wm. IV. c. 53, § 61, assaults on custom-house officers or other persons duly employed for the prevention of smuggling, are punishable with transportation for seven years, or imprisonment with hard labour for any term not exceeding three years.

14. SETTING SPRING-GUNS, &c.—By 7 & 8 Geo. IV. c. 18, § 1, if any person shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser

or other person coming in contact therewith, the person so setting or placing, or causing to be set or placed, such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanor.

But nothing in the act shall extend to make it illegal to set any gin or trap such as may have been or may be usually set with the intent of destroying vermin.

If any person shall knowingly and wilfully permit any such spring-gun, man-trap, or other engine as aforesaid which may have been set, fixed, or left in any place then being in or afterwards coming into his or her possession or occupation, by some other person or persons, to continue so set or fixed, the person so permitting the same to continue shall be deemed to have set and fixed such, gun, trap, or engine with such intent as aforesaid.

Nothing in the act shall be deemed or construed to make it a misdemeanor within the meaning of the act to set or cause to be set, or to be continued set, from sunset to sunrise, any spring-gun, man-trap, or other engine which shall be set, or caused or continued to be set, in a dwelling-house for the protection thereof.

15. INJURIES BY WANTON AND FURIOUS DRIVING, &c.—By the 1 Geo. IV. c. 4, if any person whatever shall be maimed or otherwise injured by reason of the wanton and furious driving or racing, or by the wilful misconduct of any coachman or other person having the charge of any stage-coach or public carriage, such wanton or furious driving or racing, or wilful misconduct of such coachman or other person, is a misdemeanor, and punishable as such by fine and imprisonment.

But this does not extend to hackney-coaches drawn by two horses only, and not plying for hire as stage-coaches.

If the injuries herein mentioned occasion death, the offence may amount, according to circumstances, to manslaughter or murder.

CHAPTER XII.

Of Offences against the Habitations of Individuals.

1. ARSON.—This offence consists in the malicious and wilful burning of the house or out-house of another man, and is felony at common law. It must be *malicious* and *wilful*; for if done by mischance or negligence, it is no felony. Therefore if a person were shooting for *innocent* diversion, and happened to set fire to the thatch of a house, this is not felony.

But if a man intending to commit a felony, by accident set fire to another's house, this is arson; as if, intending to set fire to the house of A, he accidentally set fire to that of B.

If a man, by wilfully setting fire to his own house, burn also the house of one of his neighbour's, so situated that the fire must necessarily have reached it, this is arson. But burning a man's own house, if another is not injured, is not arson; though this, if done in a town, is at common law a misdemeanor.

There must be an actual burning; for merely setting fire does not amount to arson. But the burning of any part is sufficient.

The burning must be of a *dwelling-house*, or of an out-house parcel of a dwelling-house, as barns, stables, &c. The out-house, however, need not be contiguous to the dwelling-house, nor under the same roof.

2. **SETTING FIRE TO A DWELLING-HOUSE, ANY PERSON BEING THEREIN.**—By 7 & 8 Geo. IV. c. 30, § 2, whosoever shall unlawfully and maliciously set fire to any dwelling-house, *any person being therein*, shall be guilty of felony, and on conviction shall suffer death.

And, by sec. 11, every principal in the second degree, and every accessory before the fact, are punishable with death or otherwise in the same manner as the principal in the first degree. And every accessory after the fact is punishable by imprisonment for any term not exceeding two years, with or without hard labour in the common gaol or house of correction, and also by solitary confinement for any portions thereof not exceeding one month at a time, and not exceeding three months in any one year, at the discretion of the court.

3. **MALICIOUSLY SETTING HOUSES &c. ON FIRE WITH INTENT TO INJURE OR DEFRAUD, &c.**—So much of the 7 & 8 Geo. IV. c. 30 (*viz.* § 2) as relates to any person unlawfully and maliciously setting fire to any of the buildings or erections therein mentioned is repealed, and the following enactment substituted, by 1 Vict. c. 89:—

“Whosoever shall unlawfully and maliciously set fire to any church or chapel or to any chapel for the religious worship of persons dissenting from the United Church of England and Ireland, or shall unlawfully and maliciously set fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, [or to any hovel, shed, or fold, or to any farm building, or any building or erection used in farming land], whether the same or any of them respectively shall then be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for not exceeding three years.”

As to accessories, &c., see sec. 11, *supra*.

4. **FIRES BY THE NEGLIGENCE OF SERVANTS.**—By 6 Ann. c. 31, § 3, and 14 Geo. III. c. 78, § 84, if any servant, through negligence or carelessness, shall fire or cause to be fired any dwelling-house, out-house, or other building, and shall be thereof convicted on the oath of one witness before two or more justices, he shall forfeit 100*l.*, to be distributed by the churchwardens &c. among the sufferers by such fire; and in case of default, he shall be committed to gaol or the house of correction for eighteen months, and kept to hard labour.

¹ Added by the 7 & 8 Vic. c. 62, § 1. And by the same act it is further enacted, (§ 2) “That whosoever shall unlawfully and maliciously set fire to any hay, straw, wood, or other vegetable produce being in any farm house or farm building, or to any implement of husbandry being in any farm house or farm building, with intent thereby to set fire to such farm house or farm building, and to injure or defraud any person, shall be liable to the pains and penalties of un-

lawfully and maliciously setting fire to the said farm house or farm building with intent thereby to injure or defraud such person.” And (§ 3) “Every male person under the age of eighteen, who shall be convicted of any offence under this act shall be liable, at the discretion of the court, in addition to any other sentence which may be passed upon him, to be publicly or privately whipped, in such manner, and as often, not exceeding thrice, as the court shall direct.”

5. **BURGLARY** is the breaking and entering into the dwelling-house of another by night with intent to commit a felony therein.

To constitute burglarious *breaking*, the breaking or taking the glass out of a window is sufficient; or picking a lock (whether of an outer or inner door), or opening it with a false key, or lifting a latch, or knocking at a door and rushing in when opened, or obtaining admission by any artifice. If the door or window were left open, it is no burglary. But it has recently been decided, that lifting the flap of a cellar usually kept down by its own weight is a sufficient breaking for the purpose of burglary. *Rex v. Russell*, 1 Mood. C. C. 337.

To constitute burglarious *entering*, the putting in a hand to draw out goods, or a pistol to demand money, is sufficient. If a servant designedly lets in a robber, it is burglary in both. And by 7 & 8 Geo. IV. c. 29, § 11, it is declared, that if any person shall enter the dwelling-house of another with intent to commit felony, or being in such dwelling-house shall commit any felony, and shall in either case break out of the said dwelling-house in the night-time, such person shall be deemed guilty of burglary.

It must be in the *night-time*; and it was held that if there were daylight enough, left or begun, to discern a man's face, it was no burglary. But now, by sect. 4 of the 1 Vict. c. 86, it is enacted, that so far as the same is essential to the offence of burglary, the *night* shall be considered to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day.

In the case of a private house, it must be a *dwelling-house* to constitute a burglary; and not a distant barn, warehouse, or the like; nor an uninhabited house; nor a shop not used as a dwelling-house; nor a mere tent or booth erected in a market or fair. But burglary may be committed in a house left only for a short season *animo revertendi*; or in a chamber in a college or inn of court; or in a mere room or lodging separately occupied; or in a church; or the gate or wall of a town. So burglary may be committed in a barn, stable, or outhouse, parcel of the dwelling-house, and within the same common fence or curtilage. But the 7 & 8 Geo. IV. c. 29, § 12, enacts, that no building, although within the same curtilage with the dwelling-house and occupied therewith, shall be deemed to be part of such dwelling-house for the purpose of burglary, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from the one to the other.

There must be a *felonious intent*, otherwise it is only a trespass. But an intent to commit any felony, whether at common law or created by statute, is (by the better opinion) sufficient.

Burglary is felony at common law; and the 7 & 8 Geo. IV. c. 29, § 11, enacted, that every person convicted of burglary should suffer death. But now the 1 Vict. c. 86, repealing so much of that act as relates to the punishment of burglary, makes a distinction between the cases in which this offence is accompanied with violence to the person of any inmate and those in which it is not so accompanied, and enacts as follows:—

Simple Burglary.—By sect. 3, whosoever shall be convicted of the crime of burglary shall be liable, at the discretion of the court, to be

transported beyond the seas for the term of the natural life of such offender or for any term not less than ten years, or to be imprisoned for any term not exceeding three years.

Burglary with Violence to the Person of any Inmate.—By sect. 2, whosoever shall burglariously break and enter into any dwelling-house, and shall assault with intent to murder any person being therein, or shall stab, cut, wound, beat, or strike any such person, shall be guilty of felony, and being convicted thereof shall suffer death.

Every principal in the second degree, and every accessory before the fact, are punishable in the same manner as the principal in the first degree. And every accessory after the fact shall, on conviction, be liable to be imprisoned for any term not exceeding two years.

Where imprisonment is awarded under this act, the court may sentence the offender to be imprisoned, or imprisoned with hard labour, in the common gaol or house of correction, and also direct that the offender be kept in solitary confinement for not exceeding one month at a time, and not exceeding three months in any one year.

Where any felony punishable under this act is committed within the jurisdiction of the Admiralty, it may be dealt with, inquired of, tried, and determined in the same manner as any other felony committed within that jurisdiction.

6. HOUSE-BREAKING.—By 7 & 8 Geo. IV. c. 29, § 12, if any person shall break and enter any dwelling-house and steal therein any chattel, money, or valuable security to any value whatever, every such offender was liable to suffer death as a felon. The punishment of death was removed by 3 & 4 Wm. IV. c. 44; and now, by the 1 Vict. c. 90, it is provided, that every person convicted of this offence, whether as a principal or an accessory after the fact, shall be liable to be transported beyond the seas for any term not exceeding fifteen nor less than ten years, or to be imprisoned for any term not exceeding three years.

Every accessory after the fact to this offence is liable to imprisonment for any term not exceeding two years.

Where imprisonment is awarded, the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also to be kept in solitary confinement for not exceeding one month at a time or three months in any one year.

7. BREAKING AND ENTERING A DETACHED BUILDING WITHIN THE CURTILAGE AND STEALING THEREIN.—By the 7 & 8 Geo. IV. c. 29, § 14, as altered by the 1 Vict. c. 90, if any person shall break and enter any building and steal therein any chattel, money, or valuable security, such building being within the curtilage of a dwelling-house and occupied therewith, but not being part thereof according to the provision hereinbefore mentioned (see § 13, *supra*), every such offender, being convicted thereof, either upon an indictment for the same offence, or upon an indictment for burglary, house-breaking, or stealing to the value of 5*l.* in a dwelling-house, containing a separate count for such offence, shall be liable to be transported beyond the seas for any term not exceeding fifteen nor less than ten years, or to be imprisoned for any term not exceeding three years.

As to accessories, mode and place of imprisonment, and solitary confinement, the same provisions apply as to the preceding offence.

CHAPTER XIII.

Of Larceny and other Offences against Property.

THE offences which form the subject of the present chapter are chiefly provided for by the 7 & 8 Geo. IV. cc. 29 and 30, two of the acts introduced by Sir R. Peel in the year 1827 for the amendment of the criminal law, and which came into operation on the 1st of July in that year; the first being a consolidation and amendment of the laws relating to *larcenies* and offences connected therewith, and the second, of those relating to *malicious injuries* to property. In both these acts are certain provisions of a general nature, which, to prevent repetition, we shall here notice, once for all, before proceeding to a detail of the several offences to which they are applicable.

1. As to *accessories*, &c. In the case of every *felony* punishable under these acts, every principal in the second degree, and every accessory before the fact, are punishable in the same manner as the principal in the first degree; and every accessory after the fact (except only a receiver of stolen property) is on conviction liable to be imprisoned for any term not exceeding two years.

And every person who shall aid, abet, counsel, or procure the commission of any *misdemeanor* is liable to be indicted and punished as a principal offender.

And if any person shall aid, abet, counsel, or procure the commission of any offence by either of these acts punishable on *summary conviction* either for every time of its commission, or for the first and second time only, or for the first time only, every such person shall, on conviction before a justice of the peace, be liable for every first, second, or subsequent offence of aiding, abetting, counselling, or procuring, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence as a principal offender is made liable.—7 & 8 Geo. IV. c. 29, §§ 61, 62; and c. 30, §§ 26, 31.

2. As to the *mode* and *place* of imprisonment. Where any person shall be convicted of any felony or misdemeanor punishable under these acts, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment or of such imprisonment with hard labour, not exceeding one month at a time, and not exceeding three months in any one year.—7 & 8 Geo. IV. c. 29, § 4, and c. 30, § 27, as amended by 1 Vict. c. 90.

3. Any person found committing any offence punishable under these acts (except only the offence of angling in the day-time) may be immediately apprehended without a warrant by any peace officer, or by the owner of the property, or by his servant or any person authorized by him, and forthwith taken before some neighbouring justice of the peace. 7 & 8 Geo. IV. c. 29, § 63; and c. 30, § 28.

4. The prosecution for any offence punishable on summary conviction under these acts must be commenced within three calendar months; and the evidence of the party aggrieved shall be admitted, and also of any inhabitant of the county &c., notwithstanding the penalty or forfeiture may be payable to the general rate of the county &c.—7 & 8 Geo. IV. c. 29, § 64; and c. 30, § 29.

5. As to the term "*maliciously*" in the 7 & 8 Geo. IV. c. 30, every punishment and forfeiture by that act imposed on any person *maliciously* committing any offence shall equally apply and be enforced, whether the offence be committed from malice conceived against the owner of the property or otherwise.

6. For the meaning of the term "*valuable security*" in the 7 & 8 Geo. IV. cc. 29, 30, see *infra*, STEALING VALUABLE SECURITIES; and the word "*property*," when used in the acts 1 & 2 Vict. cc. 86, 87, denotes every thing included under the words "chattel, money, or valuable security" in the former acts.

I. OF LARCENIES, &c.

Larceny, or theft, is distinguished into *simple* larceny, or that which is committed without force; and *compound* larceny, or larceny with aggravation, when it is accompanied with force or violence or putting in fear, as robbery, &c.

1. SIMPLE LARCENY consists in the taking and carrying away the goods of another, with intent to deprive the owner of them, without force. It is felony at common law.

There must be a *taking*; and if the possession is not changed, as if committed by a wife or by a tenant, or by a tenant in common of a chattel, it is no larceny, the possession of one being the possession of the other.

But the taking may be either actual or constructive.

Actual taking is where the thing is taken out of the owner's possession against his will, or without his consent.

Constructive taking is a taking upon a delivery of the owner, but where he has so delivered it as not to divest himself of the legal possession, or where the delivery is obtained from him by fraud and with intent to steal.

If the delivery by the owner is under such circumstances that the possession in law remains in him, as where he delivers the goods to his servant to take care of them, and the servant embezzles them, this is larceny. But a servant is not guilty of larceny if the goods had never been in the master's possession, but were delivered to the servant for the master's use. There is a distinction also between a mere servant and an agent for a particular purpose.

If a delivery was obtained *animo furandi*, as if a man hires a horse with intent to convert it to his own use, and never returns it, it is larceny. But if the possession was obtained *bonâ fide* in the first instance, and without intention to steal, a subsequent conversion is not larceny.

There must not only be a *taking*, but a *carrying away*. Therefore where the attempt to remove goods fails in consequence of their being attached by a string to the counter or the like, it is not larceny.

So it must be *with intent to deprive the owner*. Therefore if the taking be by mistake, or under a claim of right, or with intent to return

the goods to the owner, it is no larceny. Though if originally larceny, returning them will not purge the offence.

Larceny cannot be committed at common law of things not the subject of property, as a corpse, or beasts *feræ naturæ* and unreclaimed. And such animals as are not valuable in contemplation of law, but kept for mere whim and pleasure, as dogs &c., are not the subjects of larceny at common law; though, as we shall presently see, there are many statutory provisions rendering the stealing of them punishable.

By 7 & 8 Geo. IV. c. 29, § 3, every person convicted of simple larceny shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice, publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

2. STEALING VALUABLE SECURITIES.—By 7 & 8 Geo. IV. c. 29, § 5, if any person shall steal any tally, order, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings bank, or shall steal any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of this kingdom or of any foreign state, or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing, every such offender shall be deemed guilty of felony, of the same nature and in the same degree and punishable in the same manner as if he had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing mentioned in the warrant or order. And each of the several documents hereinbefore enumerated shall throughout this act be deemed for every purpose to be included under and denoted by the words *valuable security*.

As to stealing post-office bags or letters, or money or securities therefrom, see *ante*, Offences against the Post Office, pages 53—56.

3. ROBBERY consists in the forcibly taking, from the person of another, goods or money to any value, by violence or putting him in fear. It is felony at common law.

There must be a *taking*; but the taking may be either strictly from the person, or in the presence only of the party robbed. There must also either be *violence* or *putting in fear*.

If a thing be *snatched*, which was so attached to the person as to imply force in the taking (as where an ear was torn by pulling off an ear-ring), this is robbery, though there was no threat or further violence. But, in general, a mere sudden snatching, without struggle or injury to the person, does not amount to robbery.

The taking must not only be by violence or putting in fear, but these must be *previous* to the taking.

By the 1 Vict. c. 87, § 1, so much of the 7 & 8 Geo. IV. c. 29 (*viz.* §§ 6, 7) as relates to any person who shall rob any other person of any chattel, money, or valuable security, or who shall steal any such

property from the person of another, or shall assault any other person with intent to rob him, or shall with menaces or by force demand any such property of any other person with intent to steal the same, and so much of the same acts as relates to any person who shall accuse or threaten to accuse any other person of any infamous crime with a view or intent to extort or gain from him, and who shall by intimidating him by such accusation or threat extort or gain from him, any chattel, money, or valuable security, was repealed from the 30th September, 1837, and the following enactments are substituted :—

Robbery, with Cutting or Wounding.—By sect. 2, whosoever shall rob any person, and at the time of or immediately before or immediately after such robbery shall stab, cut, or wound any person, shall be guilty of felony, and being convicted thereof shall suffer death.

Robbery attended with circumstances of Violence.—By section 3, whosoever shall, being armed with any offensive weapon or instrument, rob or assault with intent to rob any person,—or shall, together with one or more person or persons, rob or assault with intent to rob any person,—or shall rob any person, and at the time of or immediately before or immediately after such robbery shall beat, strike, or use any other personal violence to any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

Extorting Property by Threat of Accusation of an Unnatural Crime.—By section 4, whosoever shall accuse or threaten to accuse any person of the abominable crime of buggery committed either with mankind or beast, or of any assault with intent to commit the said abominable crime, or of any attempt or endeavour to commit the said abominable crime, or of making or offering any solicitation, persuasion, promise, or threat to any person whereby to move or induce such person to commit or permit the said abominable crime, with a view or intent in any of the cases aforesaid to extort or gain from such person, and shall by intimidating such person by such accusation or threat extort or gain from such person any property,¹ shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

Stealing from the Person.—Whosoever shall rob any person, or shall steal any property¹ from the person of another, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for any term not exceeding three years.

Assaulting with Intent to Rob.—By section 6, whosoever shall assault any person with intent to rob shall be guilty of felony, and being convicted thereof shall (save and except in the cases where a greater punishment is provided by this act) be liable to be imprisoned for any term not exceeding three years.

¹ The word “property” throughout these acts (1 Vict. cc. 86, 87), is declared to denote every thing included in the words “chattel, money, or valuable security,” used in the 7 & 8 Geo. IV. c. 29 ; as to which, see *ante*.

Attempting to obtain Property by Menace.—By section 7, whosoever shall, with menaces or by force, demand any property of any person with intent to steal the same, shall be guilty of felony, and being convicted thereof shall be liable to be imprisoned for any term not exceeding three years.

4. *SENDING THREATENING LETTERS, OR ACCUSING WITH INTENT TO EXTORT PROPERTY.*—By 7 & 8 Geo. IV. c. 29, § 8, if any person shall knowingly send or deliver any letter or writing demanding of any person with menaces, and without any reasonable or probable cause, any chattel, money, or valuable security, or if any person shall accuse or threaten to accuse, or shall knowingly send or deliver any letter or writing accusing or threatening to accuse any person of any crime punishable by law with death, transportation, or pillory, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent to extort or gain from such person any chattel, money, or valuable security; every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court so think fit) in addition to such imprisonment.

5. *STEALING IN A DWELLING-HOUSE TO THE VALUE OF FIVE POUNDS.*—By the 1 Vict. c. 90, sect. 1, so much of the 2 & 3 Wm. IV. c. 62, and of the 3 & 4 Wm. IV. c. 44, as relates to the punishment of persons convicted of stealing in any dwelling-house any chattel, money, or valuable security to the value of 5*l.* or more, is repealed from the 30th September 1837; and any person convicted of any such offence shall be liable to be transported beyond the seas for any term not exceeding fifteen nor less than ten years, or to be imprisoned for any term not exceeding three years.

6. *STEALING IN A DWELLING-HOUSE WITH MENACE OR THREAT.*—By the 1 Vict. c. 86, sect. 1, so much of the 7 & 8 Geo. IV. c. 29 (*viz.* § 12) as relates to any person who shall steal any chattel, money, or valuable security, to any value whatever, in any dwelling-house, any person therein being put in fear, is repealed from the 30th September, 1837; and it is enacted, that whosoever, shall steal any property in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear, shall be guilty of felony, and being convicted thereof shall be liable to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for any term not exceeding three years.

7. *SACRILEGE.*—By 7 & 8 Geo. IV. c. 29, § 10, if any person shall break and enter any church or chapel, and steal therein any chattel, or having stolen any chattel in any church or chapel, shall break out of the same, every such offender, being convicted thereof, was liable to suffer death as a felon. But by 5 & 6 Wm. IV. c. 81, the punishment of death is now removed from this offence, and every person convicted thereof, or of aiding or abetting, counselling or procuring the commission thereof, shall be liable to be transported for life or not less than seven years, or to be imprisoned with or without hard labour, in the common gaol or house of correction, for not exceeding four years.

8. **SHOP-BREAKING.** — By 7 & 8 Geo. IV. c. 29, § 15, as altered by 1 Vict. c. 90, if any person shall break and enter any shop, warehouse, or counting-house, and steal therein any chattel, money, or valuable security, every such offender being convicted thereof shall be liable to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for not exceeding three years.

9. **STEALING GOODS IN PROCESS OF MANUFACTURE.** — By the 1 Vict. c. 90, so much of the 7 & 8 Geo. IV. c. 29, (*viz.* § 16) as relates to the stealing to the value of 10s. any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other or mixed with any other material, whilst laid, placed, or exposed during any stage, process, or progress of manufacture, in any building, field, or other place, is repealed; and every person convicted of any of such offences shall be liable to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for any term not exceeding three years.

10. **STEALING GOODS FROM A VESSEL IN A PORT, RIVER, CANAL, &c., OR FROM A DOCK, &c.** — By 7 & 8 Geo. IV. c. 29, § 17, if any person shall steal any goods or merchandize in a vessel, barge, or boat of any description whatsoever, in any port of entry or discharge, or upon any navigable river or canal, or in any creek belonging to or communicating with any such port, river or canal, or shall steal any goods or merchandize from any dock, wharf, or quay adjacent to any such port, river, canal, or creek, every such offender shall be liable to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

11. **PLUNDERING WRECKS.** — By the 1 Vict. c. 87, whosoever shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel, and be convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for any term not exceeding three years.

And by 7 & 8 Geo. IV. c. 29, § 19, if any goods, merchandize, or articles of any kind, belonging to any ship or vessel in distress, or wrecked, stranded, or cast on shore, shall, by virtue of a search warrant, be found in the possession of any person, or on the premises of any person with his knowledge, and such person shall not satisfy the justice of the peace that he came lawfully by the same, then the same shall, by order of the justice, be forthwith delivered over to the rightful owner, and the offender shall forfeit, over and above the value of the goods, merchandize, or articles, such sum of money not exceeding 20*l.* as to the justice shall seem meet.

And by sect 20, if any person shall offer or expose for sale any goods, merchandize, or articles whatsoever which shall have been unlawfully taken, or reasonably suspected so to have been, from any ship or vessel in distress, or wrecked, stranded, or cast on shore, any person

to whom the same shall be offered for sale, or any officer of the customs or excise, or peace officer, may lawfully seize the same, and shall with all convenient speed carry the same, or give notice of such seizure, to some justice of the peace; and if the person who shall have offered or exposed the same for sale shall not appear and satisfy the justice that he came lawfully by such goods &c., then the same shall be forthwith delivered over to the rightful owner thereof, upon payment of a reasonable reward (to be ascertained by the justice) to the person who seized the same, and the offender shall forfeit, over and above the value of the goods, merchandize, or articles, such sum of money not exceeding 20*l.* as to the justice shall seem meet.

12. **STEALING OR OBLITERATING RECORDS, &c.**—By 7 & 8 Geo. IV. c. 29, § 21, if any person shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure, or destroy any record, writ, return, panc., process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever of or belonging to any court of record, or relating to any matter civil or criminal, begun depending, or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order, or decree, or any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, every such offender shall be guilty of a misdemeanor, and shall be liable, at the discretion of the court, to be transported for seven years, or to suffer such other punishment by fine or imprisonment, or both, as the court shall award. In any indictment for such offence, it shall not be necessary to allege that the article, in respect of which the offence is committed, is the property of any person, or that it is of any value.

13. **STEALING OR CONCEALING WILLS.**—By 7 & 8 Geo. IV. c. 29, § 22, if any person shall, either during the life of the testator or testatrix, or after his or her death, steal, or for any fraudulent purpose destroy or conceal, any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, every such offender shall be guilty of a misdemeanor, and shall be liable to any of the punishments which the court may award as hereinbefore last-mentioned. And it shall not, in any indictment for such offence, be necessary to allege that such will, codicil, or other instrument is the property of any person, or that the same is of any value.

14. **STEALING DOCUMENTS OF TITLE.**—By 7 & 8 Geo. IV. c. 29, § 23, if any person shall steal any paper or parchment, written or printed, or partly written and partly printed, being evidence of the title or of any part of the title to any real estate, every such offender shall be deemed guilty of a misdemeanor, and shall be liable to any of the punishments which the court may award as in the case of stealing records. And in any indictment for such offence, it shall be sufficient to allege the thing stolen to be evidence of the title, or any part of the title, of the person or of some one of the persons having a present interest, whether legal or equitable, in the real estate to which the same relates, and to mention such real estate, or some part thereof; and it shall not be necessary to allege the thing stolen to be of any value.

By sect. 24, nothing in this act relating to either of the misdemeanors aforesaid, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall prevent any remedy at law or in equity which any party aggrieved by any such offence might or would have had if this act had not been passed. Nevertheless the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no person shall be liable to be convicted of either of the misdemeanors aforesaid by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such act on oath in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or in any examination or deposition before any commissioners of bankrupt.

15. STEALING CATTLE, OR KILLING THEM WITH INTENT TO STEAL.—By 7 & 8 Geo. IV. c. 29, § 25, if any person shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, or shall wilfully kill any of such cattle with intent to steal the carcase or skin or any part of the cattle so killed, every such offender is guilty of felony, and was by that act punishable with death. The capital punishment was taken away by the 2 & 3 Wm. IV. c. 62, and transportation for life substituted, to which, by the 3 & 4 Wm. IV. c. 44, the court might add imprisonment with or without hard labour in the common gaol or house of correction, or confinement in the Penitentiary, for any term not exceeding four years nor less than one year previous to transportation. But now, by 1 Vict. c. 90, such offenders are liable to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for not exceeding three years.

16. OFFENCES AS TO DEER.—By 7 & 8 Geo. IV. c. 29, § 26, if any person shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the *inclosed* part of any forest, chase, or purlieu, or in any inclosed place wherein deer shall be usually kept, every such offender shall be guilty of felony, and be liable to be punished in the same manner as in the case of simple larceny.

And if any person shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the *uninclosed* part of any forest, chase, or purlieu, he shall for every such offence, on conviction before a justice of the peace, forfeit such sum not exceeding 50*l.* as to the justices shall seem meet.

And if any person who shall have been previously convicted of any offence relating to deer for which a pecuniary penalty is by this act imposed, shall offend a *second time*, such second offence (whether it be of the same description as the first offence or not) shall be deemed felony, and such offender shall be liable to be punished in the same manner as in the case of simple larceny.

And if any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer, shall be found in the possession of any person, or on the premises of any person with his knowledge, and such person being carried before a justice of the peace shall not satisfy the justice that he came lawfully by such deer &c., or had a

lawful occasion for such snare or engine, and did not keep the same for any unlawful purpose, he shall forfeit and pay a sum not exceeding 20*l*. And if such person shall not under the provisions aforesaid be liable to conviction, then, for the discovery of the party who actually killed or stole such deer, it shall be lawful for the justice at his discretion, as the evidence given and the circumstances of the case shall require, to summon before him every person through whose hands such deer, or the head, skin, or other part thereof, shall appear to have passed; and if the person from whom the same shall have been first received, or who shall have had possession thereof, shall not satisfy the justice that he came lawfully by the same, he shall be liable to the payment of such sum of money as is hereinbefore last mentioned.

And if any person shall unlawfully and wilfully set or use any snare or engine for the purpose of taking or killing deer in any part of any forest, chace, or purlieu, whether such part be inclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any inclosed land where deer shall be usually kept, or shall unlawfully and wilfully destroy any part of the fence of any land where any deer shall be then kept, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay such sum not exceeding 20*l*. as to the justice shall seem meet.

And if any person shall enter into any forest, chace, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, it shall be lawful for every person entrusted with the care of such deer, and for any of his assistants (whether in his presence or not) to demand from every such offender any gun, fire-arms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer, and, in case such offender shall not immediately deliver the same, to seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer. And if any such offender shall unlawfully beat or wound any person entrusted with the care of the deer, or any of his assistants in the execution of any of the powers given by this act, every such offender shall be guilty of felony, and shall be liable to be punished in the same manner as in the case of simple larceny.

17. **TAKING HARES OR CONEYS IN WARRENS, &c.** — By 7 & 8 Geo. IV. c. 29, § 30, if any person shall unlawfully and wilfully *in the night-time* take or kill any hare or coney in any warren or ground lawfully used for the breeding or keeping of hares or coneys, whether the same be inclosed or not, every such offender shall be guilty of a misdemeanor, and shall be punished accordingly.

And if any person shall unlawfully and wilfully *in the day-time* take or kill any hare or coney in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or coneys, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay such sum not exceeding 5*l*. as to the justice shall seem meet. But nothing herein contained shall affect any person taking or killing in the day-time any coneys on any sea bank or river bank in the county of Lincoln so far as the tide shall extend, or within one furlong of such bank.

18. STEALING DOGS, BEASTS, BIRDS, &c.—By 8 & 9 Vic. c. 47 (which repeals so much of the 7 & 8 Geo. IV. c. 29 as relates to dog-stealing) if any person shall steal any dog, he shall be deemed guilty of a misdemeanor, and upon conviction shall for the first offence be committed to the house of correction and kept to hard labour for any term not exceeding six months, or pay over and above the value of the dog any sum not exceeding 20*l.* as to the justices shall seem meet. And for the second offence he shall be guilty of an indictable misdemeanor, and be liable to such punishment by fine or imprisonment with or without hard labour, or by both, as the court shall award, but such imprisonment not to exceed eighteen months.

By 7 & 8 Geo. IV. c. 29, sec. 31, if any person shall steal any beast or bird ordinarily kept in a state of confinement, not being the subject of larceny, every such offender shall for the first offence forfeit and pay over and above its value a sum not exceeding 20*l.* And for a subsequent offence he shall be committed to the common gaol or house of correction, there to be kept to hard labour for not exceeding twelve calendar months, and, if a male, be once or twice publicly or privately whipped.

If any dog, or such beast or bird, or the skin or any of the plumage thereof, be found in the possession or on the premises of any person, by virtue of a search warrant, the justice may restore the same to the owner, and the person in whose possession the same is found (knowing it to be stolen) is liable to the same forfeiture and punishment as if convicted of stealing such dog, beast, or bird.

19. TAKING PIGEONS.—By 7 & 8 Geo. IV. c. 29, § 33, if any person shall unlawfully and wilfully kill, wound, or take any house-dove or pigeon under such circumstances as shall not amount to larceny at common law, any such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the bird, any sum not exceeding 2*l.*

20. TAKING FISH.—By 7 & 8 Geo. IV. c. 29, § 34, if any person shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water or having a right of fishing therein, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be punished accordingly.

And if any person shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as aforesaid, but which shall be private property, or in which there shall be any private right of fishery, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, besides the value of the fish taken, a penalty not exceeding 5*l.*

Provided, that nothing hereinbefore contained shall extend to any person angling in the day-time; but if any person shall, by angling in the day-time, unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, he shall, on conviction before a justice of the peace, forfeit and pay any sum

not exceeding 5*l.*; and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum not exceeding 2*l.* as to the justice shall seem meet.

21. **STEALING OYSTERS.**—By 7 & 8 Geo. IV. c. 29, § 36, if any person shall steal any oysters or oyster brood from any oyster-bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, every such offender shall be guilty of larceny, and being convicted thereof shall be punished accordingly.

And if any person shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any such oyster fishery, for the purpose of taking oysters or oyster brood, although none shall be actually taken, or shall, with any net, instrument, or engine, drag upon the ground or soil of any such fishery, every such person shall be deemed guilty of a misdemeanor, and being convicted thereof shall be punished by fine and imprisonment, or both, as the court shall award; such fine not to exceed 20*l.*, and such imprisonment not to exceed three calendar months. But there is a proviso, that nothing herein shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery with any net, instrument, or engine adapted for taking floating fish only.

22. **STEALING ORES &c. IN MINES.**—By 7 & 8 Geo. IV. c. 29, § 37, if any person shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese, or mundic, or any wad, black cawke, or black lead, or any coal or canal coal, from any mine, bed, or vein thereof respectively, every such offender shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.

23. **STEALING TREES &c.**—By 7 & 8 Geo. IV. c. 29, § 38, if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the value of the article or articles stolen, or the amount of the injury done shall exceed the sum of 1*l.*) shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.

And if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of 5*l.*) shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.

By section 39, if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of 1*s.* at the least, every such offender, being convicted before a justice of the peace, shall

for the first offence forfeit, besides the value of the thing stolen or injury done, a sum not exceeding 5*l.*; and for a second offence shall be liable to imprisonment with hard labour for not exceeding twelve calendar months, and (upon conviction before two justices) to whipping; and for every subsequent offence shall be guilty of felony, and liable to be punished as in the case of simple larceny.

24. **STEALING FENCES, STILES, GATES, &c.**—By 7 & 8 Geo. IV. c. 29, § 40, if any person shall steal, or shall cut, break, or throw down with intent to steal, any part of any live or dead fence, or any wooden post, pale, or rail set up or used as a fence, or any stile or gate, or any part thereof respectively, every such offender, being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the value of the article so stolen, or the amount of the injury done, such sum not exceeding 5*l.* as to the justice shall seem meet. And if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction.

If the whole or any part of any tree, sapling, or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, rail, stile, or gate, or any part thereof, being of the value of 2*s.* at the least, shall, by virtue of a search warrant, be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, he shall forfeit, over and above the value of the article so found, any sum not exceeding 2*l.*

25. **STEALING PLANTS, FRUITS, &c.**—By 7 & 8 Geo. IV. c. 29, § 42, if any person shall steal, or shall destroy or damage with intent to steal, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hot-house, green-house, or conservatory, every such offender, being convicted before a justice of the peace, shall, for the first offence, be liable to imprisonment with or without hard labour for any term not exceeding six calendar months, or, at the discretion of the justice, to a penalty not exceeding 20*s.*, besides the value of the thing stolen or injury done. And in case of a subsequent conviction, he shall be guilty of felony, and liable to the punishment of simple larceny.

By section 43, if any person shall steal, or shall destroy or damage with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling or dying, or for or in the course of any manufacture, and growing in any land, open or inclosed (not being a garden, orchard, or nursery-ground), every such offender, being convicted before a justice of the peace, shall, for the first offence, be liable to imprisonment with or without hard labour for not exceeding one calendar month, or, at the discretion of the justice, to a pecuniary penalty of 20*s.* besides the value of the articles stolen or

the amount of the injury done; and in case of a subsequent conviction, to six months imprisonment with hard labour; and if such subsequent conviction take place before two justices, they may order the offender to be once or twice publicly or privately whipped, after the expiration of four days from the time of conviction.

26. STEALING FIXTURES.—By 7 & 8 Geo. IV. c. 29, § 44, if any person shall steal, or rip, cut, or break with intent to steal, any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any building whatsoever, or any thing made of metal fixed in any land being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, every such offender shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.

27. DEPREDACTIONS BY TENANTS AND LODGERS.—By 7 & 8 Geo. IV. c. 29, § 45, if any person shall steal any chattel or fixture let to be used by him or her in or with any house or lodging (whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her or her husband), every such offender shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.

And in every such case of stealing any chattel, it shall be lawful to prefer an indictment in the common form as for larceny, and in every such case of stealing any fixture, to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire.

28. STEALING BY CLERKS AND SERVANTS.—By 7 & 8 Geo. IV. c. 29, § 46, if any clerk or servant shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master, every such offender, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

29. EMBEZZLEMENT BY CLERKS AND SERVANTS.—By 7 & 8 Geo. IV. c. 29, § 47, if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant, or other person so employed; and every such offender being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned, *viz.* to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years,

and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

And it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement not exceeding three, which may have been committed by him against the same master within the space of six calendar months from the first to the last of those acts. And in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled to any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved; or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value should be returned to the party delivering the same, and such part shall have been returned accordingly.

30. **EMBEZZLEMENT BY AGENTS.**—By 7 & 8 Geo. IV. c. 29, § 49, if any money, or security for the payment of money, shall be intrusted to any banker, merchant, broker, attorney, or other agent, with any direction in writing to apply such money, or any part thereof, or the proceeds or any part of the proceeds of such security, for any purpose specified in such direction, and he shall, in violation of good faith and contrary to the purposes so specified, in any wise convert to his own use or benefit such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award.

And if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, shall be intrusted to any banker, merchant, broker, attorney, or other agent, for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, and he shall, in violation of good faith and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

But see, on this subject, the more recent provisions of the 5 & 6 Vict. c. 39, § 6, recited *ante*, p. 284.

31. **OBTAINING MONEY BY FALSE PRETENCES.**—By 7 & 8 Geo. IV. c. 29, § 53, if any person shall, by any false pretence, obtain from any

other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award. Provided, that if upon the trial of any person indicted for such misdemeanor, it be proved that he obtained the property in question in such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor. And no such indictment shall be removable by certiorari. And no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts.

32. RECEIVING STOLEN PROPERTY, KNOWING THE SAME TO HAVE BEEN STOLEN.—This was a misdemeanor at common law, and afterwards by statute the receiver was made an accessory to the theft.

By 7 & 8 Geo. IV. c. 29, § 54, if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing or taking whereof shall amount to a *felony* either at common law or by virtue of this act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony, and in the latter case whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. And every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to such imprisonment. Provided, that no person howsoever tried for receiving as aforesaid shall be liable to be prosecuted a second time for the same offence.

By sect. 55, if any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, or converting whereof is made an indictable *misdemeanor* by this act, such person knowing the same to have been unlawfully stolen, taken, obtained, or converted, every such receiver shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver shall on conviction be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to such imprisonment.

By sect. 60, where the stealing or taking of any property is by this act punishable on *summary conviction*, either for every offence, or for the first and second offence only, or for the first offence only, any person receiving any such property, knowing the same to be unlawfully come by, shall on conviction before a justice of peace, be liable for every first, second, or subsequent offence of receiving, to the forfeiture and

punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is by this act liable.

By 2 Geo. III. c. 28, § 12, buying or receiving goods belonging to a ship or vessel on the river Thames, knowing the same to be stolen or unlawfully come by, is punishable with transportation for fourteen years.

By 1 & 2 Geo. IV. c. 75, § 1, pilots and others are to deposit anchors, cables, and other ship's materials found by them, in places appointed by the act. And concealing such articles forfeits all claim to salvage, and renders the offenders liable as receivers of stolen goods. And persons fraudulently purchasing or receiving such anchors shall be considered as receivers of stolen goods. And pilots and others conveying such anchors &c. to foreign parts, and there selling them, shall be guilty of felony, and punishable with seven years transportation.

II. OF MALICIOUS INJURIES TO PROPERTY.

33. **SETTING FIRE TO CHURCHES, HOUSES, &c.** is provided for by the 1 Vict. c. 89; see *ante*, p. 1119.

34. **DESTROYING SILK &c. IN THE LOOM, OR THE MACHINERY.**—By 7 & 8 Geo. IV. c. 30, § 3, if any person shall maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace, respectively being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture; or shall maliciously cut, break, or destroy, or damage with intent to destroy or render useless, any warp or shute of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles; or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences aforesaid, every such offender shall be guilty of felony, and shall be liable to be transported for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to such imprisonment.

35. **DESTROYING THRESHING MACHINES OR MACHINES EMPLOYED IN MANUFACTURES.**—By 7 & 8 Geo. IV. c. 30, § 4, if any person shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any threshing machine, or any machine or engine (whether fixed or moveable) prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, or cotton goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace), every such offender shall be guilty of felony, and shall be liable to be transported for the term of seven years, or to be imprisoned for any term not exceeding two

years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to such imprisonment.

36. **SETTING FIRE TO COAL MINES.**—By 7 & 8 Geo. IV. c. 30, § 5, unlawfully or maliciously setting fire to any mine of coal or cannel coal, was punishable with death, but now, by 1 Vict. c. 89, § 9, by transportation beyond the seas for life or for any term not less than fifteen years, or by imprisonment for any term not exceeding three years.

37. **DROWNING MINES OR FILLING UP SHAFTS.**—By 7 & 8 Geo. IV. c. 30, § 6, if any person shall unlawfully and maliciously cause any water to be conveyed into any mine, or to any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall with the like intent unlawfully and maliciously pull down, fill up, or obstruct any air way, water-way, drain, pit, level, or shaft, of or belonging to any mine, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to such imprisonment. Provided, that this provision shall not extend to any damage committed under ground by any owner of any adjoining mine in working the same, or by any person duly employed in such working.

38. **DESTROYING ENGINES &c. USED IN MINES.**—By 7 & 8 Geo. IV. c. 30, § 7, if any person shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy or to render useless, any steam-engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon way, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, waggon way, or trunk be completed or in an unfinished state, every such offender shall be guilty of felony, and being convicted thereof shall be liable to any of the punishments which the court may award as herein-before last mentioned, *viz.*, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to such imprisonment.

39. **DEMOLISHING CHURCHES, HOUSES, &c. BY RIOTOUS ASSEMBLIES.** is provided for by 7 & 8 Geo. IV. c. 30, § 8. See *ante*, p. 1077.

40. **SETTING FIRE TO OR DESTROYING SHIPS, &c.**—By the 1 Vict. c. 85, so much of the 7 & 8 Geo. IV. c. 30 (*viz.* § 9) as relates to such offences, is repealed from the 30th September, 1837, and the following enactments are substituted:—

Setting Fire to or Destroying Ships or Vessels with Intent to commit Murder.—Whosoever shall unlawfully or maliciously set fire to, cast away, or in anywise destroy any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endangered, shall be guilty of felony, and being convicted thereof shall suffer death.

Setting Fire to or Destroying Ships with Intent to Defraud.—And whosoever shall unlawfully and maliciously set fire to or in any-

wise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

41. **DAMAGING SHIPS OTHERWISE THAN BY FIRE.**—By the 7 & 8 Geo. IV. c. 30, § 10, if any person shall unlawfully and maliciously damage, otherwise than by fire, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same or render the same useless, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to such imprisonment.

42. **EXHIBITING FALSE SIGNALS TO SHIPS, AND OFFENCES AS TO SHIPS, GOODS, AND PERSONS WRECKED.**—By 7 & 8 Geo. IV. c. 30, § 11, exhibiting any false light or signal with intent to bring any ship or vessel into danger, or unlawfully and maliciously doing any thing tending to the immediate loss or destruction of any ship or vessel in distress, or destroying any part of any ship or vessel in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel, or by force preventing or impeding any person endeavouring to save his life from such ship or vessel (whether on board, or having quitted the same), were punishable with death. But the 1 Vict. c. 89, repealing so much of that act as relates to these offences, substitutes the following enactments:—

Hanging out false Lights to cause Shipwreck.—Whosoever shall unlawfully exhibit any false light or signal, with intent to bring any ship or vessel into danger, or shall unlawfully and maliciously do any thing tending to the immediate loss or destruction of any ship or vessel in distress shall be guilty of felony, and being convicted thereof shall suffer death.

Impeding any Person endeavouring to save his Life from any Ship wrecked, &c.—And whosoever shall by force prevent or impede any person endeavouring to save his life from any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, whether he shall be on board or shall have quitted the same), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

Destroying Wrecks or any Article belonging thereto.—And whosoever shall unlawfully and maliciously destroy any part of any ship

or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for any term not exceeding three years.

43. DESTROYING SEA BANKS &C., AND OFFENCES AS TO NAVIGABLE RIVERS AND CANALS.—By 7 & 8 Geo. IV. c. 30, § 12, if any person shall unlawfully and maliciously break down or cut down any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, whereby any land shall be overflowed or damaged, or shall be in danger of being so, or shall unlawfully and maliciously throw down, level, or otherwise destroy any lock, sluice, floodgate, or other work on any navigable river or canal, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for not exceeding seven years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to such imprisonment.

And if any person shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground and used for securing any sea-bank or sea-wall, or the bank or wall of any river, canal, or marsh, or shall unlawfully and maliciously open or draw up any floodgate, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to such imprisonment.

44. INJURING PUBLIC BRIDGES.—By 7 & 8 Geo. IV. c. 30, § 13, if any person shall unlawfully and maliciously pull down or in anywise destroy any public bridge, or do any injury with intent and so as thereby to render such bridge, or any part thereof, dangerous or impassable, every such offender shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to such imprisonment.

45. DESTROYING TURNPIKE-GATES AND TOLL-HOUSES.—By the 7 & 8 Geo. IV. c. 30, § 14, if any person shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike-gate, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike-gate, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act of parliament relating thereto, or any house, building, or weighing engine erected for the better collection, ascertainment, or security of any such toll, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be punished accordingly.

46. **DESTROYING FISH PONDS, MILL PONDS, &c.**—By 7 & 8 Geo. IV. c. 30, § 15, if any person shall maliciously break down or otherwise destroy the dam of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish, or so as thereby to cause the loss or destruction of any of the fish, or shall maliciously put any lime or other noxious material in any such pond or water, with intent to destroy any of the fish therein, or shall maliciously break down or otherwise destroy the dam of any millpond, every such offender shall be guilty of a misdemeanor, and shall be liable to be transported for the term of seven years, or to be imprisoned for not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to such imprisonment.

47. **KILLING OR WOUNDING CATTLE.**—By 7 & 8 Geo. IV. c. 30, § 16, if any person shall maliciously kill, maim, or wound any cattle, every such offender shall be guilty of felony, and shall be liable to be transported for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit), in addition to such imprisonment.

48. **SETTING FIRE TO STACKS OF CORN, STRAW, HAY, OR WOOD, &c.**—By the 1 Vict. c. 89, whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, straw, haulm, stubble, furze, heath, fern, hay, turf, peat, coals, charcoal, or wood, or any steer of wood, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years.

49. **SETTING FIRE TO CROPS OF CORN &c., WOODS, HEATH, &c.**—By 7 & 8 Geo. IV. c. 30, § 17, if any person shall maliciously set fire to any crop of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, every such offender shall be guilty of felony, and shall be liable to be transported for the term of seven years, or to be imprisoned for not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

50. **DESTROYING HOP-BINDS.**—By 7 & 8 Geo. IV. c. 30, § 18, as altered by 1 Vict. c. 90, if any person shall maliciously cut or otherwise destroy any hop-binds growing on poles in any plantation of hops, every such offender shall be guilty of felony, and being convicted thereof shall be liable to be transported beyond the seas for any term not exceeding fifteen years nor less than ten years, or to be imprisoned for not exceeding three years.

51. **DAMAGING TREES, &c.**—By 7 & 8 Geo. IV. c. 30, § 19, if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the

amount of the injury done shall exceed the sum of 1*l*.) shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to such imprisonment.

And if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (in case the amount of the injury done shall exceed the sum of 5*l*.) shall be guilty of felony, and being convicted thereof shall be liable to any of the punishments which the court may award for the felony hereinbefore last mentioned.

By sect. 20, if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the injury done being to the amount of 1*s*. at the least, every such offender, being convicted before a justice of the peace, shall, for the first offence, forfeit, besides the value of the injury done, a sum not exceeding 5*l*., and, on a second conviction, be committed to the common gaol or house of correction and kept to hard labour not exceeding twelve calendar months, and (in case of conviction before two justices) to be further ordered to be whipped; and in case of a subsequent offence, he shall be deemed guilty of felony, and liable to any of the punishments which the court may award for the felony hereinbefore last mentioned.

52. DESTROYING PLANTS, FRUITS, &c.—By 7 & 8 Geo. IV. c. 30, § 21, if any person shall unlawfully and maliciously destroy, or damage with intent to destroy, any plant, root, fruit, or vegetable production growing in any garden, orchard, nursery-ground, hot-house, green-house, or conservatory, every such offender, being convicted thereof before a justice of the peace, shall either be committed to the common gaol or house of correction, there to be imprisoned, with or without hard labour, not exceeding six calendar months, or shall forfeit, besides the value of the injury done, a sum not exceeding 20*l*.; and on the second offence shall be guilty of felony, and liable to be transported for seven years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to such imprisonment.

By sect. 22, if any person shall unlawfully and maliciously destroy, or damage with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dying, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, or nursery-ground, every such offender being convicted thereof before a justice of the peace, shall either be committed to the common gaol or house of correction, and imprisoned, with or without hard labour, not exceeding one calendar month, or shall forfeit, besides the value of the injury done, a sum not exceeding 20*s*.; and, on a second conviction, shall be imprisoned and kept to hard labour for not exceeding six months, and (upon conviction before two justices) may be further ordered to be once or twice publicly or privately whipped.

53. DESTROYING FENCES, WALLS, STILES, OR GATES.—By 7 & 8 Geo. IV. c. 30, § 23, if any person shall unlawfully and maliciously cut, break, throw down, or in anywise destroy any fence of any description whatever, or any wall, stile, or gate, or any part thereof respectively, every such offender being convicted thereof before a justice of the peace shall, for the first offence, forfeit, besides the value of the injury done, a sum not exceeding 5*l.*; and, on a second conviction, be committed to the common gaol or house of correction, and kept to hard labour for not exceeding twelve calendar months, and (upon conviction before two justices) may be further ordered to be once or twice publicly or privately whipped.

54. MALICIOUS DAMAGE IN GENERAL.—By 7 & 8 Geo. IV. c. 30, § 24, if any person shall wilfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatever, either of a public or private nature, for which no remedy or punishment is hereinbefore provided, every such person, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of 5*l.*; which sum of money shall, in the case of private property, be paid to the party aggrieved, except where such party shall have been examined in proof of the offence, and in such case, or in the case of property of a public nature or wherein any public right is concerned, the money shall be applied in such manner as every penalty imposed by a justice of the peace under this act is hereinafter directed to be applied, &c. Provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game; but every such trespass shall be punishable in the same manner as before the passing of this act.

55. INJURIES TO WORKS OF ART.—By 8 & 9 Vic. c. 44, every person who shall unlawfully and maliciously destroy or damage any thing kept for the purpose of art, science, or literature, or as an object of curiosity, in any museum, gallery, cabinet, library, or other repository which is open for the admission of the public or of any considerable number of persons to view the same, either by permission of the proprietor or by payment of money, or any picture, statue, monument, or painted glass in any church or chapel or other place of religious worship, or any statue or monument exposed to public view, shall be guilty of a misdemeanor, and liable to imprisonment for not exceeding six months, and, if a male, to be put to hard labour, or be once, twice, or thrice privately whipped. The right of persons to recover damages is not affected by this act.

56. INJURIES TO PERSON OR PROPERTY BY FIRE OR EXPLOSIVE OR DESTRUCTIVE SUBSTANCES.—By 9 & 10 Vic. c. 25, whoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down, or damage the whole or any part of any dwelling-house, any person being therein; or destroy or damage any building with intent to murder any person, or whereby the life of any person shall be endangered; or burn, or maim, or dis-

figure, disable, or do any grievous bodily harm to any person; or who shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to or cause to be taken or received by any person any explosive substance or any other dangerous or noxious thing, or cast or throw at or upon or otherwise apply to any person any corrosive fluid or other destructive or explosive substance, with intent in any of these cases to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, although no bodily injury be effected, shall be guilty of felony, and liable to be transported beyond the seas for life, or not less than fifteen years, or imprisoned for not exceeding three years.

And whoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any building or vessel, any gunpowder or other explosive substance, with intent to do any bodily damage to any person, or to destroy or damage any building or vessel, or any machinery, working tools, fixtures, goods, or chattels, shall, whether or not any injury is effected, be guilty of felony, and liable to be transported for not exceeding fifteen years, or imprisoned for not exceeding two years.

And whoever shall unlawfully and maliciously by any overt act attempt to set fire to any building, vessel, or mine, or any stack or steer, or to any vegetable produce of such kind, and with such intent that if the offence were complete the offender would be guilty of felony and liable to be transported for life, shall, although the same be not actually set on fire, be guilty of felony, and liable to be transported for not exceeding fifteen years, or imprisoned for not exceeding two years.

And whoever shall knowingly have in his possession, or make or manufacture, any gunpowder, explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent to commit any offence against this act, shall be guilty of a misdemeanor, and liable to be imprisoned for not exceeding two years.

Male offenders under the age of eighteen, convicted under this act, or of feloniously setting fire to any building, vessel, or mine, or stack or steer, are liable, in addition, to be thrice publicly or privately whipped.

CHAPTER XIV.

Of Forgery.

FORGERY is the false making or alteration of any written instrument, whereby another may be prejudiced, with intent to defraud. It was only a misdemeanor at common law, punishable by fine and imprisonment. But it is the subject of various statutable regulations, by which it is made more penal, and amounts in most cases to felony.

The false making alone, even before publication, is a completion of the offence; for though publication is the usual medium of proof as to the fraudulent intent, which is of the essence of forgery, yet that intent may be proved by other evidence. And, in most cases, the *publication*

of a forged instrument with knowledge of the fact is made by statute a substantive offence.

Forgery may be committed by a *false* making in one's own name, or in a name wholly fictitious, as well as in the name of another person. Thus if a bill payable to J. S. or order get into the hands of another person of the same name and he indorse it, it will be forgery.

So it may be forgery to make use of the name of a person who never existed. Thus, counterfeiting a power of attorney as from the daughter and administratrix of a seaman to receive his wages, has been held forgery, although it appeared upon the trial that the seaman in question died childless and unmarried, and consequently that there never was such a person as his daughter and administratrix.

And *uttering* a note as the note of *another*, though made in the party's *own name*, is within the statutes against forgery.

But if a man draw a bill in a fictitious name by which he has been long known, it is not forgery. Or if a person who has for many years been known by a name which is not his own, afterwards assumes his real name, and in that name draws a bill of exchange, he is not guilty of forgery.

It is not requisite that the thing forged should, supposing it were genuine, have any legal validity. Thus, it has often been determined that a bill of exchange, though improperly stamped, or not stamped at all, is an instrument on which a forgery may be charged. So a man may be convicted of forging a will, though it appear in evidence that the pretended testator is then alive.

But where the legal invalidity of an instrument is *apparent on the face of it*, it seems that its fabrication is no forgery; as where a forged note is incomplete for want of signature, for in that state it does not purport to be a promissory note. And upon this ground, where one was convicted for forging a will of land, which was invalid as being attested only by *two* witnesses, the conviction was held by the judges on a conference to be improper.

The instrument forged must so resemble the true instrument which it purports to be, as to be capable of deceiving persons using ordinary observation. But if the counterfeit be so similar as to have a *general* aptness to deceive, it is sufficient.

Making a fraudulent insertion, alteration, or erasure in any material part of a true instrument, although but in a letter, and even prior to its execution by the true party, or the fraudulent application of a true signature to a false instrument, or *vice versa*, are as much forgeries as an entire fabrication. Changing the figure 2 into the figure 5 in a Bank note has been held to be forging and counterfeiting a Bank note. So the altering of a banker's one pound note by substituting the word *ten* for the word *one* was held to be forgery, though it merely purported to be a note for *ten pound*, and not *pounds*.

Though an *intent to defraud* is of the essence of forgery, yet a special intent to defraud any particular person is not requisite; a general intent to defraud is sufficient. So it is immaterial whether any party be *actually* prejudiced or not, provided any party might be prejudiced by it.

If several combine to forge an instrument, and each executes by himself a distinct part, though they may not be together when the instrument is completed they are all nevertheless guilty as principals.

Before the recent consolidation act, the statutes relating to forgery were exceedingly numerous; but by the 11 Geo. IV. & 1 Wm. IV. c. 66, an attempt was made to improve this complicated branch of legislation. This act, which came into operation on the 21st July, 1830, particularly specified all the offences of this nature which were thenceforth to be punished with death, whether relating to forged writings or other forged and counterfeit matter, or to false personation, false oaths, false entries or other false matters; and provided that all other offences of this description which were by any acts then in force punishable with death, but were not in that act so made punishable, should thereafter be punished with transportation for life or not less than seven years, or with imprisonment, with or without hard labour and solitary confinement, for not more than four nor less than two years.

The list of capital offences of this nature was again reduced by the 2 & 3 Wm. IV. c. 123: in all cases then capital under the above-mentioned act, except for forging or uttering forged wills, or powers of attorney to receive dividends or transfer stock, the punishment of death was commuted to transportation for life; and the 3 & 4 Wm. IV. c. 44 afterwards provided, that such offenders, previously to their being transported, might be imprisoned, with or without hard labour, in the common gaol or house of correction, or be confined in the Penitentiary, for any term not exceeding four years nor less than one.

Even in the same session, however, in which that act was passed (2 & 3 Wm. IV.), as well as subsequently, the number of capital offences of this description was again increased. The acts 2 & 3 Wm. IV. c. 59 (for granting annuities by the Commissioners for the Reduction of the National Debt), 2 & 3 Wm. IV. c. 125 (for the issuing of exchequer bills for the relief of Trinidad &c.), the 5 & 6 Wm. IV. c. 45 (for the abolition of slavery), and the 5 & 6 Wm. IV. c. 51 (for granting relief to Dominica), severally contained provisions by which the forging of certain documents was made punishable with death.

Now, however, by the 1 Vict. c. 84, the capital punishment is removed from all offences of this nature, and the provision of the 3 & 4 Wm. IV. c. 44, whereby persons punishable by transportation for life for these offences were liable, previously to being transported, to be imprisoned for any term not exceeding four years nor less than two years, is repealed; and it is enacted, that if any person shall after the passing of that act be convicted of any of the offences therein-before mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for life, or any term not less than seven years, or to be imprisoned for any term not exceeding four nor less than two years.

We shall now proceed to detail the several cases of forgery &c. mentioned in the 11 Geo. IV. & 1 Wm. IV. c. 66, first noticing a few clauses having a general application to all the offences described in the act.

1. As to *accessories*, &c. In the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, are punishable in the same manner as the principal in the first degree; and every accessory after the fact is liable to be imprisoned for any term not exceeding two years.

2. As to the *place* and *mode* of imprisonment. When imprisonment is awarded under the act, the offender may be sentenced to imprisonment, with or without hard labour, in the common gaol or house of correction, and also to solitary confinement, at the discretion of the court, for any portion of such imprisonment not exceeding one month at a time and not exceeding three months in any one year.

3. The act does not extend to Scotland or Ireland. But, in all cases of forging or uttering within the act, if any person shall *in England* forge, utter, &c. (in whatever place *out of England* the writing &c. may purport to be made, or in whatever language expressed) the offence shall be punishable as if the writing &c. had purported to be made in England; and if the person shall *in England* forge, utter, &c. any bill of exchange or promissory note, or any indorsement or assignment thereof, or any acceptance of a bill of exchange, or any undertaking, warrant, or order for the payment of money, or any deed, bond, or writing obligatory for the payment of money (in whatever place *out of England* the money payable thereby may purport to be payable, and in whatever language the same may be expressed, and whether the same be or be not under seal), the offence shall be punishable as if the money had been payable or purported to be payable in England.

The following are the specific cases of forgery provided for by the 11 Geo. IV. & 1 Wm. IV. c. 66:—

1. **FORGING THE SEALS &c.**—By sect. 2, to forge or counterfeit, or utter knowing the same to be forged or counterfeited, the great seal of the United Kingdom, her majesty's privy seal, any privy signet of her majesty, her majesty's royal sign manual, the seal of Scotland, or the great or privy seal of Ireland, is high treason, and was punishable with death. The capital punishment was removed by the 2 & 3 Wm. IV. c. 123, see *supra*; and now, by the 1 Vict. c. 84, these offences are punishable by transportation for life or not less than seven years, or imprisonment for not exceeding four nor less than two years.

2. **FORGING EXCHEQUER BILLS, BANK NOTES, BILLS OF EXCHANGE, PROMISSORY NOTES, &c.**—By sect. 3, to forge or alter, or to utter knowing the same to be forged or altered, any Exchequer bill or debenture, or any East India bond, or any Bank note or bill, or Bank post bill, or any bill of exchange or promissory note for the payment of money, or any indorsement on or assignment of any of the aforesaid instruments, or an acceptance of a bill of exchange, or any undertaking, warrant, or order for the payment of money, with intent in any of the cases aforesaid to defraud any person whatsoever, is felony, and was punishable with death. The capital punishment was removed by the 2 & 3 Wm. IV. c. 123, see *supra*; and now, by the 1 Vict. c. 84, these offences are punishable by transportation for life or not less than seven years, or imprisonment for not exceeding four nor less than two years.

3. **FORGING WILLS.**—And, by the same section, to forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any will, testament, codicil, or testamentary writing, with intent to defraud any body corporate or person whatever, or to procure, aid, or assist in any of the said offences, is felony, and was punishable with death until the passing of the 1 Vict. c. 84; but now, by that act, by transportation for life or not less than seven years, or imprisonment for not exceeding four nor less than two years.

And by sect. 4 it is provided, that where by any act in force any person is liable to the punishment of death for forging or altering, or uttering knowing the same to be forged or altered, any instrument or writing designated in such act by any special name or description, and the same is in law a will, testament, codicil, or testamentary writing, or a bill of exchange or a promissory note, or an indorsement or assignment of a bill of exchange or promissory note, or an acceptance of a bill of exchange, or an undertaking, warrant, or order for the payment of money, within the meaning of this act, the person so forging or uttering may be indicted as an offender against this act, and punished accordingly.

4. **MAKING FALSE ENTRIES IN THE BANK BOOKS &c.**—By sect. 5, wilfully to make any false entry in or alter any word or figure in any of the books of the Bank of England or of the South Sea Company, in which the accounts of the owners of stock, annuities, or other public funds transferable at the Bank of England or South Sea House are kept, or in any manner wilfully to falsify such accounts, with intent in any of the cases aforesaid to defraud any person, is felony, and was punishable with death. The capital punishment was removed by the 2 & 3 Wm. IV. c. 123, see *supra*; and now, by the 1 Vict. c. 84, these offences are punishable by transportation for life or not less than seven years, or imprisonment for not exceeding four nor less than two years.

5. **FORGING TRANSFERS OF STOCK, &c.**—By sect. 6, to forge or alter, or utter, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund transferable at the Bank of England or the South Sea House, or of or in the capital stock of any body corporate, company, or society established by charter or act of parliament, with intent to defraud any person whatsoever, is felony, and was punishable with death. The capital punishment was removed by the 2 & 3 Wm. IV. c. 123, see *supra*; and now, by the 1 Vict. c. 84, these offences are punishable by transportation for life or not less than seven years, or imprisonment for not exceeding four nor less than two years.

6. **FORGING POWERS OF ATTORNEY TO TRANSFER STOCK OR RECEIVE DIVIDENDS.**—And, by the same section, to forge or alter, or to utter knowing the same to be forged or uttered, any power of attorney or other authority to transfer any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the Bank of England or the South Sea House or the Bank of Ireland, or to receive any dividend payable in respect of any such share or interest, with intent to defraud any body corporate or person whatsoever, or to procure, aid, or assist in any of the said offences, is felony, and continued punishable with death until the passing of the 1 Vict. c. 84; but now, by that act, by transportation for life or not less than seven years, or imprisonment for not exceeding four nor less than two years.

7. **TRANSFERRING STOCK BY MEANS OF FALSE PERSONATION.**—By sect. 7, falsely and deceitfully to personate the owner of any such share, interest, or dividend, and thereby transfer any share or interest belonging to such owner, or thereby receive any money due to such owner, is felony, and was punishable with death. The capital punishment was removed by the 2 & 3 Wm. IV. c. 123, see *supra*;

and now, by 1 Vict. c. 84, these offences are punishable by transportation for life or not less than seven years, or imprisonment for not exceeding four nor less than two years.

8. **FALSE PERSONATION.**—And, by the same section, falsely and deceitfully to personate the owner of any such share or interest or dividend as aforesaid, and thereby endeavour to transfer any such share or interest or receive any money due to any such owner, is felony, punishable by transportation for life or for not less than seven years, or by imprisonment for not exceeding four years nor less than two.

And by 5 Geo. IV. c. 107, § 5, personating a soldier, seaman, &c. in order fraudulently to receive the wages due to him, is a misdemeanor, punishable with transportation for life or any term not less than seven years, or imprisonment, with or without hard labour, in the common gaol or house of correction, for not exceeding seven years.

9. **FORGING THE ATTESTATION TO POWERS FOR TRANSFERRING STOCK OR RECEIVING DIVIDENDS.**—By 11 Geo. IV. & 1 Wm. IV. c. 66, to forge the name or handwriting of any person as or purporting to be a witness attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock as is hereinbefore mentioned, or to receive any dividend payable in respect of any such share or interest, or to utter any such power of attorney or other authority with the name or handwriting of any person forged thereon as an attesting witness, knowing the same to be forged, is felony, punishable, at the discretion of the court, by transportation for seven years, or imprisonment for not exceeding two years nor less than one year.

10. **MAKING FALSE DIVIDEND WARRANTS.**—Any clerk, officer, or other person employed or intrusted by the Bank of England or the South Sea Company knowingly making out or delivering any dividend warrant for a greater or less amount than is due, with intent to defraud any person, is guilty of felony, and may be transported for seven years or imprisoned for not exceeding two years nor less than one year.

11. **FORGING DEEDS, COURT ROLLS, RECEIPTS, ORDERS, &c.**—To forge or alter, or to utter knowing the same to be forged or altered, any deed, bond, or writing obligatory, or any court roll, or copy of a court roll relating to any copyhold or customary estate, or any acquittance or receipt either for money or goods, or any accountable receipt either for money or goods, or for any note, bill, or other security for payment of money, or any warrant, order, or request for the delivery or transfer of goods, or for the delivery of any note, bill, or other security for payment of money, with intent to defraud any person, is felony, punishable at the discretion of the court, by transportation for life or not less than seven years, or by imprisonment for not exceeding four nor less than two years.

12. **FRAUDULENTLY ACKNOWLEDGING RECOGNIZANCES, &c.**—To acknowledge any recognizance or bail in the name of any other person not privy or consenting to the same, before any court, judge, &c., whether such recognizance or bail be or be not filed; or, in the name of any other person not privy or consenting to the same, to acknowledge any fine, recovery, cognovit actionem, or judgment, or any deed to be enrolled, is felony, punishable by transportation for life or not

less than seven years, or by imprisonment for not exceeding four nor less than two years.

13. FORGED BANK NOTES.—To purchase or receive, or, without lawful excuse, the proof whereof shall lie upon the party accused, to have in possession any forged Bank note, Bank bill of exchange, or Bank post bill, or any blanks thereof respectively, knowing the same to be forged, is felony, punishable by transportation for fourteen years.

14. FRAMES OR MOULDS FOR MAKING BANK PAPER.—Without proper authority (to be proved by the party accused) to make or use, or, without lawful excuse, knowingly to have in possession, any frame, mould, or instrument for making paper with the words “Bank of England” visible in the substance thereof, or for making paper with curved or waving bar lines, or with the laying wire lines in a waving or curved shape, or with any number, sum, or amount expressed in a word or words in Roman letters visible in the substance thereof; or to manufacture, use, sell, expose to sale, utter, or dispose of, or knowingly to have in possession, any such paper as aforesaid; or by any art or contrivance to cause the words “Bank of England” to appear visible in the substance of any paper, or to cause the numerical sum or amount of any Bank note &c. in a word or words in Roman letters to appear visible in the substance of the paper whereon the same shall be written or printed, is felony, punishable by transportation for fourteen years.

But nothing herein is to prevent any person from issuing any bill of exchange or promissory note having the amount expressed in guineas or in a numerical figure denoting the amount in pounds sterling appearing visible in the substance of the paper, nor to prevent any person from making, using, or selling any paper having waving or curved lines or other devices in the nature of water-marks, not being bar lines or laying wire lines, provided they are not so contrived as to form the groundwork or texture of the paper, or to resemble the waving or curved laying wire lines or bar lines or the water-marks of the paper used by the Bank of England.

15. ENGRAVING PLATES &c. FOR BANK NOTES &c.—Without authority, to engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any promissory note or bill of exchange purporting to be a Bank note, Bank bill of exchange, or Bank post bill, or any part thereof, or to use such plate &c. or any other instrument or device for making or printing any Bank note &c.; or, without lawful excuse, knowingly to have in possession any such plate &c.; or, without authority, knowingly to offer, utter, dispose of, or put off any paper upon which any Bank note &c. is made or printed; or, without lawful excuse, knowingly to have in possession any such paper, is felony, punishable by transportation for the term of fourteen years.

Without proper authority, to engrave or in anywise make upon any wood, stone, or other material, any word, number, figure, character, or ornament, the impression from which shall resemble or apparently be intended to resemble any part of a Bank note, Bank bill of exchange, or Bank post bill, or to use any such plate &c. or any other instrument or device for making upon paper or other material any such impression; or, without lawful excuse, knowingly to have in possession any such plate &c.; or knowingly to utter, dispose of, or put off any paper or

other material upon which there shall be an impression of any such matter as aforesaid ; or knowingly to have such in possession, is felony, punishable by transportation for fourteen years. § 16.

16. FORGING &c. THE PLATES OR PAPER OF OTHER BANKERS.—Without proper authority to make or use any frame, mould, or instrument for the manufacture of paper with the name or firm of any bankers (other than the Bank of England) appearing visible in the substance thereof, or to have in possession any such frame, mould, or instrument ; or to manufacture, use, sell, expose to sale, utter, or dispose of, or knowingly to have in possession, any such paper ; or to cause the name or firm of any such bankers to appear visible in the substance of the paper upon which the same shall be written or printed, is felony, punishable by transportation for not exceeding fourteen nor less than seven years, or imprisonment for not exceeding three years nor less than one year.

To engrave or in anywise make upon any plate, or upon any wood, stone, or other material, any bill of exchange or promissory note for the payment of money, or any part thereof, purporting to be the bill or note of any persons, body corporate, or company carrying on the business of bankers (other than the Bank of England) ; or to engrave or make upon any plate &c. any words resembling any subscription to any such bill of exchange or promissory note ; or to use or knowingly have in possession any plate &c. upon which any such bill or note, or part thereof, or any words resembling such subscription, shall be engraved or made ; or knowingly to offer, utter, dispose of, or put off, or to have in possession any paper upon which any part of such bill or note, or any words resembling any such subscription, shall be made or printed, is felony, punishable with transportation for not exceeding fourteen nor less than seven years, or imprisonment for not exceeding three years nor less than one year.

To engrave or make upon any plate &c. any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of such, (in whatever language the same be expressed, and whether the same be or be not intended to be under seal) purporting to be the bill &c. of any foreign prince or state, or of any body corporate &c. recognized by any foreign prince or state, or of any person or company of persons resident in any country not under the dominion of her majesty (without the authority of such foreign prince &c., the proof of which shall lie on the party accused) ; or to use or knowingly have in possession any such plate &c. ; or knowingly to offer, utter, dispose of, or put off, or knowingly to have in possession, any paper upon which any part of such foreign bill &c. shall be made or printed, is felony, punishable by transportation for not exceeding fourteen nor less than seven years, or imprisonment for not exceeding three years nor less than one year.

17. FORGERIES AS TO REGISTERS OF BAPTISMS, MARRIAGES, OR BURIALS, AND MARRIAGE LICENCES.—Knowingly and wilfully to insert, or cause or permit to be inserted, in any parish register of baptisms, marriages, or burials, any false entry of any matter relating to any baptism, marriage, or burial, or to forge or alter any entry in any such register ; or to utter any writing as a copy of an entry, knowing such writing to be false, forged, or altered ; or wilfully to destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any such register,

or any part thereof; or to forge or alter, or utter knowing the same to be forged or altered, any licence of marriage, is felony, punishable by transportation for life or not less than seven years, or imprisonment for not exceeding four nor less than two years.

But any rector &c. who, on discovery of any error in the register of any baptism &c. by him solemnized, shall, within one calendar month, correct the same in the manner in the act described, is exempted from the penalties.

Knowingly and wilfully to insert, or cause or permit to be inserted, in any copy of any parish register to be transmitted to the registrar of the diocese, any false entry relating to any baptism, marriage, or burial, or to forge or alter, or utter knowing the same to be forged or altered, any copy of any such register, or knowingly and wilfully to sign or verify a false copy knowing the same to be false, is felony, punishable by transportation for seven years, or imprisonment for not exceeding two years nor less than one year.

Besides the 11 Geo. IV. & 1 Wm. IV. c. 66, there remain in force the following statutes relative to forgery in particular cases:—

Forging a memorial or certificate of registry of lands in Yorkshire or Middlesex. 2 & 3 Anne, c. 4, § 19; 5 & 6 Anne, c. 18, § 8; 7 Anne, c. 20, § 15; 8 Geo. II. c. 6, § 21.

Forging the assay marks on gold and silver plate. 13 Geo. III. c. 59, § 2; 38 Geo. III. c. 69, § 7; 24 Geo. III. sess. 2, c. 50, § 16.

Forging the stamps on plate, playing cards, newspapers, &c. 52 Geo. III. c. 143, § 7, 8; 55 Geo. III. c. 184, § 7, and c. 185, § 6, 7.

Forging the stamp denoting the duty to have been paid on paper, pasteboard, &c. 2 & 3 Vict. c. 23, § 42.

Forging the stamp on linens, calicoes, stuffs. 10 Anne, c. 19, § 97; 13 Geo. III. c. 56, § 5; 33 Geo. III. c. 143, § 7.

Forging the stamp on cambrics &c. 4 Geo. III. c. 37, § 15.

Forging a hawker's licence. 50 Geo. III. c. 41, § 18.

Forging debentures or certificates for payment or return of money, required by statutes relating to the customs or excise. 52 Geo. III. c. 143, § 10.

Forging declaration of return of insurance. 54 Geo. III. c. 133, § 10.

Forging the name of the registrar of the court of admiralty or the Bank receipts for suitors' money. 53 Geo. III. c. 151, § 12.

Forging the hand of the accountant-general, registrar, &c. of the Court of Chancery, or the cashier of the Bank, to any instrument relating to suitors' money. 12 Geo. I. c. 82, § 9.

Forging the hand of the accountant-general of the Exchequer. 1 Geo. IV. c. 35.

Forging the hand of the receiver-general of the excise, or excise comptroller of cash, or other person duly authorized, to any draft &c. upon the Bank of England. 7 & 8 Geo. IV. c. 53, § 56.

Forging the hand of the receiver-general or comptroller-general of the customs, or any person acting for them, to any draft &c. upon the Bank. 3 & 4 Wm. IV. c. 51.

Forging the hand of the receiver-general of the stamp duties, or of his clerk, or of the commissioners of stamps, to any draft &c. on the Bank. 46 Geo. III. c. 76, § 9.

Forging the hand of the treasurer or other signing or vouching officer of the navy to any paper whereby her majesty's naval treasure may be disposed of. 1 Geo. I. st. 2, c. 25, § 6.

Forging the handwriting of the treasurer of the ordnance &c. to any draft &c. on the Bank. 46 Geo. III. c. 45, § 9.

Forging the hand of the receiver-general of the post-office &c. to any draft &c. on the Bank. 7 Wm. IV. & 1 Vict. c. 36, § 33.

Forging the hand of the adjutant-general of the volunteer and local militia &c. to any draft &c. on the Bank. 54 Geo. III. c. 151, § 16.

Forging the hand of the surveyor general of the woods and forests, &c. to any draft &c. on the Bank. 46 Geo. III. c. 142, § 14.

Forging the marking or handwriting of the receiver-general of the prefixes upon any writ of covenant. 52 Geo. III. c. 143, § 5.

Forging any contract, certificate, receipt, &c. relating to the redemption of the land tax. 52 Geo. III. c. 143, § 6.

Forging any letter of attorney, order, assignment, last will, &c., in order to receive the pay or prize money of any officer, seaman, or marine. 57 Geo. III. c. 127, § 4.

Forging any letter of attorney, order, last will, &c. in order to receive money due on account of any out-pension granted by Greenwich Hospital. 54 Geo. III. c. 113, § 6.

- Forging bills &c. of officers of the navy for their half-pay. 56 Geo. III. c. 101, § 4.
 Forging the name of any officer of the navy entitled to allowance on the compassionate list, or of any marine officer or marine entitled to half-pay, or of any officer's widow entitled to pension, to any remittance, bill, certificate, voucher, or receipt in relation to the same. 49 Geo. III. c. 45, § 10, 11; 7 & 8 Geo. IV. c. 8.
 Forging the signature of a parish minister to a certificate to obtain probate of a seaman's will or administration to him. 55 Geo. III. c. 60, § 31.
 Forging seamen's remittance bills. 1 & 2 Geo. IV. c. 49, § 2.
 Forging receipts or certificates of annuity for military and naval pensions. 3 Geo. IV. c. 51, § 15.
 Forging a receipt or warrant of the South Sea Company for subscriptions. 6 Geo. I. c. 11.
 Forging Mediterranean passes. 4 Geo. II. c. 18, § 1.
 Forging a shipping licence. 47 Geo. III. sess. 2, c. 66, § 26.
 Forging quarantine certificates. 6 Geo. IV. c. 78, § 25.
 Forging certificates required by the act for the abolition of the slave trade. 5 Geo. IV. c. 113, § 10.
 Making or uttering a false certificate of a previous conviction. 7 & 8 Geo. IV. c. 28, § 11.
 Forging the seal of the General Register Office, or making false entries in any register book of births, marriages, or deaths, or giving false certificates. 6 & 7 Wm. IV. c. 86, § 43.
 Forging any declaration, warrant, order, or other instrument under the 2 & 3 Wm. IV. c. 59, relating to annuities granted by the Commissioners for the Reduction of the National Debt; or under the 2 & 3 Wm. IV. c. 125, or 5 & 6 Wm. IV. c. 51, for the issue of exchequer bills for the relief of Trinidad, Dominica, &c.

All offences of forging or uttering, whether indictable at common law or by any statute, may be dealt with, indicted, tried, and punished, and laid and charged to have been committed, in any county or place in which the offender shall be apprehended or be in custody. 11 Geo. IV. & 1 Wm. IV. c. 66, § 24.

By 9 Geo. IV. c. 32, § 2, no person shall be deemed an incompetent witness, on any prosecution for forging or uttering, by reason of any interest which he may have in respect of the instrument forged.

CHAPTER XV.

Of Courts of a Criminal Jurisdiction.

1. THE HIGH COURT OF PARLIAMENT is the supreme court of the kingdom. One mode of proceeding in this court is by *impeachment* before the House of Lords on the part of the House of Commons.

The articles of impeachment are a kind of bill of indictment found by the House of Commons and afterwards tried by the Lords.

A commoner may be impeached for high misdemeanors, but there is a doubt whether he can be impeached for felony. But a peer may be impeached for any crime.

By 12 & 13 Wm. III. c. 2, no pardon under the great seal shall be pleadable to an impeachment by the Commons of Great Britain in parliament. But it is not understood by that enactment, that, after the impeachment has been heard and determined, the queen is restrained from pardoning.

Another mode of criminal proceeding in the court of parliament occurs when a peer is *indicted* for treason or felony, or misprision of either, in the Queen's Bench or at the assizes before the justices of oyer and terminer; the course being in that case to remove the indictment by *certiorari* into the court of parliament, to be there determined.

The privilege of being thus tried in parliament depends upon nobility rather than a seat in the house, and may therefore be claimed, since the Union, by Scotch and Irish peers not members of the House of Lords, by the queen consort or dowager, by all peeresses by birth, and by peeresses by marriage also, unless they have disparaged themselves by taking a commoner for their second husband.

For the greater regularity and dignity of the proceedings, a lord high steward is appointed as speaker *pro tempore*, or chairman of the court, but he is not properly the judge. The collective body of the peers are the judges both of law and fact, and the high steward has a vote with the rest in right of his peerage.

By 7 Wm. III. c. 3, § 11, upon all trials of peers for treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned at least twenty days before such trial to appear and vote therein; and every lord appearing shall vote in the trial of such peer, first taking the oaths of allegiance and supremacy, and subscribing the declaration against popery.

There is no instance of the bishops sitting in the court of parliament on trial for capital offences, whether the proceedings be by impeachment or on an indictment. The usual practice is for them to withdraw voluntarily after entering a protest, declaring their right to stay. It seems to be agreed, however, that a bishop has a right to be tried by this court in like manner and in the same cases as a peer.

2. THE COURT OF THE LORD HIGH STEWARD.—This is a court instituted for the trial of peers indicted for treason or felony, or for misprision of either. Properly speaking, the court of the lord high steward exists only during the recess of parliament, for in the session of parliament the trial is always in the court of parliament. There is this difference between this court and the court of parliament, that here the lord high steward is sole judge of matters of law, as the lords triors are matters of fact, and he has no right to vote.

The proceeding is upon indictment in the Queen's Bench or at the assizes, which, when found, is removable by certiorari into this court, in the manner before described in the case of the court of parliament. For the purpose of receiving and trying the indictment, the queen creates a lord high steward *pro hac vice*, by commission under the great seal. And the lord high steward directs a precept to a serjeant at arms to summon the lords to attend and try the indicted peer.

The 7 Wm. III. c. 3 (above cited), as to the manner of summoning the peers in cases of treason or misprision, applies to this court as well as to the court of parliament.

On trials of peers for other felonies, the number of peers to be summoned does not appear to be regulated by law, except that it is the course to summon not less than twenty-three.

The decision is by a majority; but a majority cannot convict unless it consists of twelve or more.

No bishop can be summoned to the court of the lord high steward. Nor have the bishops the privilege of being tried there.

3. THE COURT OF QUEEN'S BENCH, as already observed, is divided into a crown side and a plea side. On the crown side it takes cognizance of all criminal causes. And the judges of this court are the supreme coroners of the kingdom.

All offences committed in Middlesex, where the court sits, may be originally prosecuted in this court by *indictment* herein; and misdemeanors committed in any county in England may be prosecuted herein by *information*, filed by the attorney-general *ex officio*, or at the instance of a private individual prosecuting in the Crown Office by leave of the court. And, by different acts of parliament, some offences committed out of the kingdom are here cognizable.

Indictments from all inferior courts may be removed into the Queen's Bench by *certiorari*.

All indictments in the Queen's Bench, whether originally instituted here or removed by *certiorari*, and all informations here, are tried in this court, either at bar, or at *nisi prius* by a jury of the county where the indictment is found.

4. THE COURT OF CHIVALRY has now fallen into entire disuse. It was held before the lord high constable of England jointly with the earl marshal, and had jurisdiction over pleas of life and member, arising in matters of arms and deeds of war, as well out of the realm as within it.

5. THE HIGH COURT OF ADMIRALTY, held before the lord high admiral of England, or his deputy, styled the Judge of the Admiralty, *was* a court of criminal, as we have seen that it *is* a court of civil jurisdiction, and had the sole cognizance of all crimes and offences committed either upon the sea or on the coasts out of the body of any county; and, by 15 Ric. II. c. 3, might, concurrently with the courts of common law, hold pleas of "death and mayhem happening in great ships in the main stream of great rivers, below the bridges next the sea."

But, as it was contrary to the genius of our constitution that this court should intermeddle with criminal matters, by reason of its proceeding without the intervention of a jury, according to the course of the civil law, it was enacted by 28 Hen. VIII. c. 15, that all *treasons, felonies, robberies, murders, and confederacies* committed upon the sea, or in any haven, creek, or place where the admiral has jurisdiction, should thenceforth be inquired of and tried in such places in the realm as should be limited by the king's commission, by a grand and petty jury of the shire, in like form as if done on land, and according to the course of the common law; such commission to be under the great seal, and directed to the admiral or his deputy, and "three or four such other substantial persons" as should be named by the lord chancellor. The 39 Geo. III. c. 37 extended the provisions of the 28 Hen. VIII. to *all offences* committed within the admiralty jurisdiction, and declared that they should be deemed offences of the same nature and liable to the same punishment as if committed on shore, and that they might be tried as appointed by the 28 Hen. VIII. c. 15. Under these statutes all offences perpetrated within the limits of the admiralty jurisdiction were tried by special commission as above stated, according to the course of the common law, and not, as before, in the Court of Admiralty in a course conformed to the civil law. Among the commissioners appointed were always two common-law judges, who, in effect, tried the prisoners, the judge of the admiralty presiding. The court so constituted was called the Admiralty Sessions; and, under the 45 Geo. III. c. 72, a session was held twice a year at the Old Bailey.

But now, by 4 & 5 Wm. IV. c. 36, the Central Criminal Court

established by that act is authorized to try such offences. The 22d section, reciting that it is expedient that persons charged with certain offences committed on the high seas and other places within the jurisdiction of the Admiralty should speedily be brought to trial, enacts, that it shall be lawful for the justices and judges of oyer and terminer and gaol delivery appointed by the commissions issued under the authority of that act, or any two or more of them, to inquire of, hear, and determine any offences committed or alleged to have been committed on the high seas and other places within the jurisdiction of the admiralty of England, and to deliver the gaol of Newgate of any persons detained therein for any offences alleged to have been committed upon the high seas aforesaid within the jurisdiction of the admiralty of England.

And by 7 & 8 Vic. c. 2, in *every county*, courts of oyer and terminer or gaol delivery are now empowered to try offences committed upon the high seas and other places within the jurisdiction of the admiralty; and the justices of peace before whom informations of such offences are taken may commit the offenders to the same prison, and they are to be arraigned, tried, and sentenced in the same manner as if the offence had been committed within the county.

By 46 Geo. III. c. 54, all piracies and other offences committed within the jurisdiction of the admiralty may be determined according to the common law, in any of her majesty's islands or dominions &c., under the queen's commission, directed to four or more discreet persons, in like manner as under a commission by virtue of 28 Hen. VIII. c. 15, and shall be punished in like manner.

The 7 & 8 Geo. IV. c. 29 (Larceny Act), the 7 & 8 Geo. IV. c. 30 (Malicious Injuries Act), the 9 Geo. IV. c. 31 (Offences against the Person Act) the 11 Geo. IV. & 1 Wm. IV. c. 66 (Forgeries Act), the 2 Wm. IV. c. 34 (Coining Act), and the recent acts for the amelioration of the criminal law, 1 Vict. cc. 85 to 89, severally provide that offences punishable under those acts, if committed within the admiralty jurisdiction, shall be dealt with as any other offence committed within that jurisdiction.

6, 7. THE COURTS OF OYER AND TERMINER, AND OF GENERAL GAOL DELIVERY, AT THE ASSIZES.—The judges, at the assizes, sit by virtue of five several authorities: the commission of assize, and its attendant jurisdiction of *nisi prius*, (which are principally of a civil nature), the commission of the peace, the commission of oyer and terminer, and the commission of general gaol delivery.

The *Commission of Oyer and Terminer* is under the great seal, and directed to the lord chancellor, lord president of the council, lord privy seal, several noblemen, two judges of the courts at Westminster, queen's counsel, serjeants, and associates, or any two of them. But the judges, queen's counsel or serjeants, only, are of the quorum, so that the rest cannot act without the presence of one of them; and there must be four of the persons named in the commission present.

There can be no proceedings under the commission of oyer and terminer, except on an indictment found at the same assizes; for they must first "inquire" (in the words of the commission) by means of the grand jury, before they are empowered to "hear and determine" by the help of a petty jury. But under this commission persons may be tried whether they be in gaol or at large.

The *Commission of General Gaol Delivery* is directed to the judges, serjeants, queen's counsel, and clerk of assize and associates, constituting them the queen's justices, and commanding them, or any four, three, or two of them (of which number there must be one at least of the judges, queen's counsel, and serjeants specified) to deliver the gaol at a particular town of the prisoners therein. Under this commission the justices cannot, except in some special cases, try any person who is not in custody, actual or constructive. A person admitted to bail is in constructive custody.

The justices of gaol delivery may proceed, upon any indictment of felony or trespass found before other justices, against any person in the gaol, and not determined, as well as upon an indictment found before themselves. They may discharge not only prisoners acquitted, but also those against whom, upon proclamation made, no evidence shall appear to indict them.

By 14 Geo. III. c. 20, persons charged with felony or other crime before any court having criminal jurisdiction in England and Wales, and against whom no indictment shall be found, or who on trial shall be acquitted, or who shall be discharged by proclamation for want of prosecution, shall be immediately set at large without payment of any fee.

By 3 Geo. IV. c. 10, it is provided, that where commissions shall not be opened and read in the presence of one of the quorum commissioners at any place specified on the day named therein, the same may be opened and read on the following day, or if such following day shall be Sunday or other day of public rest, then on the succeeding day; and that where commissions are opened pursuant to the provisions of that act, the cause of delay shall be certified by such quorum commissioner to the lord chancellor, and enrolled.

Under these commissions of oyer and terminer and general gaol delivery, the gaols are generally cleared, and all offenders tried, punished or delivered, twice in every year; and on the home circuit three times a year.

On urgent occasions, as of offences demanding immediate inquiry and punishment, the queen issues a special or extraordinary commission of oyer and terminer and gaol delivery, for the special trial of such offences; upon which the course of proceeding is much the same as upon general and ordinary commissions.

8. THE COURT OF GENERAL QUARTER SESSIONS OF THE PEACE.—This court is held in every county, riding or division, once in every quarter of a year; and the times appointed for holding it are, by 11 Geo. IV. & 1 Wm. IV. c. 70, § 35, in the first week after the 11th October, 28th December, 31st March, and 24th June respectively.

It is held before two or more justices of the peace, one of whom must be of the quorum. It owes its jurisdiction, so far as respects indictments, to 18 Edw. III. c. 2, and 34 Edw. III. c. 1.

There are some matters which particularly belong to this jurisdiction and ought to be prosecuted at the sessions; such as offences relating to game, highways, ale-houses, bastards, settlements and removals of the poor, vagrants, servants' wages, and apprentices.

The jurisdiction of the court of quarter sessions was formerly more extensive than at present, extending in general to all felonies and tres-

passes, except treason, forgery at common law, usury, and perjury; though murders and other capital felonies, and manslaughter, were usually remitted for trial to the assizes. But the 5 & 6 Vict. c. 38, reciting that it is expedient that the powers of justices in general and quarter sessions of the peace with respect to the trial of offences should be better defined, enacts, that neither the justices of the peace for any county, riding, division, or liberty, nor the recorder of any borough, shall, at any session of the peace, or adjournment thereof, try any person or persons for any treason, murder, or capital felony, or for any felony which, when committed by a person not previously convicted of felony, is punishable by transportation beyond the seas for life, or for any of the following offences :—

1. Misprision of Treason.
2. Offences against the Queen's title, prerogative, person, or government, or against either House of Parliament.
3. Offences subject to the penalties of *præmunire*.
4. Blasphemy, and offences against religion.
5. Administering or taking unlawful oaths.
6. Perjury and subornation of perjury.
7. Making, or suborning any other person to make, a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor.
8. Forgery.
9. Unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern.
10. Bigamy, and offences against the laws relating to marriage.
11. Abduction of women and girls.
12. Endeavouring to conceal the birth of a child.
13. Offences against any provision of the laws relating to bankrupts and insolvents.
14. Composing, printing, or publishing blasphemous, seditious, or defamatory libels.
15. Bribery.
16. Unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person.
17. Stealing or fraudulently taking, or injuring or destroying, records or documents belonging to any court of law or equity, or relating to any proceeding therein.
18. Stealing or fraudulently destroying or concealing wills or testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate, or any interest in lands, tenements, or hereditaments.

And, by sec. 4, to enlarge the powers of justices of the peace for dividing their several courts of sessions of the peace, it is enacted, that whenever any court of general or quarter session or adjourned session of the peace shall be assembled for the dispatch of business thereunto belonging, and there shall be any order of the court in force for the appointment of a permanent chairman or deputy chairman of the said court, it shall be lawful for the justices then present, if it shall appear to them advisable, having regard to the business to be disposed of, to appoint two or more justices, one of whom shall be such deputy chairman, to sit apart in some convenient place in or near the court, there to hear and determine such business as shall be referred to them, whilst others of the justices, one of whom shall be the said chairman, are at the same time proceeding in the dispatch of the other business of the same court; and that the proceedings so had by and before the justices so sitting apart shall be as good and effectual in the law as if the same were had before the court assembled and sitting as usual in its ordinary place of sitting, and shall be enrolled and recorded accordingly; and the several provisions of the 59 Geo. III. c. 28 (to empower

magistrates to divide the court of quarter sessions) shall, so far as may be, extend and be applicable to the second court so to be holden as aforesaid.

The course of proceeding is sometimes by indictment, and sometimes by motion and order thereupon in a summary way.

In general, and unless otherwise provided by statute, the proceedings may be removed into the Queen's Bench by *certiorari*, and be there either quashed or confirmed.

It is a court of record, and its records are kept by an officer called the *custos rotulorum*, who is also a justice of the quorum. He is the principal civil officer of the county, and appointed by the royal sign-manual; and he appoints another officer of the court, called the clerk of the peace.

Courts of quarter-sessions are held in most corporation towns, which have generally within their respective limits the same authority as the sessions of the county. But the corporation justices have no jurisdiction in appeals from orders of removal of the poor, which by 8 & 9 Wm. III. c. 30 must be to the sessions of the county.

Besides the quarter sessions, both in counties and corporation towns, SPECIAL or PETTY SESSIONS are held before a few justices for dispatching smaller business between the times of the quarter sessions, as for passing the accounts of parish officers, &c.¹

9. THE SHERIFF'S TOURN, AND THE COURT LEET OR VIEW OF FRANK-PLEDGE.—These are courts of a similar description; the tourn being held before the sheriff, for each respective hundred; and the court leet before the steward of the leet, for some particular hundred, lordship, or manor.

The sheriff's tourn is a court of record, and held twice every year, within a month after Easter and Michaelmas, in different parts of the county.

The court leet is also a court of record, held once in the year only, within the hundred, lordship, &c.

All freeholders and commorants are bound to attend the tourn and leet; except persons under twelve and above sixty years of age, clergymen, women, and the queen's tenants in ancient demesne.

The constables of common right were formerly chosen and sworn in these courts. See *ante*, p. 193.

At the leet, a presentment may be made by the jury of all crimes within the jurisdiction; and this court has power, not only to present, but also to punish all trivial misdemeanors, such as common nuisances and irregularities in public commons. But no offence is cognizable at the leet unless it arose since the holding of the last court.

The leet has power to receive indictments of felonies at the common law, though not felonies by act of parliament, unless specially limited thereto. But though the leet may receive indictments for felony, it cannot hear and determine them, but must send them to the gaol delivery, there to be heard and determined, if the offenders be in custody; and if they are not in custody, the indictment must be removed by *certiorari* into the Queen's Bench.

¹ In Middlesex, by 7 & 8 Vic. c. 71, two sessions of the peace are holden every month; the first sessions in the months of January, April, July, and October, being the general quarter-sessions; and an assistant judge, or permanent chairman, is appointed to preside at the trial of all appeals, felonies, and misdemeanors.

A presentment in the leet of any offence within the jurisdiction of the court, being neither capital nor concerning any freehold, subjects the party to a fine or amercement without any further proceeding, and admits of no traverse of the truth of it. But if it touch the party's freehold, it may be removed into the Queen's Bench, and there traversed.

Upon presentment of a nuisance, the steward may either amerce the person, and also order him to remove it by such a day, under pain of forfeiting a certain sum; or he may order him to remove it under such a pain, without amercing him at all. And, on presentment at another court that he hath not removed such nuisance (having had notice thereof), the penalty may be recovered by distress or action of debt, without any further proceeding.

A court leet and court baron are usually holden together; and it seems that what is transacted therein in relation to public matters shall be applied to the jurisdiction of the court leet, and what is done in relation to private matters shall be intended to be done by the court baron.

The tourn and leet are now little used, the business having for the most part gradually devolved upon the quarter sessions, which in some cases is particularly directed by 1 Edw. IV. c. 2.

A court leet may be forfeited by misuser or nonuser.

10. THE COURT OF THE CORONER.—This is a court of record held before the coroner, to inquire, when any one dies in prison or comes to a violent or sudden death, by what manner he came to his end. The judges of the Court of Queen's Bench are coroners *virtute officii*. But those before whom this court of the coroner is holden are elective coroners, being persons elected into that office in each county of England. Their number in each county is usually four, but sometimes six.

The proceedings before the coroner must be *super visum corporis*; and if the body is not found, the coroner cannot sit. He must also sit at the very place where the death happened; and the inquest must be taken within a reasonable time after the death of the party. The jury must consist of twelve at least; and twelve must agree.

If any be found guilty by this inquest of murder or other homicide, the coroner is to commit to prison for further trial, and also to inquire concerning their lands, goods, and chattels, which are forfeited thereby. Whether homicide is found or not, he must inquire whether any deodand has accrued to the queen, or to the lord of the franchise, by the death. He must certify the whole inquisition to the Court of Queen's Bench, or to the next assizes.

By 7 Geo. IV. c. 64, § 2, every coroner (upon any inquisition before him taken, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact) shall put in writing the evidence given to the jury before him, or as much thereof as shall be material, and shall have authority to bind by recognizance all such persons as know or declare anything material touching the said manslaughter or murder, or the said offence of being accessory to murder, to appear at the next court of oyer and terminer or gaol delivery, or superior criminal court of a county palatine, at which the trial is to be, then and there to prosecute or give evidence against the

party charged. And every such coroner shall certify and subscribe the same evidence, and all such recognizances, and also the inquisition before him taken, and shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court. And, by § 5, a coroner neglecting these provisions is liable to be fined by the court to which he ought to have delivered the examinations, &c.

See further, as to the duties of coroner, *ante*, p. 194.

11. **THE COURT OF THE CLERK OF THE MARKET.**—This is a court incident to every fair and market in the kingdom, to punish misdemeanors therein, as the Court of Piepoudre is to determine disputes as to contracts and other matters of property; and as the latter is the lowest *civil* court, so this is the most inferior *criminal* court in the kingdom. Its jurisdiction, in that very principal part of it which respected the suppression of false weights and measures, has been, to a great extent, superseded by modern statutes.

12. **THE COURTS OF THE UNIVERSITIES.**—When an indictment is found at the assizes or elsewhere against any scholar of the university of Oxford, or other person entitled to its privilege, the vice-chancellor may claim the cognizance of it; and when claimed in due time and manner, it ought to be allowed him by the judges of assize.

When the cognizance is allowed, if the offence be a misdemeanor only, it is tried in the *court of the chancellor* of Oxford by the ordinary judge.

But if the offence be treason, felony, or mayhem, then, by charter of 2 Hen. IV., confirmed by 13 Eliz. c. 29, it is to be tried before the *high steward* of the university, to be nominated by the chancellor of the university and approved by the lord chancellor of England. And a commission under the great seal issues in such case, authorizing the high steward and others to try the indictment then depending, according to the law of the land and the privileges of the university.

The indictment must first be found by a grand jury at the assizes or elsewhere, and then the cognizance thereof claimed; for the high steward cannot proceed originally “to inquire,” but only, after inquest found in the common law courts, “to hear and determine.”

The high steward issues his precept to the sheriff of the county, who returns a panel of eighteen freeholders, and another precept to the bedels of the university, who return a panel of eighteen matriculated laymen; and the indictment is tried by a jury *de medietate*, in the Guildhall of the city of Oxford.

If execution becomes necessary, it must be done by the sheriff of the county, under the university process.

Several instances occurred in the reign of Elizabeth, James, and Charles I. of indictments for murder being challenged by the vice-chancellor at the assizes, and afterwards tried before the lord high steward, and the proceedings on those trials are still extant in the archives of the university.

Courts of the same description belong to the university of Cambridge; and their jurisdiction and course of proceeding appear to be in general the same with those of Oxford.

CHAPTER XVI.

Of Summary Convictions.

By a summary conviction is meant a conviction without the intervention of a jury.

1. *Proceedings before Commissioners of Excise.*—These are unknown to the common law, and depend on statutable enactments. For the regulations and course of proceeding, see *ante*, p. 109, &c.

2. *Convictions before Justices of the Peace.*—This jurisdiction is also unknown to the common law, and derived entirely from special statutory provisions, directing such method of proceeding in respect of the particular offence. See *ante*, p. 895.

3. *Attachments for Contempt of Courts.*—To this head of summary proceedings may also be referred the process for punishing *contempts*, immemorially used by the superior courts of justice, *viz.* by *attachment*, and the subsequent proceedings thereon.

The contempts thus punished are either *direct*, which openly insult or resist the powers of the courts or persons of the judges; or *consequential*, which plainly tend to create a disregard of their authority. The principal instances of either usually punished by attachment may be reduced to the following heads: 1. Those committed by inferior judges and magistrates in acting unjustly &c., or disobeying the queen's writs of prohibition, certiorari, &c. 2. By sheriffs, bailiffs, gaolers, and officers, in abusing the process of the law. 3. By attorneys and solicitors, in malpractice. 4. By jurymen, in misconduct in the discharge of their office. 5. By witnesses, in making default when summoned, refusing to be sworn or examined, or prevaricating. 6. By parties to suits, in disobedience to rules or orders of the courts. 7. By other persons, in rescues and the like; disobedience to the queen's writs; treating her writ or the rules of the court with disrespect; perverting process to oppressive purposes; speaking or writing contemptuously of the courts or judges in their official capacity; printing false accounts of causes depending; rude and contumelious behaviour, or breach of the peace, in the face of the court, and the like. And for all such offences the superior courts have power to proceed in a summary way.

If the contempt be committed in the face of the court, the offender may be instantly apprehended, and imprisoned at the discretion of the judges, without further proof or examination. But in matters which arise at a distance, if the judges, on application, supported by affidavit, see sufficient ground to suppose that a contempt has been committed, they either make a rule to show cause why an attachment should not issue, or, in very flagrant cases, an attachment issues in the first instance.

The attachment is a process to bring the party into court; and when there, he must either stand committed, or put in bail, to answer on oath to interrogatories to be administered to him touching such contempt.

His confession of the contempt will not in general avail to save him from the necessity of answering the interrogatories.

If he wilfully and obstinately refuses to answer, or answers evasively, his contempt is aggravated, and his punishment will be increased.

If in his answer he clears himself, he is discharged. Otherwise the court proceeds to correct him by fine or imprisonment, or both, and sometimes by corporal punishment.

In courts of equity, after the party in contempt has answered the interrogatories, his answers may be contradicted and disproved by affidavits of the adverse party; but in the courts of law this is not allowed, and if the party in contempt clears himself by his answers, the complaint is totally dismissed.

Such is the course of proceeding upon actual contempts; but when an attachment issues for that sort of constructive contempt which consists in not obeying a rule or order of the court made in the course of a cause, as for payment of costs, performance of an award, or the like, this is looked upon rather as a civil execution than a criminal process; and upon such attachments, therefore, the mode of proceeding is different from that above described. Upon these no interrogatories are administered, nor is any punishment inflicted; but, upon non-payment of the money &c., the party is committed to prison for satisfaction of the demand, as in other cases of civil debt. To this latter species of attachment persons having privilege of parliament are not liable, though they are liable to an attachment for actual contempt. By 10 Geo. III. c. 50, obedience to any rule of court may be enforced against persons having privilege of parliament, by the process of distress infinite.

CHAPTER XVII.

Of Arrest.

ARREST is the apprehending of the person, in order that the party may be forthcoming to answer an alleged or suspected crime.

1. *Arrest by warrant*.—A warrant may be granted in extraordinary cases by the privy council or secretaries of state; by the speaker of the House of Commons or of the House of Lords; by justices of gaol delivery or oyer and terminer; by justices at sessions; or by a judge of the Court of Queen's Bench. But warrants are most usually issued by a single justice of the peace.

At common law a judge of the Queen's Bench may issue a warrant in his own name into any county of England or Wales for the apprehending and bringing before him any persons touching whom oath is made of a felony committed, or of suspicion of felony. But, to avoid the trouble of bringing up the party, the judges of the Queen's Bench, when they issue warrants, usually direct the party to be apprehended and brought before some justice of the peace near adjoining, to be proceeded against according to law.

By 48 Geo. III. c. 58, whenever any person shall be charged with any offence for which he may be prosecuted by indictment or information in the Queen's Bench (not being treason or felony), any judge of the same court may issue his warrant under his hand and seal to apprehend him, and take sureties for his appearance in the same court.

A justice of the peace has power to issue warrants in all treasons, felonies, and breaches of the peace for which the party is punishable with corporal punishment, within the places over which his jurisdiction extends. He may issue a warrant to apprehend a person accused of felony, though not indicted; or a person suspected of felony, if the party who prays his warrant shows probable ground of suspicion. In both cases the party requiring a warrant should be examined as to the facts *upon oath*, and all charges, of whatever nature they may be, should be taken in writing.

And in case of an information *on oath* that goods are stolen, and that the party suspects the goods to be in such a house, or the like, a justice of the peace may issue his warrant to search such house &c. and to attach the parties in whose custody the stolen goods are found.

And by 7 & 8 Geo. IV. c. 29, § 63 (the Larceny Act), if any credible witness shall prove upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession or in his premises any property whatsoever on or with respect to which any offence punishable either upon indictment or summary conviction under that act shall have been committed, the justice may grant a warrant to search for such property as in the case of stolen goods.

The warrant ought to be under the hand and seal of the justice (though perhaps a seal is not essential, unless where expressly required by act of parliament), and should set forth the time and place of making, and for what cause, and should be directed to the constable or other peace officer (or to any private person by name), requiring him to bring the party either generally before any justice of the peace for the county, or specially before the justice who grants it. In the latter case it is called a *special* warrant.

A *general* warrant to apprehend all persons suspected, without designating any person in special, is illegal and void. So a general warrant to search *all* suspected places for stolen goods is illegal and void.

By 24 Geo. II. c. 45, a warrant properly penned, even though the magistrate exceeds his authority, will indemnify the officer who executes it. But an officer will not be protected where he acts without warrant; nor unless he acts strictly in obedience to the warrant.

An officer is bound to execute a warrant received by him so far as the jurisdiction of the magistrate and himself extends. And the case is the same, though the party so flying or resisting is in fact innocent of the crime charged, if he be the person named in the warrant.

And the officer may break open doors to execute a warrant for treason or other felony, or breach of the peace, if, upon demand of admittance, it cannot otherwise be obtained. And if he or his assistants be killed in the regular execution of their duty, it is murder.

An arrest may be made in the night. / And though, by the 29 Car. II. c. 7, arrests in general are prohibited on a Sunday, cases of treason, felony, and breach of the peace are excepted.

A warrant from a judge of the Queen's Bench extends all over England and Wales. But a warrant of a justice of the peace in one county must be *backed* (that is, signed) by a justice of the peace in another county before it can be executed there. However, as to the warrants of a magistrate of the Metropolitan Police District, see *ante*, 189.

By 13 Geo. III. c. 31, 44 Geo. III. c. 92, 45 Geo. III. c. 92, 48 Geo. III. c. 58, and 54 Geo. III. c. 186, regulations are made to provide for the apprehension of persons who have gone from one part of the United Kingdom to another; and, independently of these statutes, a justice may grant a warrant to apprehend a person who, being found within his jurisdiction, has committed an offence in Ireland, or in a foreign country, or on the high seas; and the secretary of state for Ireland may by his warrant remove a prisoner there, to be tried in England, for an offence committed in England.

When an arrest is made on suspicion, the prisoner is not to be handcuffed, unless he has attempted to escape, or it is necessary to prevent his escaping.

2. *Arrests by Officers without Warrant.*—A justice of the peace may arrest, without warrant, any person committing felony or breach of the peace in his presence.

The *sheriff* and the *coroner* may apprehend any felon in the county without warrant.

The *constable* may, without warrant, arrest any one for a breach of the peace committed in his view, and carry him before a justice of the peace. But not for a mere assault not committed in his view. It is said, however, that he may carry those before a justice who were arrested by persons present at an affray and by them delivered into his hands.

He may arrest, without warrant, on reasonable charge of felony, or of having given a dangerous wound, though it should afterwards appear that no felony or wounding had actually been committed. But a private person cannot justify an arrest under such circumstances.

He may for that purpose break open doors without warrant, if, upon demand, admittance cannot otherwise be obtained. And he or his assistants may lawfully kill the party so charged, if he escapes or resists, so that he cannot otherwise be taken. And if the constable or his assistant is killed in the attempt, and with the intention to oppose him in the execution of his duty, it is murder.

So a constable may, without warrant, break open doors to suppress an affray.

Watchmen, and *beadles*, may arrest all night-walkers and other offenders in the streets at night, and commit them to custody till the morning; and all those whom there is reasonable cause to suspect of felony, although there be no proof of a felony having been committed.

3. *Arrests by Private Persons without Warrant.*—Any private person who is present when any felony is committed may, without warrant, arrest the felon; and may justify breaking open doors upon following him. And if he kill the felon (provided he cannot otherwise be taken), it is justifiable. And if the person attempting to arrest is killed, it is murder.

Any person observed in the night attempting to commit a felony may

be lawfully detained by a private person, without warrant, till he can be carried before a magistrate.

A private person may also arrest, without warrant, on reasonable suspicion of felony. But he acts at his peril in so doing, and is liable to an action, unless he can afterwards prove that a felony had actually been committed by some one, and that there was reasonable ground to suspect the plaintiff. But he cannot justify breaking open doors upon suspicion; and if either party kill the other in the attempt to do so, it is manslaughter and no more.

The 5 Geo. IV. c. 83 (Vagrant Act) authorizes any person whatsoever to apprehend persons who shall be "found offending" against that act, and forthwith take and convey them before a justice.

And by the 7 & 8 Geo. IV. cc. 29 and 30 (Larcenies and Malicious Injuries Acts) any person "found committing" any offence against those acts (except only the offence of angling in the day-time) may be immediately apprehended without a warrant by any peace officer, or by the owner of the property or his servant, or by any person authorized by him, and forthwith taken before a neighbouring justice of peace.

And any person to whom any property shall be offered to be sold, pawned, or delivered, if he have reasonable cause to suspect that any such offence as is described in the said act has been committed on or with respect to such property, is authorized, and if in his power is required, to apprehend and forthwith carry before a justice the party offering the same, together with such property.

Assaults committed on officers or persons acting in their aid, or on any other person lawfully authorized to apprehend or detain offenders, are punishable, by 9 Geo. IV. c. 31, with imprisonment, with or without hard labour, in the common gaol or house of correction for not exceeding two years, and fine, and being required to find sureties to keep the peace. See *ante*, 1071.

4. *Arrest upon Hue and Cry.*—This is the old common law process of pursuing with horn and with voice all felons, and such as have given a dangerous wound.

It may be raised either by precept of a justice of the peace, or by a peace officer, or by any private man who knows of a felony. The party raising it should acquaint the constable of the vill with all the circumstances, and with the person of the felon, and thereupon the constable is to search his own town, and raise all the neighbouring vills, and make pursuit with horse and foot. In the absence of the constable, hue and cry may be made without him.

In the prosecution of such hue and cry, the constable and his attendants have the same powers, protection, and indemnification, as if acting under the warrant of a justice of the peace.

A constable who has obtained a warrant against a felon may follow him by hue and cry into a different county from that in which the warrant was granted, without getting the warrant backed.

The pursuers under a hue and cry, if the offender is actually in a house, are entitled to break open the outer door to secure him, on previous demand of admittance.

Those who join in a hue and cry raised will be protected, even though it should ultimately appear that no felony has been committed. But if

a man raises the hue and cry wantonly or maliciously, and without cause, he may be severely punished as a disturber of the public peace.

5. *Rewards for the Apprehension of Offenders.*—By 16 Geo. II. c. 15, and 8 Geo. III. c. 15, persons discovering, apprehending, and convicting felons and others found at large during the term for which they are ordered to be transported, shall receive a reward of 20*l*.

By 7 Geo. IV. c. 64, § 28, when any person shall appear to any court of oyer and terminer, gaol delivery, or superior criminal court of a county palatine, to have been active in the apprehension of any person charged with murder, or with feloniously and maliciously shooting at or attempting to discharge any kind of loaded fire-arms at any other person, or with stabbing, cutting, or poisoning, or with administering any thing to procure the miscarriage of any woman, or with rape, or with burglary or felonious housebreaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property knowing the same to have been stolen, every such court is authorized and empowered, in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expences, exertions, and loss of time in or towards such apprehension. And when any person shall appear to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with receiving stolen property, knowing the same to be stolen, such court shall have power to order compensation to such person, in the same manner as the other courts hereinbefore mentioned. Provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expences, and compensation, as courts are by this act empowered to allow to prosecutors and witnesses respectively.

By sect. 29, the order for payment is to be made out by the proper officer of the court upon being paid 5*s*.; and the sheriff is authorized to pay at sight, and to apply for repayment to the Treasury.

By sect. 30, if any man shall happen to be killed in endeavouring to apprehend any person who shall be charged with any of the offences hereinbefore last-mentioned, it shall be lawful for the court before whom such person shall be tried to order the sheriff of the county to pay to the widow of the man so killed in case he shall have been married, or to his child or children in case his wife shall be dead, or to his father or mother in case he shall have left neither wife nor child, such sum of money as to the court in its discretion shall seem meet; and the order for payment of such money shall be made out and delivered by the proper officer of the court unto the party entitled to receive the same, or unto some one on his or her behalf to be named in such order by the discretion of the court; and every such order shall be paid by and repaid to the sheriff in the manner hereinbefore mentioned.

CHAPTER XVIII.

Of Commitment and Bail.

WHEN an arrest is made, the party arrested should be taken before a magistrate as soon as it can be reasonably done; and when arrested on suspicion, he is not to be detained before he is taken to a magistrate, in order that evidence may be first collected.

The magistrate is bound immediately to take the examinations of all concerned, and should also complete them, and dispose of the prisoner by committing him to prison, holding him to bail, or discharging him, as soon as the nature of the case will permit. He is allowed, however, a reasonable time for the purpose, and may, when necessary, remand him for further examination. But the detainer must not be for too long a period; and fourteen days has been considered as too long, unless under extraordinary circumstances. Trespass will lie against a magistrate for committing a party charged with felony for re-examination for an unreasonable time, though without any improper motive.

If it manifestly appears that no crime was committed, or that the prisoner is innocent, he must be discharged; otherwise he must be committed to prison, or give bail, that is, put in securities, who, together with himself, become bound for his appearance to answer the charge.

Regularly, in all offences below felony, either against the common law or any act of parliament, the offender ought to be admitted to bail, unless it be prohibited in the particular case by act of parliament.

By 7 Geo. IV. c. 64, § 1, when any person shall be taken on a charge of felony, or suspicion of felony, before one or more justice or justices of the peace, and the charge shall be supported by positive and credible evidence of the fact, or by such evidence as, if not explained or contradicted, shall in the opinion of the justice or justices raise a strong presumption of the guilt of the person charged, such person shall be committed to prison by such justice or justices in the manner hereinafter mentioned. But if there shall be only one justice present, and the whole evidence given before him shall be such as neither to raise a strong presumption of guilt nor to warrant the dismissal of the charge, such justice shall order the person charged to be detained in custody until he or she shall be taken before two justices at the least. And when any person so taken, or any person in the first instance taken before two justices of the peace, shall be charged with felony, or on suspicion of felony, and the evidence given in support of the charge shall in their opinion not be such as to raise a strong presumption of the guilt of the person charged, and to require his or her committal, or such evidence shall be adduced on behalf of the person charged as shall in their opinion weaken the presumption of his or her guilt, but there shall notwithstanding appear to them in either of such cases to be sufficient ground for judicial inquiry, the person charged shall be admitted to bail by such two justices in the manner hereinafter mentioned. Provided, that nothing herein shall be construed to require any such justices to hear evidence on behalf of any person so charged, unless it shall appear to be conducive to the ends of justice to hear the same.

And, by sect. 2, the two justices of the peace, before they shall admit to bail, and the justice or justices, before he or they shall commit to prison, any person arrested for felony or on suspicion of felony, shall take the examination of such person, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing, and the two justices shall certify such bailment in writing; and every such justice shall have authority to bind by recognizance all such persons as know or declare any thing material touching any such felony or suspicion of felony, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or sessions of the peace, at which the trial thereof is intended to be; then and there to prosecute or give evidence against the party accused; and such justices and justice respectively shall subscribe all such examinations, informations, bailments, and recognizances, and deliver or cause the same to be delivered to the proper officer of the court in which the trial is to be, before or at the opening of the court.

By sect. 3, the same course of proceeding is to be observed by every justice of peace before whom any person shall be taken on a charge of misdemeanor or suspicion thereof; in which case a single justice may either commit the prisoner or take bail.

The depositions before the magistrate should not be taken in technical terms, but in the exact natural language and particular expressions used by the prosecutor or witnesses.

The defendant should be permitted to cross-examine the witnesses. The prisoner has no right to the assistance of an attorney when under examination on a charge of felony, but it is a privilege in the discretion of the magistrate. The defendant's examination must *not* be upon oath; but that of the witnesses for the prosecution must. The defendant may, if he chooses, call witnesses, and they are to be examined on oath. To refuse or delay bailing, to a person bailable, is an offence by the common law and by statute. And if the magistrate take insufficient bail, he is liable to be fined if the criminal do not appear.

Bail may be taken either in court or in some particular cases by the sheriff, coroner, or other magistrate, but most usually by justices of the peace. When bail is taken, a recognizance must be entered into by the principal and at least two sureties, conditioned that he shall appear at the trial to answer the charge. This recognizance must be certified to the court where the trial is to take place.

The Court of Queen's Bench, or in time of vacation any judge thereof, may bail for any crime whatsoever, be it treason, murder, or any other offence, according to the circumstances of the case; but it is in the discretion of the court. And it is not usual for this court to bail in cases of felony, unless when, in consequence of the defect of the commitment and of the examination and depositions, it appears doubtful whether any offence has been committed.

In case of commitment, the offender is sent to the county gaol by the warrant of the justice under his hand and seal, called his *mittimus*, containing the cause of the commitment, there to abide until delivered by due course of law. But he is not to be subjected to any restraint or hardship before trial.

CHAPTER XIX.

Of the several Modes of Prosecution.

THE prosecution of an offender is in general either by presentment or by indictment.

1. By **PRESENTMENT**.—A presentment is the charge of an inquest, or, in other words, of a jury assembled to inquire of offences committed within their jurisdiction.

One species of presentment is that made by the jury of the tourn or leet, of such petty offences as they inquire into in those courts. Another species is that made by a jury summoned by the proper officer to inquire, in some particular case, of matters affecting the rights of the crown, such as *felo de se*, deodands, violent or sudden deaths. This is usually called an *inquisition of office*. Some few of these inquisitions of office are in themselves convictions, and cannot afterwards be traversed or denied. But generally inquisitions of office may be traversed, and the offender may be arraigned upon them for that purpose.

Another kind of presentment is that made by a grand jury. A grand jury is thus constituted. The sheriff of the county is bound to return for grand jurors to every sessions of the peace, and to every commission of oyer and terminer and of general gaol delivery, good and lawful men of the county to the number of twenty-four at least, some out of every hundred, to inquire of all offences generally committed within the county. With respect to the county of Middlesex, that being the county in which the Court of Queen's Bench is holden, offences committed within it may be tried, not only at the sessions of the peace or commission of oyer and terminer, but (at the option of the prosecutor) in the Court of Queen's Bench. Accordingly the sheriff is bound, in every term, to make a like return of grand jurors into that court, and for the like purpose, as above stated with respect to the sessions of the peace, &c.

The persons returned as grand jurors to the sessions of the peace are, by 6 Geo. IV. c. 50, § 1, required to be qualified in the manner by the act described.

Under commissions of oyer and terminer and general gaol delivery, the persons returned for grand jurors ought to be freeholders, but to what amount is not defined, except in the counties of Lancaster and York, in the former of which 5*l.* per annum is the qualification, and in the latter 80*l.* per annum. Grand jurors must also be inhabitants of the county, and are usually gentlemen of the best figure in the county. Justices of gaol delivery at the assizes have power to reform the panel, by taking out the names of improper persons and inserting others.

Of the grand jury who appear upon their summons, twelve at least are sworn as a grand jury, and not more than twenty-three, so that twelve may be a majority.

They are instructed in the articles of their inquiry by a charge from the judge who presides in the court, and they then withdraw to the

discharge of their duty in a place set apart for them near the court. In the discharge of this duty they sometimes make *presentment* (that is, prefer a charge on their own knowledge and observation) of some offence committed within the county, such as a nuisance or the like. And upon such presentment, after it has been delivered into court by the grand jury, the officer of the court must frame an *indictment* before the party presented can be put to answer.

II. By **INDICTMENT**.—An indictment is an accusation in writing, presented upon oath by a grand jury, and charging some one or more persons with a crime.

The course of prosecution by indictment is as follows:—An accusation is laid by some prosecutor before a grand jury, after they have been sworn and charged as above described. For this purpose it is reduced to writing, and drawn up in the shape of a presentment, ready to be delivered into court by the grand jury upon their oath. In this state it is called a *bill*.

As a bill of indictment may be thus preferred either before a grand jury returned to the sessions or assizes, or (in cases of offences committed in Middlesex) before a grand jury returned into the Court of Queen's Bench, so in those cases respectively the proceeding is said to be a prosecution at the sessions or assizes, or a prosecution in the Court of Queen's Bench.

The bill of indictment is supported by evidence called before the grand jury by the prosecutor; but they do not hear evidence on behalf of the party accused, the intention of the proceeding not being to try the offender, but merely to determine whether there is ground enough to put him on his trial. If the grand jury are of opinion, upon the evidence, that the party accused is guilty of the offence charged, they indorse upon the bill of indictment, "A true bill." The indictment is then said to be *found*, and the party stands *indicted*. But if upon the evidence they think the accusation groundless, they indorse "Not found," or "Not a true bill;" and the party is discharged. Twelve at least of the jury must agree.

The grand jury cannot find one part of the same charge to be true and another false, but must either maintain or reject the whole; they may, however, return a true bill upon one count out of several. An indictment against several persons may be found against one or more of them, and rejected as to the rest. The bill of indictment when so "found," or "not found," must be delivered publicly into court.

Indictments must be in a precise and certain form.

1. *There must be a proper and sufficient Venue*; that is, the indictment must allege some place as that where the offence was committed.

The grand jury are sworn to inquire only for the body of the county, and cannot therefore inquire of a fact done out of it, unless enabled to do so in the particular case by act of parliament. Hence it follows that the venue (or place where the offence is alleged to have been committed) must in general be a place within the body of the county for which the grand jury are summoned. This general principle is, however, subject to many exceptions.

There should be a venue in the margin of the indictment, and a venue also to every material fact alleged in the body of it. The venue

in the margin of the indictment should state the county ; the venue in the body of the indictment should regularly state not only the county, but some township, hamlet, or parish within the county. But it seems sufficient in the body of the indictment, as well as in the margin, to state the county only, unless the case is of a local nature.

Although with respect to the *county*, that must be laid where the offence was really committed, except in cases where by statute it is allowed to be laid elsewhere, it is in general not material that the *township, hamlet, or parish* laid for venue should be the *true* place where the offence was committed. But if the indictment is framed on a statute which gives the penalty to the poor of the parish, the parish must be truly stated ; or if the place be a necessary ingredient in the offence, or matter of local description, it must be stated truly.

In admiralty cases no county is inserted for venue in the margin, but instead of it the words "admiralty of England;" and in the body of the indictment, the venue is laid "on the high sea," and "within the jurisdiction of the admiralty of England."

2. *The Offender must be rightly named and described.*—By the 1 Hen. V. c. 5, all indictments must set forth the christian name, surname, and addition of the state and degree, mystery, town or place, and county, of which the defendant is or was conversant.

If the name of a prisoner is unknown, and he refuse to disclose it, an indictment against him as a person whose name is to the jurors unknown, but who is personally brought before them by the keeper of the prison, is sufficient. But to describe him simply as a person to the jurors unknown, without otherwise ascertaining him, will not suffice.

3. *There must be an Allegation of the Time when the Offence was committed.*—The day of the month and year should be expressed ; either the year of the king's reign or the year of our Lord will suffice.

It is in general not material that the time alleged should be the *true* time when the offence was committed. But the dates of bills of exchange and other written instruments and records must be truly stated ; and where the time is a necessary ingredient in the offence, it must be stated according to the fact. So in a case of murder, the time of the death must be alleged, and it must be within a year and a day after the mortal stroke was given.

4. *There must be a distinct and certain Allegation of the Offence itself.*—All the facts and circumstances constituting the offence must be stated, and with certainty and precision ; and in general the statement must accurately correspond with the true state of facts. But a variance in the number and value of the articles, or the like, is in general not material.

In some crimes particular words must be used, which are so appropriated by the law to express the precise idea of the offence, that no other words, however apparently synonymous, can be substituted. Thus, in treason, the facts must be laid to be done "treasonably and against his allegiance;" in murder, the word "murdered" is essential, and also the words "of his malice aforethought;" in burglary, the word "burglariously;" in rape, the word "ravished;" in larceny, the words "feloniously took and carried away;" and in all felonies, the word "feloniously." But the words "with force and arms," though usual

in indictments for offences against the person, and proper to be inserted, are not essential.

5. *The Indictment must conclude, "against the peace of our Lady the Queen."*—When the indictment is for an offence created by statute, or made by statute an offence of a higher nature, the conclusion should be, "against the form of the statute in such case made and provided, and against the peace of our lady the queen," &c. The words "her crown and dignity" are always added, but are not essential.

III. *By Information.*—Informations are suggestions filed on record, charging a given offence to have been committed; and they are a mode of prosecution by which an offender may be brought to trial without that previous finding by a grand jury, which is required in the case of *presentment* and *indictment*.

An information will not lie for felony or misprision of treason; because for these higher offences the party must be accused upon the oath of twelve men (that is, the grand jury) before he can be put to answer.

1. One species of information is that upon *penal statutes*, as where a statute has inflicted a pecuniary penalty upon conviction of a given offence, and a criminal proceeding is instituted against some offender to recover such penalty. These are considered as a sort of penal actions only, though carried on by criminal process.

Sometimes the penalty is given partly to the use of the queen, and partly to the use of the informer; in which case it is called a *qui tam* information. In other instances it is given to the queen alone.

By 31 Eliz. c. 5, § 5, no prosecution upon any penal statute, the suit or benefit whereof is limited in part to the queen and in part to the prosecutor, can be brought by any common informer after one year is expired since the commission of the offence; nor on behalf of the crown, after the lapse of two years longer; nor where the forfeiture is originally given only to the queen, can such prosecution be had after the expiration of two years from the commission of the offence.

2. Another species of information is that which is filed by the Master of the Crown Office at the complaint or relation of some private person. The objects of this kind of information are any gross and notorious misdemeanors, riots, batteries, libels, and immoralities of an atrocious kind, not particularly tending to disturb the government (for these are the object of another species of information, to be presently noticed), but, on account of their magnitude and pernicious example, deserving a more summary prosecution than that by indictment.

But by 4 & 5 W. & M. c. 18, such information shall not be filed without the express permission of the Court of Queen's Bench; and every prosecutor obtaining such permission shall give security, by a recognizance of 20*l.*, to prosecute the same with effect, and to pay costs to the defendant in case he be acquitted, unless the judge who tries the information shall certify there was reasonable cause for filing it; and at all events to pay costs, unless the information be tried within a year after issue joined. Under this statute the course of proceeding is to move the court for a rule *nisi*, that leave be granted to file an information.

This kind of information is often granted, on motion, against magistrates for misconduct in their official capacity; but only where the conduct complained of proceeds from oppressive, dishonest, or corrupt motives, under which fear and favour may be generally included.

A motion for an information must be founded on satisfactory affidavits, disclosing all the facts of the case; and in the case of a libel, the affidavit must also deny the charge, and usually in the very words of the charge. But such denial is not necessary when the charge is very general, and does not impute particular acts of criminality, but consists of general abuse.

When the rule nisi is obtained, a copy must be served on the defendant, and the original shown to him; and, before the rule can be made absolute, affidavit must be made of such service. If the rule be made absolute, the prosecutor must then enter into the recognizances required by the 4 & 5 W. & M. c. 18.

When an information is moved for against a magistrate, previous notice must be given to the magistrate, stating the ground of complaint; and it must be served on him personally if practicable, or otherwise left at his usual place of abode in sufficient time to enable him to oppose the motion for the rule nisi.

Leave to file an information is generally refused, where the offence does not require so summary a proceeding, or the party applying is himself culpable, or the consequences of such a proceeding would be peculiarly oppressive. And the party aggrieved must in general consent to waive his civil remedy, and abandon any action already commenced for the same cause.

3. There is another species of information, *viz.* that which is filed by the attorney-general, usually called an *information ex officio*. This is filed by the attorney-general at his own discretion, without leave of the court, and not at the relation of any private prosecutor. The objects of such an information are properly such offences below the degree of felony which peculiarly tend to disturb or endanger the queen's government, or to molest or affront her in the regular discharge of her royal functions, such as libels on government or high officers of the crown, obstructions of revenue officers, breaches of quarantine, or offering to bribe public officers.

The attorney-general may file such information at his discretion against whom he will, without oath or motion, or opportunity for the defendant to show cause against the proceeding; but he generally proceeds on grounds laid before him on affidavit.

Neither he nor any witness for the crown is bound by recognizance to prosecute with effect. But by 60 Geo. III. & 1 Geo. IV. c. 4, if the trial is not brought on within twelve months after the plea of Not guilty, the court may interfere, and order it to be brought on by the defendant, unless a *nolle prosequi* shall have been entered.

4. Besides these different species of information, there is another, called an information *in the nature of a writ of quo warranto*, the object of which is usually to try the civil right to a franchise or office; but this is rather a civil than a criminal proceeding, and has been already considered, *ante*, p. 928.

Informations are filed in the Court of Queen's Bench only, except when they relate to the revenue; and then usually in the Exchequer. In their form and structure they are subject in general to the same rules as an indictment.

CHAPTER XX.

Of Process.

I. ON INDICTMENT.—In proceedings by way of indictment, the offender is often in custody, under the commitment of a magistrate or otherwise, before the indictment is found; but in other cases it may happen that there has been no arrest or commitment before the indictment found. In such case an indictment may be preferred and found against him in his absence; and it then becomes necessary to issue some writ or writs in order to bring him into court. Writs thus issued upon the indictment are called *process*, a name which does not apply to the warrant under which a party is arrested before the finding of the indictment.

In general, the mode of bringing a defendant into court upon an indictment found against him for felony is by writ of *capias*, which all courts that have power to try the offence have power to issue against the offender.

It is also the practice, upon an indictment found for a misdemeanor during the assizes or sessions, to issue a bench warrant, signed by a judge or two justices of the peace, to apprehend the defendant; and so, when the assizes or sessions are over, the clerk of assize and a clerk of the peace respectively will, on application of the prosecutor, grant a certificate of the indictment being found, upon which a judge of the Queen's Bench, or a justice of the peace of the proper county, will grant a warrant for apprehending the defendant.

And by 48 Geo. III. c. 58, whenever any person shall be charged with any offence for which he may be prosecuted by indictment or information in her majesty's court of Queen's Bench (not being treason or felony), and the same shall be made appear to any judge of the same court by affidavit or certificate of an indictment or information being filed against such person in the said court for such offence, it shall be lawful for such judge to issue his warrant under his hand and seal, and thereby cause such person to be apprehended and brought before him or some other judge of the same court, or before a justice of the peace, in order to his giving bail for appearance, to such amount as shall be expressed in the warrant, and in neglect thereof to commit such person for trial.

And if a person committed by warrant or *capias* in that court, neglect to appear and plead to the indictment or information (a copy of which is to be delivered eight days before he is required to appear and plead), the prosecutor after notice may enter an appearance and plead Not guilty for him, and such proceedings are to be thereupon had, as if the defendant had appeared and pleaded for himself.

If the defendant cannot be found so as to be taken on the *capias* or bench warrant, he may be *outlawed*.

In cases of misdemeanor, the first process towards outlawry is by *venire facias*, which is a summons to appear; and if the defendant makes default, and the sheriff return that he has summoned him, a dis-

tringas is issued, and is repeated by alias distringas from time to time, whereby the defendant forfeits part of the issues of his land on every default. But if the sheriff return that he has no lands, or that he is not found, then upon his non-appearance a *capias*, and, if necessary, an *alias* and *pluries capias* issue to take his body. If these various proceedings prove ineffectual, then a writ of *exigent* is awarded, under which he is exacted at five successive county courts. And by 4 & 5 W. & M. c. 22, § 4, upon the issuing of the exigent, a *writ of proclamation* shall also be issued, under which the defendant is to be openly proclaimed three times by the sheriff. If the defendant does not appear and is not taken on or before the fifth county court, or day of exaction, under the writ of exigent, judgment of outlawry (or in case of a woman, judgment of waiver) is given. Upon this a writ of *capias utlagatum* issues to take him into custody; upon which process any doors may be broken to apprehend the outlaw.

In cases of felony the proceeding to outlawry is more summary, being by *capias* in the first instance instead of *venire*.

The consequences of outlawry are, in cases of misdemeanor, a forfeiture of all the goods and chattels of the offender, the loss of the profits of all his real estate, and restraint of liberty; besides which the outlaw is incapable of suing in any action for redress of injury, sitting as a juror, or executing an office in any corporation, &c.

In cases of felony, outlawry amounts to a conviction and attainder of the offence as much as if the defendant had been found guilty; and consequently the same forfeiture as to estates real and personal takes place as in the case of conviction and attainder, and he is liable to have execution awarded against him without trial) unless the outlawry be reversed) whenever his body can be taken.

An outlawry however, may be *avoided* or *reversed*.

Such reversal is by *plea* or by *writ of error*, according to the nature of the case. But in the case of felony the defendant must for this purpose render himself into custody, and come in person to the bar of the court to pray to be allowed a writ of error.

The defendant may assign various matters for error; as, that he was in prison, or went beyond seas on his own business before the award of the exigent, or he may take any technical objection to the regularity of the process, and upon such reversal the party accused is permitted to plead to and defend himself against the indictment.

In one instance, though the outlawry be regular, its consequences may be avoided; for by 5 & 6 Edw. VI. c. 11, (which permits outlawry for treason to be awarded against persons residing abroad), if a person so outlawed shall, within one year, yield himself to the chief justice and offer to traverse the indictment, he shall be admitted so to do, and being acquitted of the indictment shall be discharged of the outlawry.

Outlawry does not lie against a parish, a corporation, or a hundred; nor against a peer, except for felony or breach of the peace; nor against an infant under fourteen for felony.

II. ON INFORMATION the first process is a writ of subpoena; and if the defendant does not appear on this, a *capias* is awarded. But if a corporation aggregate is defendant, the process is by *distringas*.

When the information is filed by the master of the Crown Office at the relation of a private person, the security to prosecute required by the 4 & 5 W. & M. c. 18, must be given before process issues.

Besides the process above described, the Court of Queen's Bench has the power of issuing *bench warrants* at once to apprehend the party accused.

If the defendant cannot be found so as to be taken on the *capias* or bench warrant, it may be necessary (as on an indictment) to proceed to outlawry. And the course of proceeding is the same as in outlawry on an indictment for misdemeanor; the first process being, in that case, not by *subpœna*, but by *venire facias*.

CHAPTER XXI.

Of *Certiorari*.

FROM any inferior court of criminal jurisdiction, an indictment, with all the proceedings thereon, may be removed by a writ of *certiorari facias* into the Court of Queen's Bench.

Certiorari lies from the Court of Queen's Bench to justices even in cases where they are empowered *finally* to hear and determine, unless the writ be taken away by the express words of a statute.

This writ is awarded by the Court of Queen's Bench; and the objects of the removal are, to consider and determine in the Queen's Bench the validity of the indictment and proceedings, and quash or confirm them, as there may be cause; to have a trial at bar or at *Nisi Prius* (according to the course of all indictments and informations in the Queen's Bench), in all cases where it is surmised that a partial or insufficient trial would probably be had in the court below; to plead the queen's pardon in the court of Queen's Bench; or to issue process of outlawry against the offender in those places which cannot be reached by the process of the court below.

It is also sometimes adopted for other reasons, as, in cases of misdemeanor, for the sake of obtaining a trial by special jury, which cannot be had in the inferior jurisdiction. So it may be desirable for the defendant to obtain a *certiorari*, where he is indicted at the assizes for a nuisance, in order that a view may be had of the premises,—a proceeding which cannot take place under the authority of the inferior jurisdiction without the prosecutor's consent.

A *certiorari* is granted at the instance either of the prosecutor or the defendant.

When applied for by the attorney-general or other officer of the crown, either as prosecutor, or when he takes up the defence of the party indicted on account of the latter being an officer of the crown, or for some other reason, the writ issues as a matter of course, the court having no discretion.

When a *certiorari* is applied for by a private prosecutor, the court has a discretion; yet it usually grants the writ as of course, even to high courts of criminal jurisdiction, such as the Central Criminal Court.

When applied for by a defendant, the court will not grant it unless he show strong reason for the removal. And in practice it is generally not granted at the instance of the defendant, to remove indictments from the justices of assize or gaol delivery, or the Central Criminal Court, unless the consent of the prosecutor is obtained.

The proper time for either party to apply is after indictment found, and before issue has been joined. In practice it is seldom granted after conviction, unless for special cause, such as that no remedy is to be had by writ of error; but it seems that, strictly speaking, a certiorari may be granted at any time before judgment is given; and even afterwards, where a writ of error does not lie.

Besides this the ordinary kind of certiorari, a writ of certiorari also lies to remove an indictment found against a peer, out of the Queen's Bench or any other court into the Court of Parliament or the Court of the Lord High Steward, that the defendant may claim his privilege of being tried by his peers.

A certiorari, when granted, and issued and delivered to the inferior court, makes all subsequent proceedings there erroneous, unless the Court of Queen's Bench remands the record.

CHAPTER XXII.

Of Arraignment.

WHEN an indictment is found for felony, the prisoner is put to the bar of the court, to answer the matter charged against him in the indictment. He is then said to be *arraigned*. A defendant indicted of felony must, in all cases, appear personally in court, and be arraigned; but this does not apply to misdemeanors.

In indictment or information for misdemeanor in the Queen's Bench, the defendant must, before plea, *enter an appearance*; and the appearance may be by attorney.

Upon arraignment, the defendant should be arraigned by *name*. The indictment should then be read to him, and he should be asked whether he is guilty or not guilty. The following incidents may then take place:—

1. It may happen that the prisoner *stands mute*, that is, he may either make no answer at all, or answer foreign to the purpose, or matter not allowable.

By 7 & 8 Geo. IV. c. 28, § 2, if any person being arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of "Not guilty" on behalf of such person, and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.

But if a doubt arises whether the prisoner is mute of malice, and whether the refusal to plead does not really proceed from inability,

the court, instead of ordering a plea to be entered at once, will (as before the statute) impanel a jury to try whether he stands obstinately mute, or whether he is dumb *ex visitatione Dei*; and upon such issue the prisoner's counsel is allowed to address the jury.

If the jury find the prisoner 'mute *ex visitatione Dei*, the court will use means to make him understand the arraignment, and convey his answer; but if this be impossible, will direct a plea of Not guilty to be entered and the trial to proceed. In such cases it is the duty of the court to examine all the points for him on the trial as counsel for the prisoner, to see that he hath law and justice. But if convicted, it seems that in such cases judgment even of death may lawfully be pronounced.

In the case of insanity, it is provided by 39 & 40 Geo. III. c. 94, §2, that insane persons indicted for any offence and found to be insane by a jury impanelled on their arraignment, shall be ordered by the court to be kept in custody till her majesty's pleasure be known.

2. It may also happen that upon arraignment the prisoner *confesses* the indictment; and in this case, if he merely confesses, the court has nothing to do but record the confession and award judgment. But it is usually very backward in receiving and recording such confession in capital cases, and will generally advise the prisoner to retract it and plead to the indictment.

3. But there is a kind of confession called *approvement*; that is, where a person indicted of felony, and arraigned for the same, confesses the fact before plea pleaded, and accuses others as his accomplices of the same crime, in order to obtain his pardon. The approvement (which can only be in capital cases) is considered as a sort of indictment, and the accused or appellee must go to trial upon it, and, if found guilty, must suffer the judgment of the law; but if acquitted, the approver, on the other hand, must suffer the judgment of the law as upon his own confession. But it is in the discretion of the court whether it will allow an approvement or not; and in practice the proceeding has been long disused.

It has been usual, however, for the justices of the peace before whom any persons charged with felony are committed to gaol, to admit some one of their accomplices to become a witness (or, as it is generally called, *queen's evidence*) against his fellows, upon an implied confidence, which the judges of gaol delivery have usually countenanced and adopted, that if such accomplice makes a full and complete discovery of that and all other felonies in which they have been concerned together, and to which he is examined by the magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not himself be prosecuted for any offence in respect of which he has thus made disclosure.

But he has no claim to pardon with respect to other offences in which he was not concerned with the prisoners.

And the judges will not in general admit an accomplice as queen's evidence, if it appear that he is charged with any other felony than that on the trial of which he is to be witness.

4. The prisoner, on an indictment, instead of confessing or standing mute, may *plead*.

CHAPTER XXIII.

Of Plea and Issue.

THE *plea* is the defensive matter alleged by the defendant in answer to the indictment or information, supposing him neither to confess nor to stand mute. The time for pleading on an indictment for felony, in any court, is in general *instantly* upon the arraignment.

By 60 Geo. III. & 1 Geo. IV. c. 4, in all cases of indictment for misdemeanor, at sessions or assizes (except for not repairing of bridges or highways), if the defendant have been in custody or on bail twenty days at the least upon the same charge, he must, upon the finding of the indictment, plead and try instantly; and if the indictment were found at a former session or assizes, and the defendant be in custody or on bail for the same offence, or receive notice of the indictment twenty days before any subsequent session or assizes, he must at such subsequent session or assizes plead and try. But the court may allow further time to plead or try, upon cause shown.

By the same statute, where the defendant is prosecuted for misdemeanor by information, or by indictment found in the Queen's Bench or removed into that court, he must plead or demur within four days from the time of his appearance; and in default thereof judgment may be entered against him for want of a plea. But the court or a judge may, on sufficient cause, allow further time to plead or demur.

The court have a discretionary power, at common law, of allowing a party indicted to defend *in formâ pauperis*, whereon he has counsel and clerk assigned him by the court, and he is not liable to pay office fees.

There are various proceedings in the nature of plea.

1. A *Plea to the Jurisdiction* lies in instances where the court has no power to try the offence; as if a man be indicted for treason at the quarter sessions, or the like. It must, in order of time, be pleaded before any other plea, and in general must be supported by affidavit.

But this kind of objection may be taken not only in the form of a plea to the jurisdiction, but, in general, under the plea of Not guilty also; and where the case is such that it appears on the face of the record, it may also be taken by demurrer, motion in arrest of judgment, or writ of error. As these latter modes of proceeding give the defendant the additional chance of acquittal on the merits, a plea to the jurisdiction is of rare occurrence.

To this plea the crown may demur or reply instantly; and if the plea is found against the defendant, he has judgment, in case of felony, to answer over to the felony. But, in case of misdemeanor, no judgment of *respondeat ouster* is of right demandable after the plea is found against the defendant upon matter of fact; for the decision operates as a conviction. But, as a matter of favor, he may still be admitted to plead Not guilty.

2. A *Demurrer* is when the fact alleged is allowed to be true, but exception is taken to the indictment or information in point of law, as

insufficient on the face of it to charge the defendant; and the insufficiency may be either in matter of form, as where words are omitted, or in matter of substance, as when the fact stated does not amount in law to felony or misdemeanor as charged.

Upon demurrer, issue is joined by the prosecutor on behalf of the crown, and the question of law thus arising is determined by the court.

If a demurrer to the indictment or information be determined for the defendant, the judgment is, that he be dismissed and discharged; or if on a mere formal objection, that the indictment be quashed. If against the defendant, judgment and execution are awarded against him, in case of misdemeanor, as if he had been convicted by verdict. In case of felony, it seems that the judgment is not final, but the defendant is at liberty to plead over, Not guilty.

Objections to the indictment or information for insufficiency in substance may be taken, not only in the way of demurrer, but by motion in arrest of judgment and writ of error also, or under the plea of Not guilty; and as these latter modes of proceeding give the defendant the additional chance of an acquittal on the merits, a demurrer is in such cases not usual.

But there are many formal objections which cannot now be taken except in the way of demurrer. For, by 7 Geo. IV. c. 54, § 20, no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved; nor for the omission of the words "as appears by the record," or of the words "with force and arms," or of the words "against the peace;" nor for the insertion of the words "against the form of the statute," instead of the words "against the form of the statutes," or *vice versa*; nor for that any person or persons mentioned in the indictment or information is or are designated by a name of office or other descriptive appellation instead of his, her, or their proper name or names; nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or a day that never happened; nor for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence. And by sect. 21, where the offence charged has been created by any statute, or subjected to a greater degree of punishment or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.

An information may be amended after demurrer; but an indictment cannot be amended, except by consent of the grand jury before they are discharged.

3. *A Plea in Abatement*—This is a plea alleging some matter of form as a ground for quashing the indictment or information; as if James Allen is indicted by the name of John Allen, he may plead that he has the name of James and not of John. This plea should be pleaded

before any plea in bar. It should be engrossed on parchment or paper, and there must be an affidavit annexed of its being true.

By 7 & 8 Geo. IV. c. 64, § 19, no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition of the party offering such plea, if the court shall be satisfied, by affidavit or otherwise, of the truth of such plea. But in such case the court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded.

Upon a plea in abatement the prosecutor may on behalf of the crown reply and take issue. If issue in fact be taken upon a plea in abatement, the trial may take place by a jury of the same county *instantanter*.

If issue in fact be taken, and the judgment be against the defendant, it is final in case of misdemeanor; but in case of felony, it is only that the defendant answer over. If for the defendant, it is, that the indictment be quashed or (in case of misnomer) be amended &c. according to the statute.

4. *A Special Plea in Bar.*—These are pleas which, without denying the matter of fact charged, allege some reason why the defendant should not be held liable to the indictment or information. The only special pleas in bar which are used are the following.

(1.) *Plea of Liability to Repair of a Highway or Bridge.*—To an indictment for not repairing a highway or bridge, if the parish or county indicted contend that the burthen of repairing is upon some other person or persons, they must plead specially the liability of such party, and show the reason of it; and are not permitted to give it in evidence under a plea of "Not guilty." They may, however, show under the plea of Not guilty that the parish has been relieved of the liability by a public statute.

Upon this plea the prosecutor may reply on the part of the crown, joining issue on the liability of the person or persons alleged in the plea.

(2.) *Plea of Autrefois Acquit* is a plea that the defendant was indicted on a former occasion for the same offence and acquitted. And, in general, this is a good bar to a second indictment; but under particular circumstances it may be no bar.

The true test by which the question, whether such a plea is a sufficient bar in any particular case, may be determined is, whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. Thus, an acquittal for murder may be pleaded in bar, not only to a second indictment for the same murder, but also to an indictment for manslaughter; because the defendant might have been convicted of the manslaughter upon the first indictment. So an acquittal by a competent jurisdiction abroad is a bar to an indictment for the same offence in this country. So an erroneous acquittal standing unreversed is a bar. So if a prisoner could have been legally convicted on the first indictment upon any evidence that might have been adduced, his acquittal on that indictment is a bar to a second, whether the proper evidence was in fact adduced on the first indictment or not. But an acquittal on an insufficient indictment is no bar to a second indictment for the second offence.

Nor is an acquittal upon an indictment in a wrong county a bar to a subsequent indictment for the same offence in another county. Nor an acquittal for a felony to an indictment for a misdemeanor, nor *vice versa*. Nor is an acquittal as an accessory a bar to an indictment as a principal, nor *vice versa*.

The plea must be an acquittal by a petty jury; and it must set forth the record of the former indictment and acquittal, or it will be bad on demurrer. If the indictment be for felony, the defendant should, besides pleading *autrefois* acquit, plead over, denying the felony. Though if he should neglect to do so, he may still be allowed, after the plea of *autrefois* acquit found against him, to plead Not guilty.

To this plea the crown may demur; and if the plea be held bad on demurrer, and the case be a misdemeanor, final judgment will be given against the defendant.

There may also be a replication to this plea, disputing the fact of the acquittal. And where the plea has been *ore tenus*, the replication of the crown may be immediately put in in the same way; but if the plea be in writing, so must the replication. Upon this issue a venire is awarded, and a jury sworn instant, to try the issue. And it is always by a jury, there being no trial "by the record" in criminal cases.

If the judgment be against the accused on this issue, in case of a felony, it is, that he answer over; or, if he has added to his plea of *autrefois* acquit a plea over to the felony, the jury are charged again to inquire of that second issue, and the trial proceeds as if no special plea in bar had been pleaded. But in misdemeanors the judgment against the accused is final.

When the judgment is for the accused, whether in felony or misdemeanor, it is, that he go without a day; and he is altogether discharged from the prosecution.

(3.) *The Plea of Autrefois Convict* is used where the defendant was indicted upon a former occasion for the same offence and convicted. It is in general open to the same remarks as that of *autrefois* acquit.

(4.) *Plea of Autrefois Attaint*.—This seems now to be rendered useless by the effect of 7 & 8 Geo. IV. c. 28, § 4, which enacts, that no plea setting forth any attainder shall be pleaded in bar of any indictment, unless the attainder be for the same offence as that charged in the indictment.

(5.) *Plea of Pardon*.—If the defendant has received a pardon for the offence charged, he may plead it in bar. He may plead it either upon arraignment, or after verdict in arrest of judgment, or after judgment in bar of execution. But he is bound to plead it at the first opportunity; for if he has received a pardon before arraignment, and, instead of pleading it, pleads Not guilty, he cannot afterwards avail himself of it in arrest of judgment.

By 5 & 6 Wm. III. c. 13, when a pardon is pleaded by any one for felony, the justices may at their discretion remand him to prison till he enter into a recognizance with two sureties for his good behaviour for any time not exceeding seven years; but this power is not usually exercised, and in all cases, if such plea be found for the prisoner, the course is to discharge him. A pardon by public act of parliament need not be pleaded, but the court must notice it *ex officio*.

(6.) *The Plea of Not Guilty, otherwise called the General Issue.*—This is pleaded, in most cases, by the prisoner *viva voce* at the bar, in these words, “Not Guilty.” But in cases where the defendant is allowed to appear by attorney, it is not pleaded *viva voce*, but engrossed and filed with the proper officer.

By 7 & 8 Geo. IV. c. 28, § 1, if any person, not having privilege of peerage,¹ being arraigned upon any indictment for treason, felony, or piracy, shall plead thereto a plea of “Not Guilty,” he shall by such plea, without any further form, be deemed to have put himself upon the country for trial. And the court shall in the usual manner order a jury for the trial of such person accordingly.

And by sect. 2, if any person being arraigned upon or charged with any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of “Not guilty” on behalf of such person. And the plea so entered shall have the same force and effect as if such person had actually pleaded the same.

This is the only plea on which the prisoner can receive a final judgment of death; for in all cases of felony, if a special plea in bar, or any other plea, is found against him, he is allowed to plead over “Not guilty” to the felony. On pleading this plea, the prisoner, if in irons, is entitled to have them removed, in order that he may have no unnecessary pain or restraint on his trial.

The general issue makes it incumbent upon the prosecutor to prove every fact and circumstance constituting the offence as stated in the indictment or information. On the other hand, the defendant may give in evidence under this plea, not only every thing which negatives the allegation in the indictment, but also all matters of excuse and justification

CHAPTER XXIV.

Of Trial and Conviction.

TRIAL is the decision of the matter of fact brought into issue upon the plea of the defendant.

I. TRIAL BY PEERS.—This is the method of trial used in the Court of Parliament, or before the Lord High Steward, when a peer is indicted for felony. The course of proceeding is similar to that on trial by jury, except that there can be no special verdict, and that the peers need not all agree in their verdict, the decision of the greater number (consisting of twelve at least) being conclusive.

II. TRIAL BY JURY, otherwise called trial *by the country*, is by twelve jurors of the county where the fact is alleged to have been committed.

¹ By 4 & 5 Vic. c. 22, every lord of parliament, or peer having voice and place in parliament, against whom any indictment for felony may be found, shall plead to such indictment; and shall, upon conviction, be liable to the same punishment as any other person who may be convicted of any such felony.

In the case of indictment in the Queen's Bench, or of an information, a jury is impanelled by writ of *venire facias* to the sheriff as in civil cases; and if it be for misdemeanor, the trial is at a court of Nisi Prius. But an indictment for felony in the Queen's Bench is always tried *at bar*; and so is a misdemeanor, if the case be of great difficulty or importance.

On an information *ex-officio*, the attorney-general is entitled to a trial at bar if he prefers it.

Upon an indictment found at the assizes, or any other court of oyer and terminer and gaol delivery, a jury is impanelled for trial before the court where the indictment is found and the prisoner arraigned.

With respect to the mode of proceeding for impanelling juries in such courts, see the provisions of 6 Geo. IV. c. 50, §§ 4 to 25.

In important cases of misdemeanor it frequently happens that the trial is (on the application of one of the parties) by a *special jury*, instead of a jury of the ordinary kind; for the mode of choosing which, see 6 Geo. IV. c. 50, §§ 31, 32, already noticed.

A special jury can be had in any criminal case except felony. But it can be obtained only when the prosecution is in the Queen's Bench; not when it is at the assizes, &c. And it may be obtained whether the prosecution is by indictment or by information.

On an information *ex officio*, the attorney-general usually prefers a special jury.

As to the *time* of trial, it is provided by 60 Geo. III. & 1 Geo. IV. c. 4, § 3, that persons prosecuted for any misdemeanor by indictment at any session of the peace, session of oyer and terminer, or session of gaol delivery, having been committed or held to bail to answer for such offence twenty days before the session at which the indictment was found, shall plead to such indictment, and trial shall proceed thereon at such session, unless a certiorari to remove the indictment is delivered at such session before the jury are sworn.

By sec. 5, persons so prosecuted, not having been committed or held to bail twenty days before the session at which the indictment is found, but having been committed or held to bail to answer for such offence at some subsequent session, or having received notice of the indictment being found twenty days before such subsequent session, shall plead to such indictment at such subsequent session, and trial shall proceed thereon at such same session, unless a certiorari to remove the indictment is delivered at such session before the jury are sworn.

In informations *ex officio* the attorney-general brings the case on to trial when he thinks proper, though the court will interfere after twelve months have elapsed since a plea of Not guilty, and allow the defendant to bring on the trial, unless a *nolle prosequi* has been entered.

In informations filed by the master of the Crown Office, and on indictments in the Queen's Bench, either of the parties may, upon due notice to the other, proceed to trial at the next sittings &c. after the indictment has been traversed. And on such informations the prosecutor must proceed to trial within a year after issue joined, or enter a *nolle prosequi*, at peril of costs.

In felonies the trial is at the same assizes at which the indictment is found, and generally on the day of the arraignment.

Until the passing of the 6 & 7 Wm. IV. c. 114, a person indicted for felony was not entitled to a copy of the indictment or list of the witnesses, except in cases of treason; though, if any legal exception were taken to the indictment, the court would, as a matter of favour, allow a copy to be taken of the part material to be examined, and in lesser offences the right of having a copy of the indictment was always admitted. But now by sect. 3 of that act it is enacted, that all persons who shall be held to bail or committed to prison for *any* offence against the law shall be entitled to require and have, on demand, (from the person who shall have the lawful custody thereof) copies of the examinations of the witnesses respectively upon whose depositions they have been so held to bail or committed to prison, on payment of a reasonable sum for the same, not exceeding three halfpence for each folio of ninety words. Provided always, that if such demand shall not be made before the day appointed for the commencement of the assizes or sessions at which the trial of the person on whose behalf such demand shall be made is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person presiding at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge or other person, if he think fit, to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged.

And by sec. 4, all persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had.

When the trial is called on, the jurors are to be sworn as they appear, to the number of twelve, unless they are challenged.

Challenges are objections to the jury, and may be made either on the part of the crown or of the prisoners, and either to the *whole array* or to the *polls*, that is, to particular jurors.

An objection made to a juror at the mere pleasure of the party, without showing any cause, is called a *peremptory* challenge.

When the cause assigned for challenge carries with it *prima facie* evident marks of suspicion either of malice or favour, it is said to be a *principal* challenge; as when the juror is of kin to the party, or has an interest in the cause. But when the party objects only some probable cause of suspicion, as acquaintance or the like, it is said to be *to the favour*.

By 33 Edw. I. st. 5, and 6 Geo. IV. c. 50, § 29, a peremptory challenge is not allowed to the crown. But the crown need not assign the cause of challenge till all the panel is gone through.

A peremptory challenge is allowed to the defendant only on the issue of Not guilty, and not on collateral issues. And it is allowed only in treason or felony, and not in misdemeanor.

It is allowed in treason to the number of thirty-five, that is, one under the number of three full juries; after which the defendant can challenge no further. And by 22 Hen. VIII. c. 14, and 6 Geo. IV. c. 50, § 29, it is allowed in other cases of felony, to the number of twenty only. In misprision of treason, the number allowed seems to be unsettled.

By 7 & 8 Geo. IV. c. 28, § 3, if any person indicted for treason, felony, or piracy, shall challenge peremptorily a greater number of the men returned to be of the jury than such person is entitled by law to challenge in any of the said cases, every peremptory challenge beyond the number allowed by law in any of the said cases shall be entirely void, and the trial of such person shall proceed as if no such challenge had been made.

By 6 Geo. IV. c. 50, § 27, if any man shall be returned as a juror for the trial of any issue in any of the courts in the act mentioned who shall not be qualified according to the act, the want of such qualification shall be a good cause of challenge, and he shall be discharged on such challenge, if the court shall be satisfied of the fact. But if any man returned as a juror for the trial of any such issue shall be qualified in other respects according to the act, the want of freehold shall not be good cause of challenge, nor for discharging the man upon his own application: provided, that the same shall not extend to any *special* juror.

By section 28, no challenge shall be taken to any panel for want of a knight being returned.

By section 47, the privilege of an alien to be tried by a jury *de medietate lingue* (allowed by 28 Edw. III. c. 13) is preserved; and the prayer of every alien indicted or impeached of felony or misdemeanor, the sheriff is, by command of the court, to return for one half of the jury a competent number of aliens, or so many as may be found in the town or place of trial; and such aliens are not to be challenged for want of freehold or other qualification under the act. This privilege of an alien is taken away in treason by 1 & 2 Ph. & M. c. 10.

The time for challenge is between the appearance and the swearing of the jurors. It cannot be made, either to the array or to the polls, before a full jury have made their appearance; nor after they are sworn.

The challenge to the array must be in writing; but that to the polls may be verbal.

Upon a challenge to the array (whether principal or for favour), it lies in the discretion of the court to direct the mode in which it shall be tried. If the array be quashed, a new venire is awarded to the coroners, or to elisors, at the application of the prosecutor.

When a challenge has been made to the polls for cause, if it be a *principal* challenge, it is sufficient that the ground be made out to the satisfaction of the court, and it need not be referred to triors.

Upon a challenge to the polls *for favour*, the course is, to swear two persons in court to try whether the juryman challenged will try the prisoner indifferently. If the challenge be made to the first juror, the triors should be some persons not of the jury. Evidence is then produced to support the challenge, and the juror challenged may himself be examined on the *voir dire*; and according to the verdict of the two triors, the juror is admitted or rejected.

If the juryman is admitted, he is sworn and joined with the triors in determining the next challenge; and when two jurors have been thus admitted, the office of the triors ceases, and every subsequent challenge is left to the jurymen.

By 6 Geo. IV. c. 50, § 50, no man shall serve on a jury for the

trial of a capital offence who shall not be qualified as a juror in civil causes within the same county, city, or place; and such matter shall be ground for a principal challenge; and the person challenged may be examined on oath on the matter.

If, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, and the trial be under a commission of gaol delivery, the course is, for the court to order, *ore tenus*, that a new panel be returned; and there can be no *tales*. But where the indictment or information is in the Queen's Bench, a *tales* may be awarded. No juryman who has been challenged on the original panel ought to be sworn on the *tales*. And the defendant can challenge peremptorily from the *tales* only so many as will complete his original number of twenty in case of felony, and thirty-five in treason, including the challenges he made to the original jury.

Upon the prayer and award of a *tales de circumstantibus* at Nisi Prius, it is not compulsory on the sheriff to select the talesmen from the by-standers accidentally in court; they may be selected out of persons previously appointed by the sheriff to be in attendance in the expectation that a *tales* would become necessary.

Besides these challenges by the parties themselves, the justices of gaol delivery and of the peace are empowered by statute 6 Geo. IV. c. 50, § 40, to reform the panels of jurors, by taking out the names of individuals and inserting others where necessary; and the sheriff is bound to return the panel so altered. And this extends alike to grand and petty jurors.

If a juryman is taken ill during the trial (even though the offence be a capital one), so as to be incapable of agreeing in the verdict, or die, the jury may be discharged and a fresh jury charged, and the prisoner tried *de novo*; or another juryman may be added to the eleven by consent of the prisoner; but in that case the prisoner should be offered his challenges over again as to the eleven, and the eleven should be sworn *de novo*.

When twelve jurors are procured free from exception, they are sworn "well and truly to try, and due deliverance make, between our sovereign lady the queen and the prisoner at the bar, whom they have in charge, and a true verdict to give according to the evidence."

The indictment is then opened, and counsel may be heard in support of the prosecution.

It was usual, on the trial of any person for a second offence of the same felony, to charge the jury to inquire at the same time concerning the previous conviction; but the 6 & 7 Wm. IV. c. 111, reciting that doubts may be reasonably entertained whether such practice is consistent with a fair and impartial inquiry as regards the matter of such subsequent felony, enacts, That after the passing of that act it shall not be lawful, on the trial of any person for any such subsequent felony, to charge the jury to inquire concerning such previous conviction until after they shall have inquired concerning such subsequent felony and shall have found such person guilty of the same; and that whenever in any indictment such previous conviction shall be stated, the reading of such statement to the jury as part of the indictment shall be deferred until after such finding as aforesaid. Provided nevertheless,

that if, upon the trial of any person for any such subsequent felony as aforesaid, such person shall give evidence of his or her good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the indictment and conviction of such person for the previous felony before such verdict of Guilty shall have been returned, and the jury shall inquire concerning such previous conviction for felony at the same time that they inquire concerning the subsequent felony.

At the opening of the case, application is sometimes made to *quash* the indictment. The application may be made either by the prosecutor or the defendant; but in the latter case, if the objection be not very clear and obvious, the court will not quash, but leave the defendant to demur, &c.

The witnesses for the prosecution and defence respectively must be sworn to speak the truth, and the usual form is this: "The evidence you shall give between our sovereign lady the queen and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth; so help you God."

A peer must be sworn if examined, though he is allowed to give his answer upon his *honour* in a court of equity.

Christians are sworn on the New Testament, Jews on the Old Testament, Mahometans on the Koran, and persons of other religions in such form as they may declare, according to the faith they profess, is binding on the conscience. 1 & 2 Vict. c. 105. The solemn affirmation of a Quaker or Moravian is permitted in lieu of an oath, in all cases where an oath is required by law.—3 & 4 Wm. IV. c. 49.

A witness may be asked if he believes that there is a Deity, and that there is a future state of rewards and punishments; but he cannot be questioned as to the particular tenets of his religion.

EVIDENCE.—With respect to *evidence*, the rule is, that nothing can be given in evidence unless it directly tends to prove or disprove the matter in issue. Therefore it is not allowable to show that the prisoner has a *general* disposition to commit the same kind of offence as that for which he stands indicted.

But, to prove the identity of the prisoner, it may be shown that other goods, not included in the indictment, which were stolen from the premises at the same time, were found in his possession. So it may be shown, on an indictment for arson, that property taken out of the house at the time of the firing was afterwards found secreted in the possession of the prisoner. And where several felonies are so connected together as to form an entire transaction, upon an indictment for the one, the other may be proved, to show the nature of the transaction.

So where a guilty knowledge by the prisoner is to be proved, as in the case of forgery, evidence may be given of other instances of his having committed the same offence.

So, to prove malice, acts not included in the indictment are admissible evidence; as in murder, former attempts to assassinate.

So, on an indictment for rape, defendant may give general evidence of the woman's character for want of chastity, or that she had before been criminally connected with him; though not to prove such connection with others. The prisoner is allowed to call witnesses to speak *generally* to his character; but he is not allowed to prove particular

actions in his own favour, unless they tend directly to the disproof of some of the facts charged and put in issue.

It is also a general rule, that the best evidence the nature of the case will admit of must be produced, if it can possibly be had; and if it cannot, then the next best evidence.

Therefore before a copy of a written instrument or parol evidence of its contents can be received as proof, the absence of the original instrument must be accounted for, by proving that it is lost or destroyed, or in the possession of the opposite party. Nor will even the declaration of the party against whom it is used be evidence of the instrument, unless the non-production of it be accounted for. But on an indictment for stealing a bill of exchange, parol evidence of it may be admitted, without notice to the defendant to produce the instrument itself.

The common law does not require any certain number of witnesses in criminal, more than in civil, cases; so that, at common law, the positive oath of one witness is sufficient to a conviction for any crime whatsoever. It was enacted, however, for the security of the subject, by statutes 1 Edw. VI. c. 12, and 5 & 6 Edw. VI. c. 11, that no person, not voluntarily confessing the same, should be convicted of any offence of high treason, petit treason, or misprision of treason, but upon the oaths of *two* lawful accusers. It has been made a question, whether, and how far, these statutes were in force, after 1 & 2 P. & M. c. 10; but it is one that, so far as respects the case of *high* treason at least, is of no *practical* moment. For the statute 7 Wm. III. c. 3 is express, that no person shall be convicted of any high treason within its purview, or misprision thereof, but upon the testimony of *two* lawful witnesses, either both of them to the same overt act, or one of them to one, and the other to another overt act of treason of the same kind; or upon his own free and voluntary confession of the same *in open court*. And the statute further provides, that no evidence shall be given of any overt act which is not expressly laid in the indictment.

But one witness is sufficient in treason to prove a collateral fact, as that defendant is a natural-born subject, or the like.

And by 39 & 40 Geo. III. c. 93, where the overt act of treason is the assassination of the king, or a direct attempt on his life or person, one witness is sufficient.

To convict for perjury, also, there must be two witnesses. But if the perjury assigned be directly proved by one witness, and any material circumstances be proved by another, or by written documents, in confirmation, this may suffice. If the perjury consists in the defendant's having sworn contrary to what he had himself before sworn upon the same subject, this is not within the rule requiring two witnesses.

A free and voluntary confession by the prisoner is in general sufficient to convict, without any other evidence; whether made before apprehension or after, on judicial examination, or after commitment, and whether reduced into writing or not. But if the confession was drawn from the prisoner by means of a threat or a promise, however slight, it is not admissible evidence. Any facts, however, that may be brought to light in consequence of such confession, may be proved.

A confession (if made on examination before a magistrate) ought to be taken in writing, and signed by the magistrate, as directed by

7 Geo. IV. c. 64 ; and parol evidence of such a confession will not be received, unless it is clearly proved not to have been reduced into writing. The confession, when taken in writing, ought to be read over to the prisoner, and he should be asked to sign it. But his refusing to do so will not make it inadmissible, if in other respects regularly obtained. The confession should be taken without oath, or it cannot be received.

His confession is evidence only against himself ; not against others, though proved *aliunde* to be his accomplices.

In all cases the whole of the confession should be given in evidence ; for it is a general rule, that the whole account must be taken together, both that which makes for the prisoner, and that which makes against him. But what he says in his favour is not conclusive, but the whole must be left to the jury.

Upon an indictment for murder, the dying declarations of the deceased are admissible in evidence, if it appear to the judge that the party was conscious of his being in a dying state when he made them, and impressed with a sense of his situation ; but only when the death of the deceased is the subject of the charge, and the cause of the death is the subject of the dying declaration.

The depositions of witnesses upon oath before magistrates and coroners, duly put in writing, and subscribed and delivered to the officer of the court, upon being produced at the trial, and proved by the magistrate or his clerk to have been truly taken, may be given in evidence against the prisoner in cases of felony and misdemeanor (but not in treason), if the person who made the deposition is dead or insane, or is kept out of the way by the defendant, or (as it seems) is sick, or unable to travel.

But depositions before magistrates cannot be read as evidence against the prisoner, unless taken in the presence of the prisoner, so that he had an opportunity of cross-examining. If duly taken, they are admissible in evidence after the death &c. of the deponent, not only on the trial of the same offence with which the defendant was charged when they were taken, but on an indictment for any other offence.

They may also be given in evidence by the defendant, where the witnesses appear, in order to show some material variance between their evidence at the trial and their evidence before the magistrate ; and it appears they may be read by the prosecutor, and certainly by the judge, to impeach the credit of a witness who gives evidence contradictory to facts contained in his deposition.

Hearsay is not in general sufficient evidence, except to prove public rights, customs, boundaries, and the like.

An insane person cannot be admitted as a witness, but a person deaf and dumb may ; and a person accustomed to confer with him by signs may interpret.

A child, however young, may be sworn, if he is aware of the obligation of an oath.

Husband and wife cannot be witnesses for or against each other ; but this is the only relationship which renders a witness incompetent.

And where several persons are jointly indicted, the wife of one of them cannot be produced as a witness for or against the others.

But where a woman has been taken away by force and married, she may be admitted as a witness against the offender, unless after abduction she consented to the marriage. And generally, in cases of violent injury to the person of the wife, the wife is evidence against her husband; and where he is suspected of having murdered her, her dying declarations are evidence against him.

Formerly a witness was incompetent to give evidence if he were *interested* in the event of the trial, or could avail himself of such evidence on any future occasion in support of his own interest; though in criminal cases many instances of apparent interest were not considered within the rule;—as, in particular, the testimony of the party injured was constantly admitted; and in cases of forgery the 9 Geo. IV. c. 32 expressly enacted that no person should be deemed incompetent by reason of any interest in the writing forged. Again, persons *convicted of felony* or of any species of the *crimen falsi*, as barratry, conspiracy, perjury, fraud in gaming, &c., were also incapacitated as witnesses. But now the 6 & 7 Vic. c. 85, reciting that “whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and civil cases, should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony,” enacts, that no person offered as a witness shall be excluded by reason of incapacity from crime or interest from giving evidence; but that every person so offered shall be admitted to give evidence, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial, or of the suit, action, or proceeding, and notwithstanding that such person may have been previously convicted of any crime or offence.¹

The credit of a witness may be impeached by calling evidence to show his general want of veracity; but evidence cannot be given against him of particular transactions. No one can be allowed to discredit his own witness by impeaching his character; though if on his examination his evidence proves unfavourable, the party may call other evidence to contradict facts which his witness has affirmed.

The counsel, attorney, or solicitor of the defendant cannot disclose any fact he has become acquainted with under the sanction of professional confidence. But this does not extend to any other than legal advisers, and therefore not to physicians, &c.

A witness need not answer any question tending to render him the subject of a criminal prosecution, or to subject him to penalties.

¹ The act extends both to criminal and civil cases. It is provided, however, that the act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, or the husband or wife of such

persons respectively; and that it shall not repeal any provision in the 7 Wm. IV. & 1 Vic. c. 26 (Wills Act). But any *defendant* to a cause pending in a court of equity may be examined as a witness on behalf of the plaintiff or of any co-defendant, saving just exceptions; and any interest which such defendant may have in any of the matters in question shall not be deemed a just exception to his testimony, but only as affecting or tending to affect his credit as a witness. —6 & 7 Vic. c. 85, § 1.

By 9 Geo. IV. c. 15, the judges at nisi prius, and the courts of oyer and terminer and general gaol delivery, are empowered to amend the record upon which any trial may be pending in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or in print produced in evidence and the recital or setting forth thereof upon the record.

When the evidence for the prosecution is closed, the judge calls on the defendant for his defence.

Formerly no counsel was allowed to speak for a prisoner upon his trial on the general issue in a case of felony, except upon any point of law which might arise proper to be debated. In misdemeanors, however, and even in felonies where the issue was collateral, and not the general issue, this prohibition did not apply. And the judges always allowed a prisoner's counsel to instruct him what questions to ask, or even to ask them for him with respect to matters of fact. And by 7 Wm. III. c. 3, the case of treason was excepted from the rule by which counsel were prohibited from speaking on behalf of the prisoner in cases of felony; for by that statute, upon indictment for such treason as works a corruption of the blood, or misprision thereof, except treason in counterfeiting the royal seals, the prisoner may make his full defence by counsel, not exceeding two, to be named by the prisoner, and assigned by the court or judge. It has been also decided, that the two counsel may address the jury, though the prisoner call no evidence. And by 20 Geo. II. c. 30, the same privilege of making a full defence by counsel is given in the case of *impeachments* for treason.

But now the 6 & 7 Wm IV. c. 114, reciting that it is just and reasonable that persons accused of offences against the law should be enabled to make their full answer and defence to all that is alleged against them, enacts, that after the 1st October, 1836, *all persons tried for felonies* shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law, or by attorney in courts where attorneys practise as counsel. And by sect. 2, that in all cases of summary conviction persons accused shall be admitted to make their full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney.

If any witness is examined for the defence, the counsel for the prosecution has a right to address the jury in reply, but, in general, not otherwise. But the defendant's calling witnesses merely to impeach the competency of the prosecutor's witness will not let in a reply.

In crown prosecutions the attorney or solicitor-general has a right to reply, whether the defendant calls witnesses or not.

After the case on both sides is closed, the judge sums up, stating every thing material to the point at issue that has been proved in the course of the trial; and the jury then retire to consider of their verdict.

If during the trial the prisoner be taken so ill that he is unable to remain at the bar, the judge will discharge the jury; and on his recovery another jury may be sworn. But, in general, after any evidence has been given, the jury cannot be discharged until they have given in their verdict; but are to consider of it, and deliver it in open court. The judges, however, may adjourn while the jury are withdrawn to confer, and may return to receive the verdict in open court.

When a criminal trial runs to such length that it cannot be concluded in one day, the court by its own authority may adjourn till the next morning. But the jury must be somewhere kept together (at least in a capital case), that they may have no communication except with each other. In cases, however, of misdemeanor, the separation of the jury on such adjournment does not vitiate the verdict.

The verdict must be unanimous. In general, the assent of all the jury to the verdict pronounced by the foreman in their presence is to be conclusively inferred; but if all the jury were not within sight, and it is therefore uncertain whether they all heard the verdict, the court will, in a case of misdemeanor, grant a new trial at the instance of the defendant.

The verdict may be either *general* ("Guilty" or "Not guilty") or *special*, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance, on the facts stated the case be murder, manslaughter, or no crime at all. And in all cases the jury have a right to find either a general or a special verdict.

Where an indictment for felony includes a felony of inferior degree, the jury may acquit the defendant of the higher crime, and convict him of the less. Thus, on an indictment for murder, he may be convicted of manslaughter; and on an indictment for robbery, of simple larceny.

On a verdict of Not guilty, the prisoner is for ever quit of the accusation; and upon such acquittal, or, upon discharge for want of prosecution, shall be immediately set at large, without payment of any fee to the gaoler.—14 Geo. III. c. 20.

But if the jury find him guilty, or if he confesses the crime, and the confession is thereon recorded without trial, he is, in either case, said to be *convicted*.

PROSECUTORS' AND WITNESSES' EXPENCES, &c.—By 7 Geo. IV. c. 64, § 22, the court before which any person shall be prosecuted or tried for any *felony* is empowered, at the request of the prosecutor or other person who shall appear on recognizance or subpœna to prosecute or give evidence, to order payment to the prosecutor of the costs and expences which he shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution of such sums of money as shall seem reasonable and sufficient to reimburse them for the expences they shall have severally incurred in attending before the examining magistrate and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time. And although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall *bonâ fide* have attended the court in obedience to such recognizance or subpœna, to order payment of such sum of money as shall seem reasonable and sufficient to reimburse such person for the expences *bonâ fide* incurred by reason of attending before the examining magistrates, and by reason of such recognizance or subpœna, and also to compensate such person for trouble and loss of time. And the amount of the expences of attending before the examining magistrate, and the compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate granted before the trial or attendance in court, if such magistrate shall think fit to grant the same; and the amount of all the other expences and compensation shall be ascertained by the proper

officer of the court, subject to the regulations to be established as thereafter mentioned.

And, by sect. 23, courts may order payment of the expences of prosecutors and witnesses for the prosecution on indictments for *misdemeanor*, together with a compensation for their trouble and loss of time, in like manner as in felony, in the following cases :—where any person shall be indicted of any assault with intent to commit felony,—of any attempt to commit felony,—of any riot,—of any misdemeanor for receiving stolen property, knowing the same to have been stolen,—of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer,—of any neglect or breach of duty as a peace officer,—of any assault committed in pursuance of a conspiracy to raise the rate of wages,—of knowingly and designedly obtaining any property by false pretences,—of wilful and indecent exposure of the person,—of wilful and corrupt perjury, or of subornation of perjury. And although no indictment is preferred, attendance in court in obedience to a recognition is to be allowed for, as in case of felony. But in cases of misdemeanor the power of ordering payment of expences and compensation shall not extend to the attendance before the examining magistrate.

The order for payment is to be made out by the proper officer of the court (upon payment of one shilling for the prosecutor, and sixpence for each other person), and paid by the county treasurer. § 24. By sect. 26, the quarter sessions are empowered to regulate the expences.

In cases of prosecution in the admiralty jurisdiction, the court may order payment of expences and compensation to prosecutors and witnesses in like manner as in other courts, to be paid by the assistant to the Council for the Affairs of the Admiralty and Navy.

By secs. 28, 29, courts may order compensation to parties who have been active in the apprehension of certain offenders therein described, by an order on the sheriff, who is to be reimbursed by the Treasury.

By sect. 30, if any man is killed in attempting to apprehend any such offenders as are mentioned in sect. 28, the court may order compensation to his family. See *ante*, p. 1167.

By 7 Wm. IV. & 1 Vict. c. 44, upon a charge against any person of having endeavoured to conceal the birth of a child, the court is authorized (whether a bill of indictment shall or shall not be actually preferred) to order payment of the costs and expences of the prosecutor and witnesses, together with a compensation for their trouble and loss of time, in the same manner as in cases of felony.

By 4 & 5 W. & M. c. 18, if the prosecutor, on an information filed by the master of the Crown Office, does not try within a year after issue joined, or if the defendant be acquitted by verdict, or a *nolle prosequi* be entered, the Court of Queen's Bench is authorized to award costs to the defendant, unless the judge certifies in open court, on the trial, that there was a reasonable ground for the prosecution. But on informations *ex officio* no costs are paid on either side.

RESTITUTION OF PROPERTY.—By 7 & 8 Geo. IV. c. 29, § 57, if any person guilty of any felony or misdemeanor under that act, in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence by or on the behalf of the owner of the pro-

perty, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representatives; and the court shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner. Provided, that if it shall appear, before any award or order made, that any valuable security shall have been *bond fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bond fide* taken or received, by transfer or delivery by some person or body corporate, for a just and valuable consideration, without any notice or any reasonable cause to suspect that the same had been stolen, taken, obtained, or converted as aforesaid, in such case the court shall not award or order the restitution of such security.

When, after a conviction, the owner is entitled to restitution, he may take his goods wherever he can find them, without any writ or order for restitution, so that it be effected without breach of the peace. And he is entitled to such restitution although, since the goods were stolen, they have been sold in market overt to an innocent purchaser. But until conviction the right of recaption of things stolen, and the right of action for them, are suspended.

CONSEQUENCES OF CONVICTION.—Upon conviction for any felony, the personal property of every description of the offender, which he has at the time of the conviction, are immediately forfeited to the queen. But, before conviction, he may *bond fide* sell any of his chattels real or personal, for the sustenance of himself and family between the fact and conviction; yet if they are collusively and not *bond fide* parted with, merely to defraud the crown, the law will reach them.

Upon conviction for misprision of treason, the profits of the offender's lands during life, and also his goods and chattels, are forfeited.

NEW TRIAL.—In prosecutions in the Queen's Bench for *misdeemeanors*, if a verdict of Guilty has been given contrary to the evidence, and not to the satisfaction of the judge, the court will, on the motion of the defendant, grant a *new trial*. And there are many other grounds on which, after such verdict, a new trial will be granted at the instance of the defendant, to promote the purposes of justice.

But a new trial will not be granted at the instance of the prosecutor, though the defendant has been acquitted contrary to the evidence, unless the verdict should appear to have been obtained by some fraudulent or irregular proceeding on the part of the defendant.

And no new trial can be granted in any case of *felony*; but if the conviction appears to the court to be improper, the execution is repited, to enable the defendant to apply for a pardon.

CHAPTER XXV.

Of Judgment and its Consequences.

THE Court of Queen's Bench may give judgment in every case, whether the indictment were originally found there or removed by certiorari from an inferior tribunal.

By 14 Hen. VI. c. 1, judges at Nisi Prius are empowered, in cases of felony and treason, to pass sentence on a prisoner convicted before them; or they may return the *postea*, together with the criminal, into the court above, if they think proper. And by 11 Hen. VI. c. 6, and 1 Edw. VI. c. 7, justices of *oyer and terminer*, gaol delivery, and of the peace, have power to give judgment by virtue of their respective commissions; and this, even though the trial was before former commissioners.

If an inferior court do not give judgment, the Queen's Bench may issue a *mandamus*.

By 11 Geo. IV. & 1 Wm. IV. c. 70, § 9, upon all trials for felonies or misdemeanors upon any record of the Queen's Bench, judgment may be pronounced during the sittings or assizes by the judge before whom the verdict was taken (except only in cases of information filed by leave of the Queen's Bench, or in cases of information filed by the attorney-general, where he prays that the judgment may be postponed), and the judge may either order an immediate commitment in execution, or may respite the execution until the sixth day of the next term.

No corporal punishment can in any case be awarded against a defendant, unless he is personally present. He may be fined in his absence; but, to mitigate a fine, he must appear in person.

After conviction, if the defendant is not in custody, a *capias* is awarded against him to bring him in to receive judgment; and if he absconds, he may be prosecuted to outlawry.

In case of a conviction for a misdemeanor, where judgment is given in the Queen's Bench, if the defendant be present he will be committed until judgment shall be passed against him; unless the prosecutor consent to his liberation on his recognizance to appear and receive judgment.

Upon conviction, where judgment is given in the Queen's Bench, whether for a capital felony or otherwise, the prosecutor enters a four-day rule for judgment; and in that interval he brings the *postea* into court, to enable the judges to pass sentence.

ARREST OF JUDGMENT.—At any time between the conviction and the judgment, either in case of felony or misdemeanor, the defendant may move the court in *arrest of judgment*. And, to give him an opportunity of doing this, he must, in capital offences, be asked, after conviction and before judgment, what he has to say why judgment of death should not be pronounced against him. And it must appear on the record that this question was put.

The grounds for a motion in arrest of judgment are objections arising upon the face of the record itself. No defect in evidence or other objection to the proceedings not apparent on the record can be urged in this shape. But a motion in arrest of judgment may be grounded on a defect apparent in any part of the record, and not merely on such as occur in the indictment itself.

By 7 Geo. IV. c. 64, § 20, no judgment upon any indictment or information for felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," or of the words "with force and arms," or of the words "against the peace;" nor for

the insertion of the words "against the form of the statute," instead of "against the form of the statutes," or *vice versâ*; nor for that any person mentioned in the indictment or information is designated by a name of office or other descriptive appellation instead of his proper name; nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened; nor for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence.

And, by sect. 21, no judgment after verdict, upon any indictment or information for felony or misdemeanor, shall be stayed or reversed for want of a similiter, nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process or of any of the jurors, nor because any person has served upon the jury who had not been returned as a juror by the sheriff; and where the offence charged has been created by any statute, or subjected to a greater degree of punishment or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.

A *pardon* may be also pleaded in arrest of judgment, and it has the same advantage when so pleaded, as when pleaded in arraignment.

The defendant must be personally before the court, to move in arrest of judgment; and if several be convicted, they should be all present. But the court may, without any motion, arrest the judgment if they see cause.

If the judgment be pronounced, though not actually entered, the only course for the defendant is by *writ of error*.

If judgment be arrested, all the proceedings are thereby set aside, but a subsequent indictment may be preferred.

Where a motion to arrest the judgment is made at the assizes, and the judge thinks there may be good ground for it, he respites the judgment for the opinion of all the judges. And, after passing sentence, he may respite execution, for the like purpose.

PASSING SENTENCE.—If there be no ground for the motion, the court then proceeds to pronounce judgment.

The judgment of *death* is, that the offender be hanged by the neck till dead, with certain additions in the case of treason. See *ante*, p. 1061. The time and place of execution are no part of the judgment, except (before the recent act 6 & 7 Wm. IV. c. 30) in the case of murder.

By 4 Geo. IV. c. 48, § 1, whenever any person shall be convicted of any felony, except murder, and shall by law be excluded the benefit of clergy in respect thereof, and the court before which such offender shall be convicted shall be of opinion that under the particular circumstances of the case such offender is a fit and proper subject to be recommended to the royal mercy, it shall be lawful for such court (if it shall think fit so to do) to direct the proper officer, then being present in the court,

to require and ask, and thereupon such officer shall require and ask, if such offender hath or knoweth any thing to say why judgment of death should not be recorded against such offender; and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall and may and is hereby authorized to abstain from pronouncing judgment of death upon such offender, and, instead of pronouncing such judgment, may order the same to be entered of record. And thereupon such proper officer as aforesaid shall and may and is hereby authorized to enter judgment of death on record against such offender in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open court against such offender by the court before which such offender shall have been convicted. And, by sect. 2, the judgment thus recorded shall have the same effect as if judgment was pronounced and the party reprieved.

BENEFIT OF CLERGY.—Formerly there was this distinction as to capital offences, that some were within the benefit of clergy, and others were excluded from that benefit. In the former cases the offender was upon the first offence discharged from capital punishment, upon praying “the benefit of clergy;” in the latter cases he was not allowed that exemption. But now the law in this respect is altered; the benefit of clergy having been abolished by the 7 & 8 Geo. IV. c. 28, § 6, as we have already seen, *ante*, p. 235.

The 7 & 8 Geo. IV. c. 28 having thus, by sec. 6, abolished the benefit of clergy, provides, by sect. 7, that no person convicted of felony shall suffer death, unless it be for some felony which was excluded from the benefit of clergy before or on the first day of the then session of parliament (14th November, 1826), or which hath been or shall be made punishable with death by some statute passed after that day.¹

By sect. 8, every person convicted of any felony not punishable with death shall be punished in the manner prescribed by the statute or statutes specially relating to such felony; and every person convicted of any penalty for which no punishment hath been or hereafter may be specially provided, shall be deemed to be punishable under this act, and shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice, publicly or privately whipped (if the court think fit) in addition to such imprisonment.

By sect. 9, when any person shall be convicted of any offence punishable under this act for which imprisonment may be awarded, it shall be

¹ By 1 Edw. VI. c. 12, the same advantage was given to peers as a privilege of peerage, on a first conviction of certain felonies, which other subjects derived from benefit of clergy. As that act was not noticed when the 7 & 8 Geo. IV. c. 28 was passed, considerable doubt was entertained whether the privilege of peerage thus created did not still continue in force, and as a consequence whether a peer of parliament would have been liable to any punishment at all on a first conviction. This matter first attracted public notice at the time of the trial of the Earl of Cardigan

in the House of Lords, and it became a question whether, if that peer had been found guilty, he would not have escaped punishment by reason of this deficiency in the law. However, the 4 & 5 Vict. c. 22 was shortly afterwards passed which repealed the first-mentioned statute, and enacts, that every lord of parliament or peer of this realm against whom any indictment for felony may be found shall plead to such indictment, and shall upon conviction be liable to the same punishment as any other of her majesty's subjects.

lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for such portion or portions thereof as to the court in its discretion shall seem meet. But the 1 Vict. c. 90 limits the period of solitary confinement, so that it shall not exceed one month at a time, nor three months in any one year.

By sect. 10, whenever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced. And when such person shall be already under sentence either of imprisonment or transportation, the court, if empowered to pass sentence of transportation, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could be otherwise awarded.

By sect. 11, if any person shall be convicted of any felony not punishable with death, committed after a previous conviction for felony, such person shall on such subsequent conviction be liable, at the discretion of the court, to be transported beyond the seas for life or not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court think fit) in addition to such imprisonment.

By sect. 13, no free pardon, nor any discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any felony committed after the granting of such pardon.

ATTAINDER.—Immediately upon judgment of death (and also upon judgment of outlawry for a capital crime), *attainder* follows; that is, the offender loses his civil rights and capacities, and becomes as it were dead in law. He cannot maintain, but he is liable to civil suits; though he ought not to be charged therein, but by leave of the court or a judge at chambers.

Another consequence of attainder is *forfeiture*, which applies to the freehold only, for the goods and chattels are forfeited prior to the attainder, *viz.* upon conviction. So property accruing to the felon afterwards before the term of his sentence, whether of imprisonment or transportation, is expired, is also forfeited.

By attainder in *treason* a man forfeits to the crown all his freehold lands and tenements of inheritance, whether fee simple or fee tail, and all his rights of entry on freehold lands and tenements which he had at the time of the offence committed or at any time afterwards, to be for ever vested in the crown; and also the profits of all freehold lands and tenements which he had in his own right for life so long as such interest shall subsist. And by 5 & 6 Edw. IV. c. 11, the wife's dower is forfeited. But the husband may be tenant by the curtesy of the wife's lands, though she is attainted of treason.

Copyhold estates, in case of treason, are forfeited to the lord of the manor, and not to the crown.

By attainder for any other felony as well as for treason, the offender, before the passing of the 54 Geo. III. c. 145, forfeited to the crown the profits during his life of all lands in which he had an estate for life or in tail. He also forfeited to the crown all his freehold tenements in fee simple for a year and a day, and the crown might commit what waste it pleased. This was called the *king's year, day, and waste*, and was usually compounded for. Subject to these rights of the crown as to the freehold, the lands both freehold and copyhold (except lands entailed) accrued to the lord of whom they were holden.

Another consequence of attainder, in treason and all felonies, before the same statute, was *corruption of blood*. The blood was corrupted both upwards and downwards; so that an attainted person could neither inherit lands or other hereditaments from his ancestors, nor transmit those he held by descent to his heir; nor could title be derived through him by descent; but the same would escheat to the lord of the fee, subject to the crown's superior right of forfeiture.

But the law, both as to forfeiture for felony and corruption of blood, is now materially altered. For by 54 Geo. III. c. 145, no attainder for felony which shall take place after the passing of this act, *except in cases of treason or murder*, or of abetting, procuring, or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person other than the right or title of the offender during his life only; and it shall be lawful for every person to whom the right or interest of any lands, tenements, or hereditaments after the death of such offender should or might have appertained if no such attainder had been, to enter into the same.

And by 3 & 4 Wm. IV. c. 106, § 19, the descent of any land may be traced *through* an attainted person, unless such land had escheated in consequence of the attainder before the 1st January, 1834.

TRANSPORTATION.—This punishment is now chiefly regulated by 5 Geo. IV. c. 84. Section 2 enacts, that every person convicted of any offence for which he is liable to be transported shall be adjudged to be transported beyond the seas, and the judgment shall subject him to be conveyed beyond the seas. And in cases where the queen shall extend mercy to any offender convicted of a capital crime upon condition of transportation, the court or judge shall make an order for the transportation of the offender, which shall subject him to be conveyed beyond the seas accordingly.

By sec. 3, &c. her majesty may appoint places beyond the seas for this purpose, either within or without her dominions; and orders may be given for removal to the ship &c., and contracts made for the transportation.

By sec. 10, her majesty may appoint places of confinement in England and Wales, either on land or on vessels in the Thames or other river, for confinement of male offenders under sentence of transportation. And, by sec. 13, her majesty may by order in council declare that such male offenders shall be kept to hard labour in any part of her dominions out of England.

By sec. 17, convicts adjudged by courts out of the United Kingdom

to transportation, or pardoned on condition of transportation, may be imprisoned in England in such places of confinement, until transported or entitled to their liberty.

By sec. 18, all offenders under sentence or order of transportation may, by order of a visiting justice, be kept to hard labour in the gaol, if their health permit, and by order of a secretary of state may be removed to the house of correction, and there kept to hard labour.

By sec. 19, the time spent in gaol, house of correction, or place of confinement, shall go in discharge of the term of transportation.

By sec. 22, offenders who have been transported being found at large in any part of her majesty's dominions, without lawful excuse, before the expiration of the term, are guilty of felony, punishable with death. But the capital punishment is now removed by the 4 & 5 Wm. IV. c. 67, and persons convicted of such offence, or of aiding or abetting, counselling or procuring the commission thereof, shall be liable to be transported beyond the seas for life, and (previously to transportation) to be imprisoned, with or without hard labour, not exceeding four years.

By sec. 26, any felon under sentence or order of transportation who had received a remission of part of his term from the governor of the colony, might maintain any action or suit either here or abroad. The 2 & 3 Wm. IV. c. 62, however, provided that no governor should give any *pardon* or *ticket of leave*, or permission to suspend the labour of any convict (except in case of illness), unless, if transported for seven years, he had served four,—if transported for fourteen, he had served seven,—or if transported for life, he had served eight years; and that no such convict should be capable of acquiring any property, or of bringing any action for the recovery of property, until he had obtained a *pardon*. But this is now repealed by the 6 & 7 Vic. c. 7; and no governor can remit any part of the time for which an offender is transported, but may recommend any such convict to her majesty for either an absolute or conditional pardon; and if her majesty signify her approval thereof through the secretary of state, may, pursuant to instructions from such secretary, grant an absolute or conditional pardon under the seal of his government, which shall have the effect, in the places specified therein, of a pardon under the great seal. And by the same act, any felon under sentence or order of transportation holding a *ticket of leave* may, notwithstanding his conviction of felony, acquire and hold personal property, and maintain any action or suit for the recovery of personal property, and for any damage or injury sustained, in the courts of the colony where he shall lawfully reside. If such ticket of leave be revoked, the property so acquired shall vest in her majesty, and be disposed of at the discretion of the governor. But no felon holding a ticket of leave shall be capable of acquiring or holding any estate in lands or tenements other than as a tenant for years, or for some less term or estate, determinable in each case upon the revocation of the ticket of leave, until he shall have obtained an absolute or conditional pardon pursuant to the provisions hereinbefore contained.¹

¹ See further, on the subject of transportation, 11 Geo. IV. & 1 Wm. IV. c. 39; and, as to the abolition of the office of Superintendent of Convicts, 9 & 10 Vic. c. 26.

By the Annual Mutiny Acts provision is made for empowering court-martials to adjudge transportation in lieu of corporal punishment; they provide also for the case of an order by her majesty for transportation in lieu of capital punishment upon the sentence of a court-martial.

OTHER PUNISHMENTS.— Besides death and transportation, various other punishments may be adjudged by law; such as fine, imprisonment, whipping, hard labour, &c., which are in a great measure in the discretion of the court. But such discretion is not to be exercised arbitrarily or oppressively. By 1 W. & M. sess. 2, c. 2, excessive fines are not to be imposed, nor cruel and unusual punishments inflicted.

By 1 Vict. c. 23, the punishment of the pillory is now entirely abolished. It had been previously restricted by 56 Geo. III. c. 138 to the offences of taking a false oath, perjury, or subornation of perjury, and false affirmation, or subornation thereof; and now, in all cases where the punishment of the pillory had previously formed the whole or a part of the judgment, the court may pass such sentence of fine or imprisonment, or both, in lieu of pillory, as shall seem proper.

By 1 Geo. IV. c. 57, judgment or sentence shall in no case be given that any female be whipped, either publicly or privately. But in cases where whipping of female offenders had formed either part or the whole of the sentence, it shall be lawful for the court, or justice of the peace, to pass sentence of confinement with hard labour in the common gaol or house of correction for any time not exceeding six months nor less than one month, or of solitary confinement therein for not exceeding seven days at any one time, in lieu of the sentence of whipping.

By 3 Geo. IV. c. 114, the court may sentence the offender to imprisonment with hard labour for any term not exceeding the term for which it might have previously imprisoned for such offences, either in addition to or in lieu of any other punishment which may be inflicted by any law in force before this act, in the following cases; *viz.* for any attempt to commit felony, for a riot, for keeping a common gaming house, common bawdy house, or common ill-governed and disorderly house, for wilful and corrupt perjury, or subornation of perjury.

And, as we have already seen, in every case of conviction for any felony or misdemeanor for which imprisonment may be awarded under the 7 & 8 Geo. IV. cc. 29, 30, the 9 Geo. IV. c. 31, the 11 Geo. IV. & 1 Wm. IV. c. 66, or the 2 & 3 Wm. IV. c. 34, the court is empowered to sentence the offender to be imprisoned, or imprisoned and kept to hard labour in the common gaol or house of correction, and also to direct that he be kept in solitary confinement for the whole or any portions of such imprisonment, or imprisonment with hard labour, as to the court in its discretion shall seem meet. But, as regards *solitary confinement*, the 1 Vict. c. 90, § 5 imposes a restriction enacting, that, after the commencement of that act (1st October, 1837) it shall not be lawful for any court to direct that any offender shall be kept in solitary confinement for any longer period than one month at a time, or than three months in the space of one year.

By 11 Geo. IV. & 1 Wm. IV. c. 39, § 7, where the queen shall extend mercy to a capital offender on condition of imprisonment, with or without hard labour, the court, or any judge of the courts at Westminster, to whom the intention shall be signified, shall allow the offender the benefit of a conditional pardon and make an order accordingly.

By 9 Geo. IV. c. 32, § 3, where an offender convicted of any felony not punishable with death shall have endured the punishment to which he hath been adjudged, it shall have the like effects and consequences as a pardon under the great seal as to such felony; but not so as to prevent or mitigate any punishment to which he might otherwise be lawfully sentenced on a subsequent conviction for any other felony.

RECORDING JUDGMENT.—When the judgment is pronounced, it ought to be entered on record. A defective one, omitting an essential part of the judgment required by law, or an excessive judgment, is bad altogether.

In felonies or misdemeanors, the court may alter the judgment during the same term in which it is given, but not afterwards.

The justices at sessions may do so at any time during the sessions, because it is regarded as only one day; but they cannot do so at a subsequent period, unless an adjournment is entered on the roll.

CHAPTER XXVI.

Of Reversal of Judgment.

As we have seen, a judgment may sometimes be reversed without writ of error. This is where the error is *dehors* the record.

Thus, judgment given by persons who had no valid commission is void, and may be falsified by showing the special matter, upon bare inspection.

So if a man purchases land of another, and afterwards the vendor is, either by outlawry or his own confession, convicted and attainted of some treason or felony previous to the sale, whereby such land becomes liable to forfeiture; the purchaser is at liberty, upon any trial, without bringing a writ of error, to falsify not only the time of the supposed felony or treason, but the very point of the felony or treason itself. But the vendor himself cannot.

A judgment may also be reversed by writ of error. This is where the error appears on the record.

A writ of error lies from all inferior criminal jurisdictions to the Court of Queen's Bench, and from the Queen's Bench to the House of Peers. It lies for notorious mistakes in the judgment or other parts of the record.

A writ of error is not allowed, except on leave obtained under the royal sign manual, or from the attorney-general. In case of misdemeanor, if there is probable ground, the attorney-general is bound to grant his fiat. But in felony a writ is only allowed *ex gratia*.

The course at the present day is to send a copy of the record, or, at least, of the indictment (when that is defective), together with counsel's opinion as to the insufficiency, to the attorney-general. The writ, when obtained, is lodged with the clerk of the peace or of assize, who returns it with the proceedings into the Crown Office.

For the recent provisions for staying the execution of judgment upon a prosecution for misdemeanor while a writ of error is depending, see 8 & 9 Vic. c. 68.

An attainder may also be reversed by act of parliament.

If a judgment pronounced upon a conviction be falsified or reversed, all former proceedings are absolutely set aside; but the party convicted remains liable to be prosecuted another time for the same offence.

CHAPTER XXVII.

Of Reprieve and Pardon.

1. **OF REPRIEVE.**—A reprieve is the withdrawing of a sentence for an interval of time, whereby the execution is suspended.

A reprieve may be by the queen's commands, expressed to the court by which execution is to be awarded. It may be granted also *ex arbitrio judicis*, and this either before or after judgment; as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or favourable circumstances to the prisoner's character appear, and it is wished to give him an opportunity of applying to the crown for pardon.

These reprieves may be granted or taken off by the justices of gaol delivery, although the session is finished and their commission expired.

When the judge thinks proper to recommend a capital convict for mercy, he reprieves him, and sends a memorial or certificate to the secretary of state's office, stating that from favourable circumstances appearing at the trial &c., he recommends him to her majesty's mercy, and to a pardon upon condition of transportation or some slighter punishment.

So a reprieve may also be *ex necessitate legis*; as where a woman is capitally convicted, and pleads her pregnancy in delay of execution. But this is no cause to stay the judgment, though it is to respite the execution till she be delivered. And therefore execution should never be awarded against a woman without asking her what she can say why execution should not be awarded.

In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire of the fact; and if they bring in their verdict *quick with child*, execution shall be stayed generally till the next session, and so from session to session, till either she be delivered, or prove by the course of nature not to have been with child at all.

If the offender becomes *non compos mentis* between judgment and the award of execution, this also is ground of reprieve.

Where this is suggested, the judge may swear a jury to inquire whether the prisoner is really insane or not; and if they find that he is, he must be reprieved till the ensuing session.

II. **OF PARDON.**—The power of pardoning is part of the prerogative of the crown.

By 28 Hen. VIII. c. 24, it is declared, that no other than the sovereign hath power to pardon or remit any treason or felony whatsoever.

The queen may pardon all offences, except—1. The committing any man to prison out of the realm; 2. A common nuisance, while it remains undressed, though her majesty may afterwards remit the fine; and 3. An offence against a penal statute after a private informer has commenced the action. Nor can the crown pardon an offence before it is committed.

By 12 & 13 Wm. III. c. 2, a pardon cannot be pleaded in bar to an impeachment by the Commons in parliament. But after the impeachment is determined, the offender may be pardoned. So, after the lords have delivered their sentence of Guilty, the Commons can, in effect, pardon the party, by declining to demand judgment against him.

By 7 & 8 Geo. IV. c. 29, § 59, it shall be lawful for the queen's majesty to extend her royal mercy to any person imprisoned by virtue of that act, although imprisoned for non-payment of money to some party other than the crown.

A formal pardon by the queen is by letters patent under the great seal. If granted to a defendant in prison, the proper mode of obtaining its benefit seems to be to procure the sign manual or privy seal, signifying her majesty's intention to pardon the offender, and directing the justices of gaol delivery to bail him on his entering into a recognizance to appear and plead the pardon at the next general session. This mandate is obeyed by the justices, who, if the pardon is conditional, take security also for the performance of the stipulations upon which it is granted, and then issue their warrant to the gaoler for the prisoner's discharge.

By 7 & 8 Geo. IV. c. 28, § 13, where the queen's majesty shall be pleased to extend her royal mercy to any offender convicted of any felony punishable with death or otherwise, and by warrant under her royal sign manual, countersigned by one of the principal secretaries of state, shall grant to such offender either a free or a conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the great seal for such offender as to the felony for which such pardon shall be so granted. Provided, that no free pardon, nor any such discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any felony committed after the grant of such pardon.

Any suppression of truth or suggestion of falsehood in a charter of pardon will vitiate the whole.

A general pardon does not extend to a conviction or attainder of felony, unless particularly mentioned. Nor will a pardon of felonies include piracy. And by 13 Ric. II. st. 2, c. 1, no pardon for treason, murder, or rape shall be allowed, unless the offence be particularly specified therein; and particularly in murder, it shall be expressed whether it was committed by lying in wait, assault, or malice prepense.

But in general a pardon is construed most beneficially for the subject, and most strongly against the crown.

A pardon may be conditional, as on condition of being confined to hard labour or being transported.

The queen's pardon by letters patent must be specially pleaded in order for the defendant to have the benefit of it on his trial, and that at a proper stage of the proceedings; and the court have no discretionary power to notice it, unless it be pleaded. But a pardon by act of parliament need not be pleaded, if a public act; for the courts are bound to notice it.

The effect of a pardon by the queen is to acquit the offender of all corporal penalties and forfeitures annexed to the offence.

The pardon of treason or felony so far clears the party from the infamy and all other consequences of the crime, that he may not only have an action for scandal for calling him traitor or felon after the time of the pardon, but he may also be a good witness.

But no pardon by the queen, without express words of restitution, shall divest either from the queen or a subject an interest in lands or goods vested in them by an attainder or conviction precedent. But a pardon prior to conviction prevents a forfeiture either of lands or goods.

In the case of pardon after attainder, issue born after the attainder may inherit. And under a pardon by act of parliament, after attainder, the blood may be restored as to all consequences whatever.

To enable a prisoner to avail himself of a reprieve or pardon, he is always asked (when any time has elapsed between the judgment and the award of execution), what he hath to allege why execution should not be awarded against him. And, though not asked, he may plead the various matters above stated, in delay or bar of execution.

There is another matter which he may plead in bar of execution, and which may therefore properly be noticed in this place, namely, *diversity of person*, i. e.; that he is not the person against whom sentence was given. To this there may be a replication that he is the same; and a venire is awarded to try the issue thus joined, returnable *instantanter*. In these collateral issues the trial is always *instantanter*, and no time is allowed the prisoner to prepare his defence or produce his witnesses, unless, upon a plea of diversity of person, he will make oath that he is not the person attainted. And he is not allowed a peremptory challenge on these trials.

CHAPTER XXVIII.

Of Execution.

EXECUTION in all cases, as well capital as otherwise, must be performed by the sheriff or his deputy; and the judge may *command* execution without any writ.

The usage in country cases is, for the clerk of assize to make out four lists of the prisoners, with separate columns, containing their crimes, verdicts, and sentences, leaving a blank column, which the judge fills up, opposite the names of the capital convicts, by writing, "to be executed," "reprieved," "respited," "transported," &c. These, being first carefully compared together by the judge and the clerk of the assize, are signed by them; and one is given to the sheriff, and one to the gaoler, and the judge and clerk of assize each keep another. If the sheriff receives afterwards no special order from the judge, he executes the judgment in the usual manner, agreeably to the directions of his calendar.

The sheriff is to do execution within a convenient time; which in the country is not specified. The sheriff usually allows two Sundays to intervene between the receipt of the calendar and the execution.

Cases of execution for murder formed an exception to the general rule till the passing of the 6 & 7 Wm. IV. c. 30; the law requiring sentence to be passed immediately after conviction, and execution to take place on the day next but one after that on which the sentence was pronounced, unless the same happened to be a Sunday, and then on the Monday following. But now, by that act, sentence of death may be pronounced after convictions for murder in the same manner, and the judge has the same power in all respects, as after convictions for other capital offences.

In London the course was, for the recorder to report to the king in person the case of the several prisoners; and on receiving the royal pleasure that the law was to take its course, he issued his warrant to the sheriffs, directing them to do execution on the day and at the place therein assigned. But by an act of parliament which was passed shortly after the accession of her present majesty (1 Vict. c. 77) this practice of the recorder reporting to the crown the prisoners under sentence of death in Newgate was abolished; and it is enacted, that whenever any offender shall be convicted before the Central Criminal Court of any offence for which he is liable to and shall receive sentence of death, and the court shall be of opinion that, under the circumstances, the judgment of the law ought to be carried into effect, it shall be lawful for the said court, and such court is required, to order and direct execution to be done on such offender in the same manner as any court of assize is empowered to order and direct execution by the law as it stood before the passing of this act. Provided, that nothing in this act shall affect her majesty's royal prerogative of mercy; nor the rights or privileges of the lord mayor, aldermen, and recorder of the city of London. The sentence, therefore, may now be carried into effect without any communication whatever being made to the government. The usual course, however, is for the sheriffs to settle the day on which the execution is to take place, and then notify the same to the home secretary. Her majesty has, of course, the power of extending her pardon to, or granting a commutation of the punishment of any criminal; but the crown is now relieved from the painful task formerly cast upon it, of directly ordering, or seeming to order, the execution of a fellow-creature.

When the proceeding is in the Court of Queen's Bench, a rule is made for the execution, either specifying the time and place, or leaving it to the discretion of the sheriff.

The sheriff cannot alter the manner of execution, by substituting one death for another, without being guilty of felony himself.

If, upon judgment to be hanged by the neck till dead, the criminal be not thoroughly killed, but revives, the sheriff must hang him again.

APPENDIX.

CONTAINING A VARIETY OF PRECEDENTS OF GENERAL UTILITY.

FORMS FOR THE CONVEYANCE OF REAL PROPERTY,

According to the Statute 8 & 9 Vic. c. 119.

The statute 8 & 9 Vic. c. 119, intituled "An Act to facilitate the conveyance of real property," which came into force on the 1st of October, 1845, enacts—

"That whenever any party to any deed made according to the forms set forth in the First Schedule to this act, or to any other deed *which shall be expressed to be made in pursuance of this act, or referring thereto*, shall employ in any such deed respectively any of the forms of words contained in Column I. of the Second Schedule hereto annexed, and distinguished by any number therein, such deed shall be taken to have the same effect and be construed as if such party had inserted in such deed the form of words contained in Column II. of the same Schedule, and distinguished by the same number as is annexed to the form of words employed by such party; but it shall not be necessary in any such deed to insert any such number.—Sec. 1.

"That every such deed, unless any exception be specially made therein, shall be held and construed to include all houses, outhouses, edifices, barns, stables, yards, gardens, orchards, commons, trees, woods, underwoods, mounds, fences, hedges, ditches, ways, waters, watercourses, lights, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the lands therein comprised belonging or in anywise appertaining, or with the same demised, held, used, occupied, and enjoyed, or taken or known as part or parcel thereof, and also the reversion or reversions, remainder and remainders, yearly and other rents, issues, and profits of the same lands, and of every part and parcel thereof, and all the estate, right, title, interest, inheritance, use, trust, property, profit, possession, claim, and demand whatsoever, both at law and in equity, of the grantor, in, to, out of, or upon the same lands and every part and parcel thereof, with their and every of their appurtenances.—Sec. 2.

"That every such deed under this act shall be chargeable with the stamp duty with which the same would have been chargeable in case it had been a release founded on a lease or bargain and sale for a year, and also with the same stamp duty (exclusive of progressive duty) with which such lease or bargain and sale for a year would have been chargeable.—Sec. 3.

"That in taxing any bill for preparing and executing any deed under this act, it shall be lawful for the taxing officer, and he is hereby required, in estimating the proper sum to be charged for such transaction, to consider not the length of such deed, but only the skill and labour employed and responsibility incurred in the preparation thereof.—Sec. 4.

"That any deed or part of a deed which shall fail to take effect by virtue of this act shall nevertheless be as valid and effectual, and shall bind the parties thereto, so far as the rules of law and equity will permit, as if this act had not been made.—Sec. 5.

"That in the construction and for the purposes of this act and the schedules hereto annexed, unless there be something in the subject or context repugnant to such construction, the word "lands" shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal, and to such customary land as will pass by deed, or deed and admittance, and not by surrender, or any undivided part or share therein respectively; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing, and the converse; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and the word "party" shall mean and include any body politic or corporate or collegiate as well as an individual.—Sec. 6.

FIRST SCHEDULE.

THIS INDENTURE, made the — day of — One thousand eight hundred and forty — [or other year], in pursuance of an Act to facilitate the Conveyance of Real Property, BETWEEN [here insert names of parties, and recitals if any],

WITNESSETH, That in consideration of £— sterling now paid by the said [grantee or grantees] to the said [grantor or grantors] (the receipt whereof is hereby by him [or them] acknowledged), he [or they] the said [grantor or

grantors] doth [or do] grant unto the said [grantee or grantees], his [or their] heirs and assigns for ever, All &c. [parcels.]

[Here insert covenants or any other provisions.]

IN WITNESS whereof the said parties hereto have hereunto set their hands and seals.

SECOND SCHEDULE.

Directions as to the Forms in this Schedule.

1. Parties who use any of the forms in the First Column of this Schedule may substitute for the words "covenantor" or "covenantee," or "releasor" or "releasee," any name or names, and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the Second Column.

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in any of the forms in the First Column of this Schedule, and corresponding changes shall be taken to be made in the corresponding forms in the Second Column.

3. Such parties may introduce into or annex to any of the forms in the First Column any express exceptions from or other express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the Second Column.

4. Such parties may add the name or other designation of any person or persons, or class or classes of persons, or any other words, at the end of Form 2 of the First Column, so as thereby to extend the words thereof to the acts of any additional person or persons or class or classes of persons, or of all persons whomsoever; and in every such case the Covenants 2, 3, and 4, or such of them as shall be employed in such deed, shall be taken to extend to the acts of the person or persons, class or classes of persons, so named.

COLUMN I.

1. The said (*covenantor*) covenants with the said (*covenantee*),

2. That he has the right to convey the said lands to the said (*covenantee*) notwithstanding any act of the said (*covenantor*);

3. And that the said (*covenantee*) shall have quiet possession of the said land,

4. free from all incumbrances.

5. And the said (*covenantor*) covenants with the said (*covenantee*) that he will execute such fur-

COLUMN II.

1. And the said covenantor doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said covenantee, his heirs, and assigns, in manner following; that is to say,

2. That, for and notwithstanding any act, deed, matter, or thing by the said covenantor done, executed, committed, or knowingly or wilfully permitted or suffered to the contrary, he the said covenantor now hath in himself good right, full power, and absolute authority to convey the said lands and other the premises hereby conveyed, or intended so to be, with their and every of their appurtenances, unto the said covenantee, in manner aforesaid, and according to the true intent of these presents.

3. And that it shall be lawful for the said covenantee, his heirs and assigns, from time to time and at all times hereafter, peaceably and quietly to enter upon, have, hold, occupy, possess, and enjoy the said lands and premises hereby conveyed, or intended so to be, with their and every of their appurtenances, and to have, receive, and take the rents, issues, and profits thereof and of every part thereof to and for his and their use and benefit, without any let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever of, from, or by him the said covenantor or his heirs, or any person claiming or to claim by, from, under, or in trust for him, them, or any of them;

4. And that free and clear, and freely and absolutely acquitted, exonerated, and for ever discharged, or otherwise by the said covenantor or his heirs well and sufficiently saved, kept harmless, and indemnified of, from, and against any and every former and other gift, grant, bargain, sale, jointure, dower, use, trust, entail, will, statute, recognizance, judgment, execution, extent, rent, annuity, forfeiture, re-entry, and any and every other estate, title, charge, trouble, and incumbrance whatsoever, made, executed, occasioned, or suffered by the said covenantor or his heirs, or by any person claiming or to claim by, from, under, or in trust for him, them, or any of them.

5. And the said covenantor doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said covenantee, his heirs and assigns, that he the said covenantor, his heirs, executors, or administrators, and all and every other person whosoever having or claiming, or who shall or may hereafter have or claim, any estate, right, title, or

ther assurances of the said lands as may be requisite.

interest whatsoever, either at law or in equity, in, to, or out of the said lands and premises hereby conveyed or intended so to be, or any of them, or any part thereof, by, from, under, or in trust for him, them, or any of them, shall and will from time to time and at all times hereafter, upon every reasonable request, and at the costs and charges of the said covenantee, his heirs or assigns, make, do, execute, or cause to be made, done, or executed, all such further and other lawful acts, deeds, things, devices, conveyances, and assurances in the law whatsoever, for the better, more perfectly, and absolutely conveying and assuring the said lands and premises hereby conveyed or intended so to be, and every part thereof, with their appurtenances, unto the said covenantee, his heirs and assigns, in manner aforesaid, as by the said covenant, his heirs and assigns, his or their counsel in the law, shall be reasonably devised, advised, or required, so as no such further assurances contain or imply any further or other covenant or warranty than against the acts and deeds of the person who shall be required to make or execute the same, and his heirs, executors, or administrators only, and so as no person who shall be required to make or execute such assurances shall be compellable for the making or executing thereof to go or travel from his usual place of abode.

6. And the said (covenantor) covenants with the said (covenantee) that he will produce the title deeds enumerated hereunder, and allow copies to be made of them, at the expence of the said (covenantee).

6. And the said covenantor doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said covenantee, his heirs and assigns, that the said covenantor and his heirs shall and will, unless prevented by fire or other inevitable accident, from time to time and at all times hereafter, at the request, costs, and charges of the said covenantee, his heirs or assigns, or his or their attorney, solicitor, agent, or counsel, at any trial or hearing in any action or suit at law or in equity or other judicature, or otherwise, as occasion shall require, produce all and every or any deed, instrument, or writing hereunder written, for the manifestation, defence, and support of the estate, title, and possession of the said covenantee, his heirs or assigns, in or to the said lands and premises hereby conveyed, or intended so to be, and at the like request, costs, and charges, shall and will make and deliver, or cause to be made and delivered, true and attested or other copies or abstracts of the same deeds, instruments, and writings respectively, or any of them, and shall and will permit and suffer such copies and abstracts to be examined and compared with the said original deeds by the said covenantee, his heirs and assigns, or such person as he or they shall for that purpose direct and appoint.

7. And the said (covenantor) covenants with the said (covenantee) that he has done no act to incumber the said lands.

7. And the said covenantor, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree with and to the said covenantee, his heirs and assigns, that he hath not at any time heretofore made, done, committed, executed, or wilfully or knowingly suffered, any act, deed, matter, or thing whatsoever whereby or by means whereof the said lands and premises hereby conveyed, or intended so to be, or any part or parcel thereof are, is, or shall or may be in anywise impeached, charged, affected, or incumbered, in title, estate, or otherwise howsoever.

8. And the said (releasor) releases to the said (releasee) all his claims upon the said lands.

8. And the said releasor hath remised, released, and for ever quitted claim, and by these presents doth remise, release, and for ever quit claim, unto the said releasee, his heirs and assigns, all and all manner of right, title, interest, claim, and demand whatsoever, both at law and in equity, into and out of the said lands and premises hereby granted, or intended so to be, and every part and parcel thereof, so as that neither he, nor his heirs, executors, administrators, or assigns, shall or may at any time hereafter have, claim, pretend to, challenge, or demand the said lands and premises, or any part thereof, in any manner howsoever; but the said releasee, his heirs and assigns, and the same lands and premises, shall from henceforth for ever hereafter be exonerated and discharged of and from all claims and demands whatsoever which the said releasor might or could have upon him in respect of the said lands or upon the said lands.

FORMS FOR LEASES,

According to the Statute 8 & 9 Vic. c. 124.

The statute 8 & 9 Vic. c. 124, intituled "An Act to facilitate the granting of certain Leases," which came into force on the 1st of October, 1845, enacts,—

"That whenever any party to any deed made according to the forms set forth in the First Schedule to this act, or to any other deed *which shall be expressed to be made in pursuance of this act*, shall employ in such deed respectively any of the forms of words contained in Column I. of the Second Schedule hereto annexed, and distinguished by any number therein, such deed shall be taken to have the same effect and be construed as if such party had inserted in such deed the form of words contained in Column II. of the same Schedule, and distinguished by the same number as is annexed to the form of words employed by such party; but it shall not be necessary in any such deed to insert any such number.—Sec. 1.

"That every such deed, unless any exception be specially made therein, shall be held and construed to include all outhouses, buildings, barns, stables, yards, gardens, cellars, ancient and other lights, paths, passages, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the lands and tenements therein comprised belonging or in anywise appertaining.—Sec. 2.

"That in taxing any bill for preparing and executing any deed under this act it shall be lawful for the taxing officer, and he is hereby required, in estimating the proper sum to be charged for such transaction, to consider not the length of such deed, but only the skill and labour employed and responsibility incurred in the preparation thereof.—Sec. 3.

"That any deed or part of a deed which shall fail to take effect by virtue of this act shall nevertheless be valid and effectual, and shall bind the parties thereto, so far as the rules of law and equity will permit, as if this act had not been made.—Sec. 4.

"That in the construction and for the purposes of this act and the schedules hereto annexed, unless there be something in the subject or context repugnant to such construction, the word "lands" shall extend to all tenements and hereditaments of freehold tenure, and to such customary land as will pass by deed, or deed and surrender, and not by surrender alone, or any undivided part or share therein respectively; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing, and the converse; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and the word "party" shall mean and include any body politic or corporate or collegiate as well as an individual.—Sec. 6.

FIRST SCHEDULE.

THIS INDENTURE, made the — day of — One thousand eight hundred and forty — [*or other year*], in pursuance of an Act to facilitate the granting of certain Leases, BETWEEN [*here insert names of parties, and recitals if any*],

WITNESSETH, That the said [*lessor or lessors*] doth [*or do*] demise unto the said [*lessee or lessees*], his [*or their*] executors, administrators, and assigns, All &c. [*parcels*] from the — day of — for the term of — thence ensuing, yielding therefore during the said term the rent of [*state the rent, and mode of payment*].

IN WITNESS whereof the said parties hereto have hereunto set their hands and seals

SECOND SCHEDULE.

Directions as to the Forms in this Schedule

1. Parties who use any of the forms in the First Column of this Schedule may substitute for the words "lessee" or "lessor" any name or names, and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the Second Column.

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in the forms in the First Column of this Schedule, and corresponding changes shall be taken to be made in the corresponding forms in the Second Column.

3. Such parties may fill up the blank spaces left in the Forms 4 and 5, in the First Column of this Schedule so employed by them, with any words or figures, and the words or figures so introduced shall be taken to be inserted in the corresponding blank spaces left in the forms embodied.

4. Such parties may introduce into or annex to any of the forms in the First Column any express exceptions from or express qualifications thereof respectively, and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the Second Column.

5. Where the premises demised shall be of FREEHOLD tenure, the Covenants 1 to 10 shall be taken to be made with and the Proviso 11 to apply to the *hairs and assigns* of the lessor; and where the premises demised shall be of LEASEHOLD tenure, the covenants and proviso shall be taken to be made with and apply to the lessor, his *executors, administrators, and assigns*.

COLUMN I.

1. That the said (*lessee*) covenants with the said (*lessor*) to pay rent;

2. and to pay taxes;

3. and to repair;

4. and to paint outside every — year:

5. and to paint and paper inside every — year;

6. and to insure from fire in the joint names of the said (*lessor*) and the said (*lessee*);

to show receipts;

and to rebuild in case of fire.

7. And that the said (*lessor*) may enter and view state of repair; and that the said (*lessee*) will repair according to notice.

COLUMN II.

1. And the said lessee doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said lessor, that he the said lessee, his executors, administrators, and assigns, will during the said term pay unto the said lessor the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever;

2. And also will pay all taxes, rates, duties, and assessments whatsoever, whether parochial, parliamentary, or otherwise, now charged or hereafter to be charged upon the said demised premises, or upon the said lessor on account thereof, excepting land tax, and excepting in Ireland tithe rent-charge and such portion of the poor rate as the lessor is or may be liable to pay, and excepting also all taxes, rates, duties, and assessments whatsoever, or any portion thereof, which the lessee is or may be by law exempted from;

3. And also will during the said term well and sufficiently repair, maintain, pave, empty, cleanse, amend, and keep the said demised premises, with the appurtenances, in good and substantial repair, together with all chimney pieces, windows, doors, fastenings, water closets, cisterns, partitions, fixed presses, shelves, pipes, pumps, pales, rails, locks and keys, and all other fixtures and things which at any time during the said term shall be erected and made, when, where, and so often as need shall be;

4. And also that the said lessee, his executors, administrators, and assigns, will in every — year in the said term paint all the outside wood-work and iron-work belonging to the said premises, with two coats of proper oil colours, in a workmanlike manner;

5. And also that the said [*lessee*], his executors, administrators, and assigns, will in every — year paint the inside wood, iron, and other works now or usually painted, with two coats of proper oil colours, in a workmanlike manner; and also re-paper, with paper of a quality as at present, such parts of the premises as are now papered; and also wash, stop, whiten, or colour such parts of the said premises as are now plastered;

6. And also that the said lessee, his executors, administrators, and assigns, will forthwith insure the said premises hereby demised to the full value thereof, in some respectable insurance office, in the joint names of the said lessor, his executors, administrators, and assigns, and the said lessee, his executors, administrators, or assigns, and keep the same so insured during the said term; and will, upon the request of the said lessor, or his agent, show the receipt for the last premium paid for such insurance for every current year; and as often as the said premises hereby demised shall be burnt down or damaged by fire, all and every the sums or sum of money which shall be recovered or received by the said [*lessee*], his executors, administrators, or assigns, for or in respect of such insurance, shall be laid out and expended by him in building or repairing the said demised premises, or such parts thereof as shall be burnt down or damaged by fire as aforesaid.

7. And it is hereby agreed, that it shall be lawful for the said lessor, and his agents, at all seasonable times during the said term, to enter the said demised premises, to take a schedule of the fixtures and things made and erected thereupon, and to examine the condition of the said premises; and further, that all wants of reparation which upon such views shall be found, and for the amendment of which notice in writing shall be left at the premises, the said lessee, his executors, administrators, and assigns, will, within three calendar months next after every such notice, well and sufficiently repair and make good accordingly.

8. That the said (*lessee*) will not use premises as a shop;

9. And will not assign without leave;

10. And that he will leave premises in good repair.

11. Proviso for re-entry by the said lessor on nonpayment of rent or nonperformance of covenants

12. The said (*lessor*) covenants with the said (*lessee*) for quiet enjoyment.

8. And also that the said lessee, his executors, administrators, and assigns, will not convert, use, or occupy the said premises, or any part thereof into or as a shop, warehouse, or other place for carrying on any trade or business whatsoever, or suffer the said premises to be used for any such purpose, or otherwise than as a private dwelling house, without the consent in writing of the said lessor.

9. And also that the said [*lessee*] shall not nor will during the said term assign, transfer, or set over, or otherwise by any act or deed procure the said premises or any of them to be assigned, transferred, or set over, unto any person or persons whomsoever, without the consent in writing of the said [*lessor*], his executors, administrators, or assigns, first had and obtained.

10. And further, that the said [*lessee*] will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the said lessor the said premises hereby demised, with the appurtenances, together with all buildings, erections, and fixtures now or hereafter to be built or erected thereon, in good and substantial repair and condition in all respects, reasonable wear and tear, and damage by fire, only excepted.

11. Provided always, and it is expressly agreed, that if the rent hereby reserved or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach or nonperformance of any of the covenants and agreements herein contained on the part of the said lessee, his executors, administrators, and assigns, then and in either of such cases it shall be lawful for the said lessor, at any time thereafter, into and upon the said demised premises, or any part thereof in the name of the whole, to re-enter, and the same to have again re-possess, and enjoy as of his or their former estate, anything, hereinafter contained to the contrary notwithstanding.

12. And the lessor doth hereby, for himself, his heirs, executors, administrators and assigns, covenant with the said lessee, his executors, administrators, and assigns, that he and they, paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the said lessor, his executors, administrators, or assigns, or any other person or persons lawfully claiming by, from, or under him, them, or any of them. (')

The forms prescribed by these acts (8 & 9 Vic. c. 119 and 124) can only be applied with safety to small and simple transactions. It should, however, be observed, that all lands, as regards the conveyance of the immediate freehold, now lie in *grant* as well as in *livery*; and that the word "give," or the word "grant," in a deed hereafter executed, will no longer imply a covenant in law in respect of any tenements or hereditaments, except so far as they may imply a covenant by force of any act of parliament. As to the operation of these words before this statute, see Co. Litt. 284, n. (a). The word "demise" is left, as at the common law, to imply a covenant.

In the general transactions of so great a commercial nation as England, it is impossible for the utmost wisdom of the legislature (and the Editor makes this assertion with great deference) to provide for the people *forms* for their adoption with safety in their general dealings with each other. They may be made to suit specific cases, as the conveyance of land for railways, churches, corporations, and other such transactions, which are guard-

ed by act of parliament, and where the purchase money is protected at all times if the vendor cannot show an undisputed title to it. It should also be borne in mind, that acts of parliament in these days are subject to amendment after amendment, which plunge the practitioner suddenly into a sea of trouble and difficulty. (See Western's "Exposition of the Act to simplify the Transfer of Real Property.")

Mr. Davidson, in his "Concise Precedents in Conveyancing adapted to the Act to amend the Law of Real Property," says, "It is doubtful whether the theory upon which these acts are framed, can by any degree of skill, be made available for practical purposes to any important extent."

Mr. Sweet, in his "Statutes relative to Conveyancing," says, "It is no doubt possible to shorten deeds by substituting for the usual clauses references to parliamentary forms; but brevity will then be obtained at the expense of neatness and clearness, and with much risk of ambiguity, and even misapprehension." And at the commencement of his

LEASE OF A HOUSE, BY THE FREEHOLDER,

(Without reference to the Act 8 & 9 Vic. c.124.)

THIS INDENTURE, made the — day of —, one thousand eight hundred and forty —, BETWEEN [lessor] of &c. of the one part, and [lessee] Parties.
of &c. of the other part,

WITNESSETH, That, for and in consideration of the rent and covenants herein- Testatum.
after reserved and contained to be paid, observed, and kept by and on the part
and behalf of the said [lessee], his executors, administrators, and assigns, HE the
said [lessor] HATH demised and leased, and by these presents DOth demise and
lease unto the said [lessee], his executors, administrators, and assigns, ALL THAT
messuage or tenement situate &c. [here describe the parcels and boundaries Parcels.
minutely], together with all out-buildings, areas, courts, pumps, cisterns, pipes,
sewers, ways, lights, casements, and appurtenances, to the said messuage or tene-
ment belonging or appertaining; TO HAVE AND TO HOLD the said messuage or Habendum.
tenement and premises, with the appurtenances, unto the said [lessee], his execu-
tors, administrators, and assigns, for the term of — years, to be computed from
— and thence next ensuing,⁽¹⁾ YIELDING AND PAYING therefor yearly and Reddendum
every year during the said term unto the said [lessor], his heirs or assigns,² the
rent of — pounds of lawful current money of England, free and clear of and
from the land-tax, sewer-rate, and all other taxes, levies, rates, duties, charges,
assessments, or impositions whatever, parliamentary, parochial, or otherwise,
that now are or shall or may be taxed, levied, rated, charged, assessed, or
imposed on or in respect of the said premises during the said term; the said
rent to be payable and paid on the four most usual feasts or days for payment
of rent, namely, Lady-day, Midsummer-day, Michaelmas-day, and Christmas-
day, in each and every year, by even and equal portions, the first payment
thereof to be made on — day now next.

AND the said [lessee], for himself, his heirs, executors, and administrators, Covenants:³
doth hereby covenant,³ promise, and agree to and with the said [lessor], his To pay rent
and taxes;

work he observes, "This act (8 & 9 Vic. c.100) must be characterized as positively mischievous in its tendency, and as having effected a retrograde step in law reform; it has repealed some useful provisions of the act of the preceding session, and, without settling any of the doubts which existed as to the construction of that act, has substituted for many of its clauses others not better in design, and much more inaccurate in expression."

In another treatise on the Real Property Acts, by Edward Vansittart Neale, Esq., of Lincoln's Inn, the author (who is an advocate for these new laws) observes, "In respect to the danger of errors in the use of these forms, we would observe, that the acts enable, but they do not disable. They say, that certain forms shall under certain circumstances have a certain effect; but they do not say, that the courts of law or equity shall not put a large and liberal construction upon the words actually employed, so as to give effect to what may appear to have been the intention of the parties, even if the parliamentary magic should fail to produce its transmutation through the inattention of the enchanter. If therefore it be clear, from the reference made to the act, that the parties to a deed intended it to take effect under either of these acts, it appears to us *probable* that the courts, with that freedom from a punctilious pedantry by which they are in modern times distinguished, would hold that slight errors in the use of the forms employed did not vitiate their effect, upon this principle, that the longer forms contained in the second

column were to be regarded as the interpretation put by the parties themselves upon the words actually used, and by which they must be bound. 2dly, Even if this liberality of construction should not be adopted, still it must be remembered, that an error in copying any particular form will vitiate that form only, and will not affect the rest of the deed. 3dly, If any particular form should thus fail to take effect under the acts—or if, by so gross an error as the neglecting to refer to the acts at all, all the forms employed should fail so to take effect—it must be remembered, that the substance of each covenant will be contained in the words actually used, and it will remain for the court to say what construction is to be put upon these short covenants."

So that it would appear, whoever adopts these forms is in fact to run the risk of buying a law-suit.—EDITOR.

¹ If the lease is to be made determinable at the end of the first seven or fourteen years, then add here, "determinable nevertheless as hereinafter mentioned."

² This reservation may be made without saying to whom. See Whitlock's case, 8 Co. Rep. 69 (b). And now 8 & 9 Vic. c. 106, § 9.

³ Covenants run with the land, when either the liability to perform them, or the right to take advantage of them, passes to the assignee of the reversion. A covenant is said to run with the reversion, when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the reversion. 4 Western's Conveyancing, 28. See Spencer's case, 5 Co. 18 (a); 1 Smith's Lead. Ca. 22.

heirs and assigns,¹ that he the said [*lessee*], his executors, administrators, or assigns, shall and will, at all times during the said term, pay the said yearly rent of — pounds, by equal quarterly payments, at the days and times and in manner hereinbefore appointed for payment thereof, without any deduction or abatement whatsoever; AND also shall and will pay the land-tax, sewer-rate,⁽¹⁾ and all other taxes, rates, assessments, and impositions whatsoever, parliamentary, parochial, or otherwise, which now are, or which during the continuance of this demise shall at any time be rated, taxed, assessed, or imposed on the said demised premises or any part thereof, or upon the landlord or tenant in respect thereof.

To paint
and repair;

AND ALSO that the said [*lessee*], his executors, administrators, or assigns, shall and will paint, twice over, with good oil-colours, at his or their own expence, all the outside wood and iron work in, about, or belonging to the said demised messuage and premises every [third] year during the continuance of this demise; AND ALSO shall and will, at his or their own like expence during the said term, when and so often as need or occasion shall require, well and sufficiently repair, amend, pave, glaze, cleanse, and scour the said messuage and premises hereby demised, and all and singular the windows, wainscots, rooms, floors, casements, shutters, doors, partitions, ceilings, roofs, tilings, walls, pales, rails, pavements, gates, privies, sinks, gutters, pumps, drains, sewers, and watercourses, and all and every other the parts and appurtenances of the said demised premises, or thereunto belonging, and also uphold, sustain, maintain, and keep the same and every part thereof in good, sufficient, and substantial repair and condition; AND, at the end or sooner determination of this demise shall and will peaceably and quietly leave, surrender, and deliver up unto the said [*lessor*], his heirs or assigns, the said messuage or dwelling-house and all and singular other the premises so well and sufficiently and substantially repaired, amended, paved, glazed, cleansed, and scoured, upholden, sustained, maintained, and kept as aforesaid together with all new erections and buildings to be erected and built on the said premises or any part thereof, and all glass windows and casements, shutters, doors, partitions, locks, keys, bars, bolts, hinges, iron pins, wainscots, hearths, chimney pieces, pumps, pipes, posts, pales, rails, dressers, shelves, and such other things as now are or at any time during the said term hereby demised shall be fixed, fastened, or belong to the said demised premises, and which cannot be removed without prejudicing or defacing the same.²

To permit
lessor to
view, and
to repair on
notice;

AND ALSO that it shall be lawful for the said [*lessor*], his heirs, executors, administrators, and assigns, and his and their agents, either alone or with workmen or others, from time to time, at seasonable times in the day-time, during the said term, to enter into and upon the said demised premises and every part thereof, to view and examine the state and condition thereof; AND in case any decays or want of reparation or amendment be found at any such examination or view, he the said [*lessee*], for himself, his executors, administrators, and assigns, doth

¹ This precedent assumes the lessor to be the freeholder. Where he has only a term, make all the covenants with him, his executors, administrators, and assigns.

² The land tax and sewers' rate, unless thus specially imposed on the tenant, are payable by the landlord. See *Hyde v. Hill*, 3 Term. Rep. 377.

³ All fixtures which a tenant has affixed to his premises for the purposes of trade he may remove. See *Amos & Ferard on Fixtures*, 276; *Penton v. Roberts*, 2 East. 86; *Lewton v. Salmon*, 1 H. Blacks. 259 n. (the case of the salt pans). But this does not extend to tenants for agricultural purposes, where the tenant has made erections for the purposes of husbandry. See upon this subject, *Elwes v. Maw*, by Lord Ellenborough, 3 East. 38. Ornamental fixtures put up by the

tenant for his convenience may be removed in certain cases. See *Buckland v. Butterfield*, 2 Brod. & Bing. 51. In the case of *Dean v. Allaby*, mentioned by Lord Ellenborough in *Elwes v. Maw*, Lord Kenyon said, "If a tenant will build upon premises demised to him a substantial addition to the house, or add to its magnificence, he must leave his additions at the expiration of his term for the benefit of his landlord; but the law will make the most favourable construction for the tenant, where he has made necessary and useful erections for the benefit of his trade or manufacture, and which enable him to carry it on with more advantage." This was only a *Nisi Prius* decision. 2 Esp. 475. See upon the whole subject, 4 Western's Conveyancing, 16 et seq.

herely covenant, promise, and agree with and to the said [lessor], his heirs and assigns; that he the said [lessee], his executors, administrators, and assigns, shall and will from time to time cause the same to be well and sufficiently repaired, amended, painted, paved, glazed, cleansed, scoured, and made good within — months next after notice in writing, shall have been given to him or them, or left at or upon the said demised premises, for that purpose.

AND FURTHER, that the said [lessee], his executors, administrators, or assigns, shall not nor will, during the said term hereby granted, use, exercise, or carry on, in or upon the said demised premises or any part thereof, or permit or suffer the same or any part thereof to be occupied by any person or persons who shall use, exercise, or carry on therein, the trade or business of a butcher, brewer, baker, dyer, smith, farrier, pipe-maker, distiller, tallow-chandler, soap-boiler, tripe-man, tripe-dresser, or tripe-seller, or any other noisome or offensive trade or business, without the licence and consent of the said [lessor], his heirs, or assigns, in writing for that purpose first obtained

Against certain trades.

AND MOROVER, that the said [lessee], his executors or administrators, shall not nor will, at any time or times during the continuance of this demise, bargain, sell, assign, demise, or underlet, set, or otherwise part with this present lease, or the premises hereby demised, or any part thereof, or any estate, term, or interest therein, to any person or persons whomsoever, for the whole or any part of the said term, without the special licence and consent in writing of the said [lessor], his heirs or assigns, being first obtained for that purpose.

Not to assign the lease - Lessor.

PROVIDD ALWAYS, and it is hereby declared and agreed by and between the said parties to these presents, that if it shall happen that the yearly rent of — hereinbefore reserved, or any part thereof, shall be behind and unpaid by the space of twenty-one days next over or after any of the said days on which the same is hereinbefore reserved and appointed to be paid as afore-said, being first lawfully demanded; (1) or if the said [lessee], his executors, administrators, or assigns, shall not well and truly observe and keep all and singular the covenants and agreements which on his, or their part or behalf are or ought to be observed and kept; then and in either of the said cases the estate and term hereby granted, or so much thereof as shall be then unexpired, shall cease and be void to all intents and purposes whatsoever, but so nevertheless as not to prevent or impede any action, suit, or proceeding for the recovery of any arrear of the said rent hereby reserved which may be then due, or for the nonperformance or breach of all or any of the covenants and agreements hereinbefore contained, from being brought, commenced, continued, or prosecuted by the said [lessor], his heirs or assigns; and that it shall be lawful for him or them to enter upon the said demised premises and fully to resume the possession thereof, and to eject the said [lessee], his executors, administrators, or assigns, and all other occupiers thereof.

Provision re-entry.

AND ALSO, that the said [lessee], his executors, administrators, or assigns, shall and will, immediately after the execution hereof, insure the said messuage and premises in the joint names of the said [lessor], his heirs and assigns, and of the said [lessee], his executors, administrators, and assigns, in the — office, or in some other respectable office for insurance of houses and buildings from fire in London or Westminster, to be previously approved by the said [lessor], his heirs or assigns, in the sum of £—, and keep the same constantly so insured during the said term; and shall and will at all times, upon the request of the said [lessor], produce to him or them the policy of insurance, and the receipts for the annual or other premiums paid for the same. And in case the said messuage and premises shall at any time or times during the said term be burnt down, destroyed, or damaged by fire, the monies which shall be received from or by virtue of such insurance shall be forthwith laid out in repairing or re-building and completing the said messuage and premises, so far as such money will go. And the said [lessee], his executors, assigns,

Covenant by Lessee to insure.

(1) This demand must be made on the sabbath. See Doe dem. Whelpden v. Whelpden, twenty-first day after the rent-day, before 3 Car. & P. 613.

nistrators, or assigns, shall and will at his or their own expence completely finish, fit for habitation, the said messuage and premises in the same style and manner as may be as they were in before such accident or damage by fire, or as the said [*lessor*], his heirs or assigns, and the said [*lessee*], his executors, administrators, or assigns, shall mutually agree upon in writing and according to law, at the sole expence of the said [*lessee*], his executors, administrators, or assigns, in case the monies so to be received from any insurance office shall be insufficient for that purpose.

Covenant
for Quiet
enjoyment.

AND the said [*lessor*], for himself, his heirs and assigns, doth hereby covenant and agree with the said [*lessee*], his executors, administrators, and assigns, that he the said [*lessee*], his executors, administrators, or assigns, paying the rent hereby reserved, and observing and performing, fulfilling, and keeping all and singular the covenants and agreements hereinbefore contained as on his or their part and behalf to be observed and performed, shall and may peaceably and quietly have, hold, occupy, possess, and enjoy all and singular the said demised premises, and every part thereof, with their appurtenances, during the term hereby granted, without any lawful let, suit, trouble, denial, molestation, or disturbance whatsoever of, from, or by the said [*lessor*], his heirs or assigns, or any other person or persons lawfully claiming or to claim by, from, or under, or in trust for them or any of them.

IN WITNESS whereof the said parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written,

Signed, sealed, and delivered, being first duly	A. B. (Seal.)
stamped, in the presence of	E. F. (Seal.)
	G. H. (Seal.)

The following may be used, instead of the corresponding Covenants of the preceding, when such are the intentions of the Parties

Proviso for
Cesser of
Rent if
Premises
shall be
burnt.

PROVIDED ALWAYS, that in case the messuage, tenement, or dwelling-house hereby demised shall at any time or times during the term hereby granted happen to be destroyed or demolished by fire, so as to render the occupation thereof impossible, or if the same shall be so far damaged by fire as to occasion the necessary removal therefrom of the family, or business of the said [*lessee*], his executor, administrators, or assigns, during the repairing of such damages, then and in either of such cases, and as often as the same shall happen, the rent hereinbefore reserved shall cease to be paid or payable by him the said [*lessee*], his executors, administrators, or assigns, to the said [*lessor*], his heirs or assigns, from the time or times when the said messuage or dwelling-house shall be so destroyed, demolished, or damaged, and such removal as aforesaid shall take place, until the said messuage or dwelling-house shall be rebuilt or reinstated.

Proviso to
determine
Lease by
Notice.

PROVIDED ALWAYS, and it is hereby covenanted, declared, and agreed by and between the said parties to these presents, that if the said [*lessor*], his heirs or assigns, or the said [*lessee*], his executors, administrators, or assigns, shall be desirous of determining the said term hereby granted at the end of the first seven years, or of the first fourteen years thereof, and notice in writing of such desire shall be given by or on behalf of the said [*lessor*], his heirs or assigns, to the said [*lessee*], his executors, administrators, or assigns, or left at his or their last known place of abode, or at or upon the said demised premises, or shall be given by or on behalf of the said [*lessee*], his executors, administrators, or assigns, to the said [*lessor*], his heirs or assigns, or left at his or their usual place of abode, at least — calendar months before the expiration of such seven years or of such fourteen years, as the case may be, then and in such case the said term of twenty-one years hereby granted shall cease and determine at the expiration of such seven years or of such fourteen years respectively in like manner as if the said term hereby granted had expired by effluxion of time, or as if this present demise had originally been made for seven or for fourteen years only, instead of the said term of twenty-one years.

Assignment of the Lease of a Messuage and Premises.⁽¹⁾

THIS INDENTURE, made the — day of —, one thousand eight hundred and forty —, BETWEEN A. B. [assignor] of the one part, and C. D. [assignee] of the other part.

WHEREAS by an indenture of lease bearing date the — day of —, 184—, and made between D. E. of the one part, and the said (assignor) of the other part, for the considerations therein mentioned, the said (D. E.) did demise unto the said (assignor), his executors, administrators, and assigns, ALL (parcels) to hold to the said (assignor) his executors, administrators, and assigns, from the — day of — then last, for the term of — years, at and under the yearly rent of —, payable quarterly, as therein mentioned, and subject to the covenants therein contained: And whereas the said [assignee] hath contracted with the said [assignor] for the absolute purchase of the said messuage and premises comprised in and demised by the said recited indenture of lease with the appurtenances, free from all incumbrances, at the price of —: Now THIS INDENTURE WITNESSETH, That in consideration of the sum of —, of lawful current money of England, paid by the said [assignee] to the said [assignor] upon the execution of these presents, the payment and receipt whereof he the said [assignor] doth hereby acknowledge, and from the same doth hereby for ever discharge the said [assignee], his executors, administrators, and assigns, he the said [assignor] doth hereby grant, bargain, sell, assign, transfer, and set over unto the said [assignee], his executors, administrators, and assigns, ALL that the said messuage or tenement and premises, situate and being at —, and all and singular other the premises comprised in and demised by the said recited indenture of lease with the appurtenances, together with the same indenture of lease, and all the estate, right, title, interest, term of years to come and unexpired, property, claim, and demand whatsoever of him the said [assignor] of, in, or to the said premises, or any part thereof, TO HAVE AND TO HOLD the said messuage or tenement, and all and singular other the premises hereby assigned, with their appurtenances, unto the said [assignee], his executors, administrators, and assigns, for and during all the residue yet to come of the said term of twenty-one years by the said recited indenture of lease granted, subject nevertheless to the payment of the rent and to the performance of the covenants and agreements in and by the same indenture of lease reserved and contained, and which henceforth on the part of the lessee or assignee are or ought to be paid and performed.⁽²⁾

AND the said [assignor] doth hereby, for himself, his executors and administrators, covenant, promise, and agree with and to the said (assignee) his executors, administrators, and assigns, in manner following, that is to say, That the rent, covenants, and agreements in and by the said recited indenture of lease reserved and contained have been duly paid and performed up to the — day of — last. AND that, for and notwithstanding any act, deed, matter, or thing whatsoever by the said (assignor) made, done, or committed, the said recited indenture of lease is, at the time of the sealing and delivery of these presents, a good and valid lease in the law, and not forfeited, surrendered, or become void or voidable. AND that, for and notwithstanding any such act, deed, matter, or thing as aforesaid, he the said (assignor) now hath in himself good right and absolute authority to assign the said messuage and premises for all the residue of the said term of twenty-one years in manner aforesaid. AND

¹ By 29 Car. II. c. 3, assignments of leases are required to be in writing. Now, by the 8 & 9 Vic. c. 106, sec. 3, an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, must be made by deed.

² After an assignee has assigned over, this condition is inoperative. — See *Woolveridge v. Steward*, per Lord Denman. 3 Moo. & Scott, 561.

Recital of Lease

Testatum.

Parcels.

Habendum

Covenants Assignor

That rent and covenants have been performed;

That lease is valid;

That he has good right to assign.

For quiet
enjoyment.

Free from
incum-
brances;

For further
assurance

Covenant by
Purchaser,
for payment
of rent, and
perform-
ance of the
covenants.

that it shall be lawful to and for the said (*assignee*), his executors, adminis-
trators, and assigns, at all times hereafter during the now residue of the said
term of twenty-one years, peaceably and quietly to enter, have, hold, occupy,
possess, and enjoy the said messuage and premises with their appurtenances,
and to receive and take the rents, issues, and profits thereof to and for his and
their own use and benefit, subject only to the payment of the rent and perform-
ance of the covenants in and by the said recited indenture of lease reserved and
contained, and free from all other incumbrances whatsoever, without any inter-
ruption, claim, or demand whatsoever of or by him the said (*assignor*), his
executors or administrators, or any person or persons lawfully or equitably
claiming or to claim by, from, under, or in trust for him, them, or any of them;
And that free and clear, and freely and clearly acquitted, exonerated, released,
and for ever discharged or otherwise by the said (*assignor*), his executors or
administrators, well and sufficiently saved, defended, and kept harmless, and
indemnified of, from, and against all and all manner of former and other estates,
titles, trouble, charges, and incumbrances whatsoever, made, done, committed,
or suffered by the said (*assignor*), his executors or administrators, or by any
person or persons lawfully claiming or to claim by, from, under, or in trust for
him, them, or any of them. AND FURTHER, that the said (*assignor*), his execu-
tors and administrators, and all other persons having or claiming or who shall
or may have or claim any estate, right, title, interest, property, or demand
whatsoever, of, in, to, or out of the said messuage or tenement and premises,
shall and will, at all times during the said term of twenty-one years, at the
request and expence of the said (*assignee*), his executors, administrators, or
assigns, make and execute every such further and other lawful and reasonable
assignments, deeds, and assurances whatsoever, for the better, more perfectly
and absolutely assigning and assuring of the said messuage and premises for
the remainder of the said term of twenty-one years in manner aforesaid, as by
the said (*assignor*), his executors, administrators, or assigns, or his or their
counsel in the law, shall be reasonably advised and required.

AND the said (*assignee*) doth hereby, for himself, his heirs, executors, and
administrators, covenant, promise, and agree with and to the said (*assignor*),
his executor, and administrators, that he the said (*assignee*), his executors,
administrators, and assigns, shall and will, from time to time, and at all
times hereafter during the now residue of the said term of twenty-one
years, well and truly pay the yearly rent in and by the said indenture of
lease reserved, at such times and in such manner as the said rent is thereby
reserved; and also shall and will observe, perform, and keep all and singular
the covenants, conditions, and agreements in the said indenture of lease con-
tained, and which henceforth on the tenant or lessee's part ought to be
observed, performed, and kept: and shall and will, from time to time, and
at all times hereafter, save, defend, keep harmless and indemnified the
said (*assignor*), his heirs, executors, and administrators, and his and their lands,
goods, and chattels, from and against the payment of the said rent, and the
performance of the said covenants, conditions, and agreements, and from and
against all and all manner of actions, suits, cause and causes of action, costs,
charges, damages, claims, and demands whatsoever for or on account of the
same, or in anywise relating thereto (!)

IN WITNESS, &c

Signed, sealed, and delivered, being first duly
stamped, in the presence of

A. B. (L. S.)
C. D. (L. S.)

* E F
G H

1 Where the vendor is lessee, the purchaser covenant, his future liability will be at an
end, and the covenant therefore is unnecessary.
2 Matthews, 1 Bro C C 52. Where he is an
assignee of the lease, and not under a similar
Taylor v. Shum, 1 Bos. & Pull. 21; Fagg v.
Dobbs, 3 Younge & C 96.

An Agreement to let a Furnished House for a Year, and from Year to Year

AN AGREEMENT made and entered into the — day of — One thousand eight hundred and forty —, BETWEEN A.B. of &c. of the one *Parties.* part, and C.D. of &c. of the other part.

The said A.B. doth hereby agree to let, and doth let, and the said C.D. doth hereby agree to take, and doth take, ALL THAT messuage or tenement, *Parcels,* with the appurtenances, situate and being No. — in — street, in the parish of —, in the county of —, together with the use of all the furniture, goods, and effects now being thereupon, and which are particularly set forth in the Schedule hereunder written, now in the occupation and possession of —, for one whole year from the — day of — now last past, and so on *Term.* from year to year until this agreement shall be determined by either of them the said A.B. and C.D. giving to the other of them three calendar months notice in writing, on or before some one of the quarterly days for payment of rent hereinafter mentioned after the expiration of one year from the date hereof, of such his intention to determine the same, at and under the yearly rent of *Rent.* £ —, payable quarterly, on the — day of —, the — day of —, the — day of —, and the — day of —, in every year during the continuance of this agreement, without any deduction whatsoever, except for any taxes, rates, and assessments in respect of the said premises. AND the said C. D. doth hereby agree with the said A. B., his executors, administrators, *Agreement by Tenant to pay* and assigns, that he the said C. D., his executors or administrators, will pay the said rent of £ — to the said A. B., his executors, administrators, or assigns, during the continuance of this agreement, on the several days and times aforesaid, without any deduction whatsoever, except for taxes and rates as aforesaid. AND that the said C. D., his executors and administrators, *To repair* shall, during the continuance of this agreement, keep the said messuage and premises in good and tenantable repair, and keep the said furniture, goods, and effects in such good plight and condition as the same now are, and make good and replace all such parts of the same furniture and effects as shall be broken or destroyed with others of the same sort and value, and so deliver the same up respectively to the said A. B., his executors, administrators, or assigns, at the determination of the tenancy. AND that the said C. D., his executors or administrators will not under any pretence whatsoever sell or remove from the said premises any of the said furniture or effects, and will at the expiration of the tenancy quietly deliver up the said messuage, furniture, effects, and premises unto the said A. B., his executors, administrators, or assigns, in good plight and condition (reasonable use and wear thereof, and damage by fire, only excepted.) *Not to sell or remove furniture. To surrender at end of term.* PROVIDED ALWAYS, that if the said rent £ — shall not be duly paid in manner aforesaid, or if any officer under any process of law whatsoever, or any other person, shall attempt to remove or carry away all or any part of the said furniture and effects, *Proviso required.* it shall immediately upon and after such attempt being made be lawful for the said A. B., his executors, administrators, and assigns, to re-enter into and upon the said messuage, furniture, effects, and premises, and to take possession thereof respectively, and to remove and expel the said C. D., his executors and administrators, and his and their agents and servants, and all other persons whomsoever, and that without being obliged to, bring any ejectment for the recovery of such possession, and which the said C.D., for himself, his executors and administrators, doth expressly assent to, and thereupon this agreement shall cease and be void as regards the tenancy hereby created, but as regards any monies or damages that may be due to the said A.B. by the said C.D. it shall remain in full force.

* The landlord cannot maintain trover against a sheriff who enters under an execution against the tenant, until the expiration of the tenancy. See *Gordon v. Harper*, 7 Term

Rep. 5; *Baylis v. Fisher*, 7 Bing. 153. Therefore this proviso is necessary for the protection of the landlord

Agreement
by Landlord
to insure.

AND the said A.B. doth hereby further agree at his own expence to insure the said messuage, furniture, effects, and premises; and if the same respectively shall at any time during the continuance of this agreement be burnt down or damaged by fire, the tenancy hereby created, and the rent hereby reserved, shall thenceforth immediately cease and determine, and upon payment of all monies then due by the said C.D. to the said A.B., this agreement shall be void.¹ AND also that the said A.B., his executors, administrators, or assigns, shall and will pay all taxes, rates, and assessments, parliamentary and parochial, or otherwise charged upon the said premises, and at all times indemnify the said C.D., his executors and administrators, in respect thereof. IN WITNESS &c.

In case of
Fire the rent
and tenancy
to cease,
and agree-
ment to be
void.

The SCHEDULE or INVENTORY before referred to.

An Agreement to let a House for a Year, and so on from Year to Year.

Parties.

AN AGREEMENT made and entered into the — day of —, One thousand eight hundred and forty —, BLIWLEN A.B. of &c. of the one part, and C.D. of &c. of the other part.

Parcels.

The said A B doth hereby agree to let, and doth let, and the said C.D. doth hereby agree to take, and doth take, ALL THAT messuage or tenement, with the appurtenances, situate and being No. —, in — street, in the parish of —, in the county of —, now in the occupation of —, for the

Term.

term of one whole year, and so on from year to year, until this agreement shall be determined, in manner after mentioned, at and under the clear

Rent.

Agreement
by tenant to
to pay rent,
taxes,

yearly rent of £—, to be payable quarterly on &c free from all taxes and deductions whatsoever. And the said C.D. for himself, his executors and administrators, doth hereby agree to pay the said rent of £—, at the times and in manner aforesaid, clear of all deductions whatsoever. And that he and they shall and will pay all taxes, rates, and assessments whatsoever, parliamentary or parochial, now charged, or hereafter to be charged, on the said premises, or on the landlord on account thereof, the land tax and property

To repair.

tax only excepted. And that he and they shall and will, at his and their own expence, keep the said messuage and premises in the same state of repair they now are, and shall and will, at the expiration or other sooner determination of the said term, surrender and deliver up the same unto the said A B, his executors, administrators, or assigns, in good plight and condition (reasonable use and wear thereof and damage by fire in the mean time only excepted). And it is further agreed, that after the expiration of the said term of one year, each of them the said parties hereto shall and will

To surren-
der at the
end of
tenancy.
Agreement
to determine
the tenancy
at three
months'
notice by
her party.

give or take three calendar months notice in writing to the other of them, upon any one of the said days hereinafter named for payment of rent, to determine the aforesaid tenancy; and upon the expiration of such notice, this

In case of
Fire, rent
and tenancy
to cease, and
agreement
to be void.

agreement shall cease and be void. And it is further agreed, that in case the said messuage and premises shall at any time, during the continuance of this agreement, be burnt down, or damaged by fire, the term hereby created and the rent hereby reserved shall thenceforth immediately cease and determine; and, upon payment to the said A.B. of all moneys then due by the said C.D., this agreement shall be void. IN WITNESS, &c.

¹ Without such a clause the tenant under this agreement would be bound to pay rent during the term in case of the premises being destroyed by fire, though the landlord should not insure, or should neglect to reinstate the premises. See *Baker v. Holtzapffel*, 4 Taunt. 45; *Holtzapffel v. Baker*, 18 Ves. 116; *Leedes v. Chetham*, 1 Sim. 146. This is the rule — When the law creates a duty, and the party is unable

to perform it without any default in him, and he has no remedy over, the law will excuse him; but when the party by his own contract creates a duty or charge upon himself, he is bound to make good his contract, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.

NOTICES BETWEEN LANDLORD AND TENANT.

Notice from a Landlord to a Tenant to Quit.

Mr. A. B.,

I do hereby give you notice to quit and deliver up, on the — day of — next, possession of the messuage or dwelling-house, situate at — in the parish of — in the county of — which you now hold under me. (a)

Dated, &c.

C. D.

(a) If the commencement of the tenancy is uncertain, say, "provided your tenancy commenced at that period of the year; or otherwise, that you quit and deliver up possession of the said messuage &c. at the end of the year of your tenancy which shall expire next after half a year from the time of your being served with this notice."

Notice to Quit or pay Double Rent.

I do hereby give you notice, and require you, to quit and deliver up, on or before the 29th day of September now next, the possession of the messuage and premises situate No. — street, in the parish of —, in the county of —, which you now hold of me, or on such other day as your holding shall expire next after the expiration of half a year from the receipt of this notice;¹ and in default thereof, I now require that you shall pay to me double the yearly value of the said messuage [or dwelling-house, farm, lands, &c.] from the said — day of — so long as you continue to keep possession of the said premises after the expiration of this notice, according to the form of the statute in that case made and provided.

Notice of a Landlord's Intention to apply to Justices to recover Possession under the 1 & 2 Vict. c. 74. See ante.

I — [Owner, or Agent to — the Owner, as the case may be] do hereby give you notice, that unless peaceable possession of the tenement [shortly describing it] situate — which was held of me [or of the said — as the case may be] under a tenancy from year to year [or as the case may be], which expired [or was determined] by notice to quit from the said — [or otherwise, as the case may be] on the — day of —, and which tenement is now held over and detained from the said —, be given to — [the Owner or Agent] on or before the expiration of seven clear days from the service of this notice, I — shall, on — next, the — day of — at — of the clock of the same day, at —, apply to her Majesty's Justices of the Peace acting for the district of — [being the district, division, or place in which the said tenement, or any part thereof, is situate], in petty sessions assembled, to issue their warrant directing the constables of the said district to enter and take possession of the said tenement, and to eject any person therefrom.

Dated this — day of — 184—. To Mr. —

(Signed)

[Owner or Agent].

[This is a notice to be given where a tenant at a rent not exceeding £20 a year, either at will, or for any term not exceeding seven years and upon which no fine shall have been reserved, holds over after his term or interest has ended or been determined by a legal notice to quit. It may be served either personally or by leaving the same with some person being in and apparently residing at the place of abode of the person so holding over; and the person serving the notice must read over the same to the person served, and explain the purport thereof. If the tenant cannot be found, and his place of abode be unknown, or admission thereto cannot be obtained for serving the summons, then the posting of the summons on some conspicuous part of the premises will be deemed good service upon such tenant.]

Notice from Tenant to Landlord of Intention to Quit.

I do hereby give you notice, that I shall quit and deliver up to you (if to an agent, say, as agent of A. B., my landlord), or such other person as you may appoint to receive the same, on the — day of — which will be in the year of our Lord 18—, being the end of my present year's holding, the possession of all that messuage or dwelling-house, garden, and hereditaments, with the appurtenances, situate in — in the county of —. As witness my hand this, &c.

To Mr. A. B.

C. D.

¹ See *Hirst v. Horne*, 6 Mees & Wils. 303, for the sufficiency of this notice.

Notice of determining a Lease.

I do hereby give you notice, that, in pursuance of the power given and reserved to me by the indenture of lease bearing date &c., and made between &c., comprising the messuage or tenement, farm, lands, hereditaments, and premises which I hold as lessee of you, situate &c., that it is my mind and intention to avoid the same indenture of lease at the expiration of the first seven years of the term thereby granted, which will be on &c., and that I shall quit and deliver up the possession of the said messuage and premises to you at that period. Dated, &c.

Notice from Landlord to repair Premises.

Mr. C. D.,

I do hereby give you notice, and require you, to put in good and tenantable repair all and singular the house and premises which you now rent of or hold under me, situate &c., particularly (stating such places as particularly want repairing). As witness my hand this — day of — 184—.

A. B.

Or,

Mr. C. D.

I do hereby give you notice to repair and make good the several defects and wants of repair particularly mentioned in the Schedule or Survey hereunder written, in, at, or to the messuage or tenement which you hold of me, situate in —, in the parish of —, in the county of —, within — months from the date hereof.

A. B.

[Copy the Schedule upon the notice at the foot, which should be also signed by the landlord or his surveyor.]

Demand of Possession.

Mr. C. D.—I demand of you the possession of the several pieces of land called or known by the names of the — and the —, situate, lying, and being in —, in the county of —, lately purchased by me of —, and now in your possession by my sufferance. And I hereby give you notice, that if you do not immediately quit and yield up to me the possession of the said lands and tenements, I shall proceed to recover the same by course of law.

Witness, E. F

A. B.

Notice to Quit, under the Statute 1 Geo. IV. c. 87,¹ which applies only to Tenants under Leases or Agreements in writing holding over,² but not to any Tenancy for Years determinable no Lives.³

To —

I do hereby, according to the statute in such case made and provided, demand and require you forthwith to quit and deliver up to me the possession of the dwelling-house [or farm, lands, and premises] with the appurtenances, situate and being — in the parish of —, in the county of —, and which were held by you [or by C. D.] as tenant thereof under a lease [or agreement in writing] for the term of — years, which expired on — [or from year to year, and which tenancy was determined by me [or the said C. D., or by you, as the case may be], by regular notice to quit, on the — day of — last.

A. B.

¹ The 1 Geo. IV. c. 87, sec. 1, enacts, That where the term or interest of any tenant holding under a lease or agreement in writing any lands, tenements, or hereditaments for any term or number of years certain, or from year to year, shall have expired or been determined either by the landlord or tenant by a regular notice to quit, and such tenant or any one holding or claiming by or under him shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and

served personally upon or left at the dwelling-house or the usual place of abode of such tenant or person, the landlord may then maintain ejectment and require bail. See also the 11 Geo. IV. & 1 Wm. IV. c. 70, sec. 86. See also Woodfall's Landlord and Tenant by Wollaston, 788, n. (d), and 825.

² Doe dem. Bradford v. Roe, 4 Barn. & Ald. 770.

³ Doe dem. Pemberton v. Roe, 7 Barn. & Cress. 2.

PRACTICAL DIRECTIONS FOR MAKING A DISTRESS.

Though the landlord himself may make the distress, it is generally made by some person employed by him; in which case the landlord must give to such person an authority in writing, called a Warrant of Distress.

Form of an Authority given by a Landlord to empower another to distrain for him.

Mr. E. F.

I do hereby authorize you to distrain the goods and chattels of C. D. on the premises now in his possession, situate at — in the county of — for — pounds, being [*half a year's*] rent due to me for the same at — day last; and for your so doing this shall be a sufficient warrant and authority

Dated this — day of — 184—.

A. B.

[The proper way of making a distress for rent in arrear is, to go upon the premises for which the rent is due, and take hold of some piece of furniture or other article there, and say (if the distress be made by the landlord himself), "I seize this chair" (or other thing, as the case may be) "in the name of all the goods and effects on these premises, for the sum of £20, being half a year's rent due to me at Lady-day last." Or (if the distress be made by some person empowered by the landlord) say, "for the sum of £20 due to A. B. the landlord of these premises, at Lady-day last, by virtue of an authority from him the said A. B. to me given for that purpose."

An inventory is then to be made of so many of the goods &c. as will be sufficient to cover the rent and expences of the distress, appraisement, and sale; which is not required to be on a stamp, as the 23 Geo. III. c. 85, § 51, expressly exempts an inventory of goods distrained

The person who distrains the goods may take the inventory. An appraiser is not necessary till after the end of the five days allowed the tenant by 2 Wm & M. to pay the rent or replevy the goods.

The inventory being taken, you must make a fair copy of it, and write at the bottom a notice to the tenant, to inform him that such distress has been made, and of the time when the rent and charges of the distress must be paid or the goods replevied; which, with the notice thereunder written, must be either given to the tenant himself or to the owner of the goods; or it may be left at the house, with any person dwelling therein; or if there be no person in the house, on the table in the kitchen, or some other notorious part of the house. It is proper to have another person with you when you make a distress, to examine the inventory, and to be witness of the transaction, if called on for that purpose.

The safest way is to remove the goods immediately, and in the notice to acquaint the tenant where they are removed to; but it is now most usual to let them stay on the premises, and leave a man in possession to protect them till you are entitled to sell them by law, which is on the seventh day, because the statute says you are to give five days notice, which is held to be five clear days exclusive of the day the distress was made.

The man in possession of the goods is to be paid 2s. 6d. per day if kept by the tenant, and 3s. 6d. if he keeps himself.

Form of an Inventory and Notice to be served on a Tenant when a Distress is taken of his Goods &c. for Rent Arrear.

AN INVENTORY of the several goods and chattels distrained by me (or E. F., bailiff to Mr. A. B.) this — day of — 184— in the dwelling-house (or as the case may be) of C. D., situated at — in the county of — by the authority and on the behalf of the said A. B. the landlord of the said premises, for [*twenty*] pounds, being [*half a year's*] rent due to him the said A. B. at [*Lady-day*] last, and as yet in arrear and unpaid.

In the Kitchen.

2 Wainscot tables

3 Copper saucepans

6 Old Chairs

2 Pottage pots, &c.

In the Parlour.

1 Large pier looking-glass

2 Mahogany card-tables, &c.

2 Sconces in gilt frames

1 Pembroke table

In the Dining Room.

6 Hair-bottom chairs, mahogany frames, &c.

1 Set of dining tables

Mr. C. D.,

Take notice, that I, as bailiff to Mr. A. B., have this day distrained the goods and chattels mentioned in the above inventory for the sum of [*twenty*] pounds, being [*half a year's*] rent due at [*Lady-day*] last, for the premises above mentioned, and have secured the goods and chattels in the front parlour of the said house; and that unless

the said arrears of rent and charges of distress are paid, or the goods and chattels replevied, within five days from the date hereof, the said goods will be appraised and sold according to law.

Dated, &c.

E. F.

A TRUE copy of the above Inventory and Notice was this — day of — 18—, delivered to the above-mentioned C. D., in the presence of us,

G. H.

I. K.

If the goods are secured off the premises, what relates to the securing the goods must be omitted, and the notice must inform the tenant of the place where.

Notice to the Sheriff when in possession under an Execution.

If the sheriff is in possession of the goods of a tenant on an execution, the landlord need not make a distress, but should forthwith serve him with the following notice:—

To — Esq., Sheriff of the County of

I hereby give you notice, that there is now due to me from C. D., the person to whom certain goods belong of which you are now in possession under and by virtue of a writ of fieri facias (or as the case may be) returnable [here mention the return] the sum of [twenty] pounds, for [half a year's] rent due at [Lady-day] last, and which sum I hereby give you notice to pay to me before such goods be removed from the premises.

Dated, &c.

A. B., Landlord.

But where there is no sheriff in possession on an execution, and the tenant wants further time to raise the money, and the landlord chooses to give him such indulgence, he must take a memorandum from the tenant, that possession is continued at his request and by his desire, or the landlord will be a trespasser for continuing in possession beyond the time limited by the statute, and liable to an action for so doing. It may be in the following words:—

Form of a Tenant's Consent to the Landlord's continuing in possession, upon the Premises, of Goods distrained, after the seventh day.

MEMORANDUM, That I, C. D., do hereby consent and agree, that A. B., my landlord, who hath distrained my goods and chattels in the said dwelling-house &c., situate at — in the county of —, shall continue in possession of the said goods and chattels in the said dwelling-house for the space of — days from the date hereof; he the said A. B. having agreed to forbear the sale of the said goods and chattels for the said space of time, to enable me to discharge the said rent. And I, the said C. D., do hereby agree to pay the expences of keeping the said possession. As witness my hand this — day of —, 18—.

C. D.

If no further time shall be allowed, at the expiration of the fifth day from the time of the distress and notice, the sheriff's office should be searched, to know if the goods have been replevied. If they have not, go to the premises; and if the rent and charges of the distress are not paid, you should send for a constable of the hundred, parish, or place where the goods were distrained, and two sworn appraisers, who, having viewed the goods must be sworn by the constable in the usual manner.

If the distress is taken in two hundreds, the constable of the place where the distress is driven or put is the proper officer within the 2 W. & M.

The Appraisers' Oath.

You, and each of you, shall well and truly appraise the goods and chattels mentioned in this inventory according to the best of your judgment. So help you God.

Memorandum of the Appraisers being sworn.

MEMORANDUM, That on the — day of —, in the year of our Lord 18—, G. H. and I. K., two sworn appraisers, were sworn upon the Holy Evangelists by me, L. M., of &c., constable, well and truly to appraise the goods and chattels mentioned in this Inventory, according to the best of their judgment. As witness my hand,

L. M., Constable,

Present at the time of swearing the said G. H. }
and I. K. as above, and witness thereto, } P. S.

After the appraisers are sworn, and have viewed and valued the goods, indorse the following Memorandum on the inventory for the appraisers to sign:—

Memorandum to be indorsed.

We, the above-named G. H. and I. K., being sworn upon the Holy Evangelists by L. M., constable above-mentioned, well and truly to appraise the goods and chattels mentioned in this Inventory according to the best of our judgment, and having viewed the said goods and chattels, do appraise and value the same at the sum of — pounds, and no more. As witness our hands this — day of — 18—.

Witness, L. M.

G. H. }
I. K. } *Sworn Appraisers.*

After the goods are sold for the best price you can get, you must deduct the arrears of rent and all reasonable charges; and the overplus (if any) must be paid or applied to the tenant's use.

By a late act of parliament, the charges for making a distress for a small amount are regulated; for the particulars of which see *ante*, p. 364.

A person distraining cannot be one of the sworn appraisers, he being interested in the business.

The goods being thus valued, they are usually bought by the appraisers at their own valuation; and a receipt at the bottom of the inventory, witnessed by the constable or other person who swore them, is usually held a sufficient discharge.

If a distress be of considerable value, it is advisable to have a proper bargain and sale between the landlord, the constable, and the appraisers or purchasers, for the better proving the transaction afterwards, should it be found necessary, which may be in the following form:—

Bargain and Sale of Goods distrained for Rent.

THIS INDENTURE, made &c. Between (landlord) of &c., of the first part, (constable) of &c., of the second part, and (appraisers or purchasers) of &c., of the third part,

WITNESSETH, That it is affirmed by the said (landlord), that on the — day of — last past, he did enter into a messuage and lands called S— farm, in H—, within the hundred of —, and for £— rent at the feast of — last past due to him the said (landlord) from C.D., upon a demise whereby the said C.D. held the said farm of the said (landlord), and did distrain there, and found the goods and chattels following; to wit, [*recite particulars, or say*, “the goods and chattels in the inventory hereunder-written mentioned and specified.”] AND IT IS HEREBY FURTHER WITNESSED, by the said (constable), and the said G.H. and I.K., upon their oaths sworn before the said constable, that after distress taken, to wit, on the — day of — last past, the said (landlord) did, at the chief mansion-house of the said farm, give public notice of the said distress, and the cause thereof, and did then and there deliver unto F., daughter of the said C.D., a note in writing, expressing the particulars of such goods and chattels distrained at —. AND THIS INDENTURE FURTHER WITNESSETH, that the said goods being yet unreplevied, the said (landlord), with the constable aforesaid, for and in consideration of £—, being the best price that can be gotten for the said goods and chattels, by the said (purchasers) paid to the said (landlord) towards satisfaction of the said rent for which the said goods and chattels were distrained, HAVE bargained, sold, assigned, and transferred, and by these presents do bargain, sell, assign, and transfer, ALL the goods and chattels hereinbefore mentioned to be distrained, TO HAVE AND TO HOLD unto the said (purchasers) as their own proper goods and chattels for ever. IN WITNESS, &c.

If the tenant means to replevy the distress, he must, within five days after he has had notice of the distress, take with him two housekeepers living in the city or county where the distress was made, and go to the sheriff's office of such city or county; where he must enter into a bond, with the two housekeepers as sureties, in double the value of the goods distrained (such value to be ascertained by the oath of one or more witnesses not interested, which oath the person granting such replevin is to administer), conditioned for the prosecution of a suit in replevin against the distrainer with effect, and for returning the goods if a return thereof shall be awarded. Upon this the sheriff will direct a precept to one of his bailiffs, and by that means the possession of the goods will be restored to the tenant, to abide the event of the suit in replevin.

BILLS OF SALE.

Absolute Bill of Sale of Goods and Chattels.

THIS INDENTURE made the — day of — one thousand eight hundred and forty —, BETWEEN A. B. [*vendor*] of &c. of the one part, and

C. D. [*purchaser*] of &c. of the other part :

WHEREAS the said [*vendor*] hath contracted with the said [*purchaser*] for the absolute sale to him of the goods and effects in the schedule hereunder written, at the sum of £—— Now THIS INDENTURE witnesseth, that in consideration of the sum of £——, of lawful current money of England, to the said [*vendor*] in hand paid by the said [*purchaser*] at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), he the said [*vendor*] hath bargained and sell unto the said [*purchaser*] all the goods, household stuff, and implements of husbandry, and all other the goods and chattels whatsoever, mentioned in the Schedule hereunto annexed, now remaining and being in &c., To HAVE, hold, receive, take, and enjoy, all and singular the said goods, household stuff, and implements of husbandry, and every of them, hereby bargained and sold, unto the said [*purchaser*], his executors, administrators, and assigns, absolutely for ever, without any claim, disturbance, or hindrance of any person whomsoever, and without any account to any person whomsoever to be made, answered, or hereafter to be rendered. And the said [*vendor*], for himself, his executors and administrators, all and singular the said goods and household stuff unto the said [*purchaser*], his executors, administrators, and assigns, against the said [*vendor*], his executors, administrators, and every other person or persons whomsoever, shall and will warrant, and for ever defend, by these presents; of which goods and chattels the said [*vendor*] hath put the said [*purchaser*] in full possession, by delivering him one chair in the name of all the said goods and chattels at the sealing and delivery hereof IN WITNESS, &c.

A. B. [Seal.]

Signed, sealed, and delivered by the said [*vendor*], being first duly stamped, and at the same time full possession of all and singular the goods, chattels, and effects were given by the said [*vendor*] to the said [*purchaser*] by the said [*vendor*]'s delivering to the said [*purchaser*] one chair in the name of the whole of the said goods and chattels, in the presence of

E. F.
G. H.

The SCHEDULE before referred to

Conditional Bill of Sale of Goods and Merchandize.

THIS INDENTURE, made the — day of — one thousand eight hundred and forty —, BETWEEN A. B. of &c. of the one part, and C. D. of &c. of the other part,

WITNESSETH, That, for and in consideration of the sum of £—— &c. in hand paid by the said C. D. to the said A. B., the receipt whereof is hereby acknowledged, he the said A. B. hath bargained, sold, and confirmed, and by these presents hath bargained, sell, and confirm, unto the said C. D., his executors, administrators, and assigns, ALL THOSE and all other the goods and effects mentioned in the Schedule hereunder written [*here name the goods*], To HAVE, hold, receive, take, and enjoy the said goods and merchandize, and all and singular other the premises hereby bargained and sold unto the said C. D., his executors, administrators, and assigns, as and for his and their own proper

goods and merchandize, for ever, subject nevertheless to the proviso for redemption hereinafter contained. And the said [vendor], for himself, &c. [*clause of warranty, as in last precedent.*] PROVIDED ALWAYS, and it is hereby agreed, that if the said A. B., his executors, administrators, or assigns, shall pay or cause to be paid unto the said C. D., his executors, administrators, or assigns, the sum of £— on the — day of —, without any deduction whatsoever, Then these presents, and every clause, article, condition, and thing herein contained shall cease, determine, and be absolutely void. And the said A. B. doth hereby, for himself, his executors, and administrators, covenant and agree with and to the said C. D., his executors, administrators, and assigns, in manner following; that is to say, That he the said A. B., his executors or administrators, shall and will pay the said sum of £— at the time and in the manner aforesaid. And that in case default shall happen to be made in payment of the said sum of £— or any part thereof, on the said — day of —, Then the said C. D., his executors, administrators, and assigns, shall and may peaceably and quietly have, receive, and enjoy, to his and their own proper and absolute use and behoof, for ever, the said hereby bargained goods and premises, and every part thereof, with all and singular the appurtenances, without any lawful let, suit, trouble, molestation, or denial of the said A. B., his executors, administrators, or assigns, or any other person or persons claiming under him. And the said C. D., for himself, his executors and administrators, doth hereby covenant and agree with the said A. B., his executors, administrators, or assigns, that he the said C. D., his executors, or administrators, shall and will, immediately after the receipt of the said sum of £—, and upon the request of the said A. B., his executor, administrators, or assigns, well and truly deliver unto him or them the said goods and effects in as good plight and condition (fire and other inevitable accidents excepted) as the same and every of them at this present time now are. IN WITNESS, &c.

Sealed and delivered, &c. (*as in the last precedent*)

The SCHEDULE before referred to.

BONDS FOR PAYMENT OF MONEY.

Simple Bond

KNOW ALL MEN BY THESE PRESENTS, That I, A. B., of —, merchant, am held and firmly bound to C. D., of —, Esq., his certain attorney, executors, administrators, and assigns, in the sum of £— (*double the amount of the debt*) of good and lawful current money of England, to be paid to the said C. D. or to his certain attorney, executors, administrators, or assigns; for which payment to be well and faithfully made, I bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal. Dated this — day of —, One thousand eight hundred and forty —.

THE CONDITION of the above-written obligation is such, that if the above-bounden A. B., his heirs, executors or administrators, do and shall well and truly pay or cause to be paid unto the above-named C. D., his executors, administrators, or assigns, the principal sum of £—, of lawful current money of England, together with interest for the same, after the rate of five pounds per cent per annum, on or before the — day of — now next, then the above-written obligation shall be void, or otherwise shall be and remain in full force.

Signed, sealed, and delivered, } E. F.
in the presence of } G. H.

A. B. (Seal.)

Bond from Two or more Persons.

KNOW ALL MEN BY THESE PRESENTS, That we, A. B., of &c., and C. D., of &c., and each of us, are and is held and firmly bound to E. F., of &c., his certain attorney, executors, administrators, and assigns, jointly and severally, in the sum of £——, of lawful current money of England, to be paid to the said E. F., or to his certain attorney, executors, administrators, or assigns; for which payment to be well and faithfully made we bind ourselves and each of us [*if more than two obligors, say,* and each and every of us] our and each [and every] of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our respective seals. Dated this —— day of ——, 184——.

[*The Condition may be as in the foregoing precedent, only observing that it be made joint and several*]

Signed, sealed and delivered by the said }
 A. B. and C. D., in the presence of }
 G. H.
 I K.

A. B. (Seal.)
 C D. (Seal.)

Condition to a Bond for Payment of Money by Instalments

NOW THE CONDITION OF THIS OBLIGATION IS SUCH, That if the above-bounden [*obligor*], his heirs, executors, or administrators, do and shall pay or cause to be paid unto the above named [*obligee*], his executors, administrators, or assigns, the full sum of £——, of &c with interest for the same after the rate of 5*l.* for every 100*l.* for a year, on the days and times and in manner following, that is to say, the sum of £——, part thereof, on the —— day of —— next ensuing the date of the above-written obligation, and which will be in the year of our Lord 18——; the sum of £——, other part thereof, on the —— day of —— then next following; and the sum of £——, the residue thereof, with interest for the same after the rate aforesaid, on the —— day of —— then next ensuing, which will be in the year of &c., Then the above-written bond or obligation shall be void; but if default shall be made in any one of the said payments, then this obligation shall be and remain in full force and virtue for the whole of the instalments or sum that shall remain unpaid of the said sum of £—— and interest at the time of any such default being made.

CO-PARTNERSHIP.

Deed of Copartnership for carrying on a Joint Trade.

THIS INDENTURE, made the —— day of ——, 184——, between A. B. of ——, of the one part, and C. D. of ——, of the other part.

Whereas the said A. B. and C. D. have agreed to enter into co-partnership in the trade or business of ——, upon the terms and conditions and in manner hereinaftermentioned: THIS INDENTURE therefore WITNESSETH, that, in consideration of the mutual trust and confidence that they the said A. B. and C. D. have and repose in each other, and in pursuance of the said agreement, they the said A. B. and C. D. for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, do mutually

and reciprocally covenant, declare, and agree with and to the other of them, and with and to the executors and administrators of the other of them, in manner following, (that is to say):—

That they, the said A. B. and C. D., on the day of the date of these presents, shall and will be and become co-partners together, under the names of B. and D., in the art and trade of — and all things thereto belonging; and also in buying, selling, vending, and retailing all sorts of wares, goods, and commodities belonging to the said trade of —; which said co-partnership is to continue from — for and during and unto the full end and term of — from thence next ensuing, and fully to be complete and ended, unless the said co-partnership shall be previously dissolved in manner hereinafter mentioned. And, to that end and purpose, the said A. B. hath, on the day of the date of these presents, delivered in as stock —, and the said C. D. the sum of —, to be used, laid out, and employed in common between them, for the management of the said trade of — to their mutual benefit and advantage.

That neither of them the said co-partners shall nor will, at any time hereafter, use, exercise, or follow the trade of — aforesaid, or any other trade whatsoever, during the continuance of the said co-partnership, to their private benefit or advantage, but shall and will from time to time, and at all times, do their and each of their best endeavours in and by all means possible, to the utmost of their skill, power, and cunning, for their joint interest, profit, benefit, and advantage, and truly employ, buy, sell, and merchandise with the stock aforesaid, and the increase thereof, in the trade of — aforesaid, without any sinister intentions or fraudulent endeavours whatsoever.

That they the said co-partners shall and will from time to time, and at all times hereafter during the said term, pay, bear, and discharge equally between them the rent of the shop which they the said copartners shall rent or hire for the joint exercising or managing the trade aforesaid. And that all such gain, profit, and increase that shall come, grow, or arise for or by reason of the said trade and joint occupying as aforesaid, shall be, on the — day of — in every year [or on the first day of every month during the said co-partnership, during the said term, *as the case may be*] equally and proportionably divided between the said copartners, share and share alike. And also, that all such loss as shall happen to the said joint trade by bad debts, ill commodities, or otherwise, without fraud or covin, shall be paid and borne at the same time equally and proportionably between them.

That there shall be had and kept, at all times during the said term and joint occupying and copartnership together as aforesaid, perfect, just, and true books of account, wherein each of the said co-partners shall duly enter and set down as well all money by him or them received, paid, expended, and laid out in and about the management of the said trade, as also all wares, goods, commodities, and merchandizes by them or either of them bought and sold by reason or upon account of the said co-partnership, and all other matters and things whatsoever to the said joint trade and the management thereof in any wise belonging or appertaining; which said books shall be kept in the shop where the said joint trade shall be carried on, and shall be used in common between the said co-partners, so that either of them may have access thereto without any interruption of the other.

That the said co-partners, once in every — months, or oftener if need shall require, upon the reasonable request of one of them, shall make, yield, and render each to the other, or to the executors or administrators of each other, a true, just, and perfect account of all profits and increase by them or either of them made, and of all losses by them or either of them sustained, and also of all payments, receipts, disbursements, and all other things whatsoever by them made, received, disbursed, acted, done, or suffered, in their said co-partnership and joint occupying as aforesaid; and, the same accounts so made, shall and will clear, adjust, pay, and deliver each unto the

other at the time of making such account their equal shares of the profits so made as aforesaid.

And at the end of the term of —, or other sooner determination of the said co-partnership, they the said co-partners, each to the other, or, in case of the death of either of them, the surviving party to the executors or administrators of the party deceased, shall and will make a true, just, and final account of all things as aforesaid, and divide the profits as aforesaid, and in all things well and truly adjust the same; and that then also, upon the making of such a final account, all and every the stock and stocks, as well as the gains and increase thereof, which shall appear to be remaining, whether consisting of money, wares, debts, &c., shall be equally divided between them the said co-partners, their executors or administrators, share and share alike.

That it shall be lawful for each of them the said co-partners to receive and take out of the profits of the said co-partnership £—— per week, for his separate use and benefit, and to be considered as in part satisfaction of his share of the said gains and profits.

That neither of them the said A. B. and C. D. shall at any time, in the names of the said co-partners, draw, indorse, accept, or sign any bill of exchange, or promissory note, except for the purposes and in the usual and due course of the said trade or business; nor shall either of the said partners, without the consent of the other of them, become surety or bail for any person, nor sell, lend, or give credit to any person; and that any loss to be sustained by a breach of this clause shall be made good by the partner committing the breach from his own monies.

That in case of the death of either of the said co-partners during the continuance of the said co-partnership, the survivor of them shall use his best endeavours, with all convenient speed, to sell, collect, and convert into money all the goods and effects belonging to the said co-partnership, and all the debts then due or owing to or from the said co-partnership, without receiving any compensation for his trouble in doing so. And that the surviving partner shall render a just account to the executors or administrators of the deceased partner within — after his decease, and shall pay over to such executors or administrators at the expiration of such —, or before, if all the accounts are before then settled, the share of such deceased partner of and in the clear balance which shall remain of the said partnership effects, after paying all the debts due therefrom.

That at the expiration of the said co-partnership, by death, dissolution, or effluxion of time, the clear residue of the capital and all the debts then due to the said co-partnership, after paying all the debts then due from the same, and the expences of converting into money and collecting the partnership debts and effects, shall be equally divided between the said co-partners, or between the survivor of them and the representatives of the deceased partner, as follows:—The capital brought in or advanced by the respective partners shall be repaid with interest after the rate of five pounds per cent per annum; and, after payment thereof, the residue shall be divided between the said A. B. and C. D., or their respective executors and administrators, in equal shares, after full payment shall have been made of all monies due from the one to the other of the said co-partners, either for overdrawn weekly accounts, or upon any other account whatsoever.

That if either of the said A. B. and C. D. shall wish to put an end to and dissolve the said co-partnership, and of such his wish shall give notice in writing to the other of them, either personally, or by leaving the same at the shop or place of business where the said joint trade shall for the time being be carried on, for six calendar months, to dissolve the said co-partnership, then immediately after the expiration of such notice the said co-partnership term of — years shall cease, as if the same had expired by effluxion of time, and shall stand dissolved, and thereupon each of the said parties hereto shall sign,

an advertisement of such dissolution, to be inserted in the London Gazette; and in case of the refusal of one party to sign such advertisement, after such notice as last aforesaid, within the said period of six months, the other party may sign it for him, and such last-mentioned party is hereby authorized and expressly empowered to sign the name of such refusing party to the notice of dissolution; and within three months after the expiration of such six months, the capital stock in trade, debts, and effects of the said co-partnership shall be got in, paid, and divided, in the same manner in all respects as is hereinbefore provided for and directed upon the death of either of the said co-partners during the continuance of the said co-partnership.

That if at any time during the continuance of the said co-partnership, or after the determination thereof, any dispute or difference shall arise between the said parties, or their respective executors or administrators, concerning or in any way relating to the said co-partnership business, or the amount thereof, or the division of the profits thereof, or otherwise, or of the true construction of these presents, or any part thereof, as often as any such dispute or difference shall arise, the same shall be referred to and be determined by two indifferent persons, one to be nominated in writing by the said A.B. his executors or administrators, and the other by the said C.D. his executors or administrators; and every award to be from time to time made by such arbitrators shall be binding and conclusive upon the said A.B. and C.D. and their respective executors or administrators, provided every such award be made in writing, and ready to be delivered to the said respective parties hereto, or to their respective executors or administrators, within ——— next after reference shall from time to time be made to arbitrators; but in case such arbitrators shall not at any time make their award as aforesaid within the said time of ———, then every such dispute or difference shall be referred to and determined by such other one indifferent person as such first-named arbitrators shall by any writing under their respective hands nominate and choose as an umpire in the matter referred to them; and whatever determination the said umpire shall make concerning the matters to him referred shall be binding and conclusive for the said A.B. and C.D. and their respective executors and administrators, provided such umpirage shall be made in writing and be ready to be delivered to the said parties hereto respectively, or their respective executors or administrators, within ——— next after the nomination of such umpire.

And for the better enforcing the due obedience of every such award, arbitration, or umpirage, the reference and submission thereto shall from time to time, as often as the same shall be required, be made a rule of her majesty's Court of Queen's Bench, according to the statute 9 & 10 Wm. IV. cap. 15.

And lastly, for the due performance of all the covenants and agreements in these presents contained, each of them the said A.B. and C.D. bindeth himself, his heirs, executors, and administrators, unto the other of them, his executors, administrators, and assigns in the penal sum of £ ——— of lawful current money of England, firmly by these presents, to be recovered as liquidated damages against the party who shall refuse or neglect to perform all or any of the covenants hereinbefore contained, and which the party who shall so make any such default doth hereby consent to pay to the other of them, his executors or administrators; and it is hereby mutually declared, covenanted, and agreed by and between the parties hereto respectively, that it shall be sufficient for the party not in default to give these presents in evidence in any of her majesty's courts of record, to recover the same.¹

In witness, &c.

¹ Under an express covenant and agreement of this nature, the whole sum mentioned as liquidated damages may be recovered at law. *Reilly v. Jones*, 1 Bing. 302; 8 Moore, 241. But see *Randall v. Everest*, 2 Car. & P. 577; *S. C.*, Moo. & Malk. 41, per Lord Tenterden; but this was a case of contract *not* under seal. See also 3 Western's Conveyancing, 106. Lord Denman, in *Palmer v. Temple* (9 Adolph.

& Ell, 508), observed, "The vendor may sue for the penalty, and recover such damages for breach of the agreement as the jury may award." It is submitted, that, under a covenant framed as above, the whole sum may be recovered, but no more. See *Lowe v. Piers*, 4 Burr. 2225, per Lord Mansfield, C. J.; *Fletcher v. Dyke*, 2 Term Rep. 32; *Parrant v. Amhus*, 3 Barn. & Ald. 692.

WILLS.

THIS is the LAST WILL AND TESTAMENT of me, A. B., of —, Esquire.

I REVOKE all wills and testamentary dispositions I may have made at any time heretofore.

I DESIRE, that all my just debts, funeral and testamentary expences, legacies, and the charges of proving this my will, may be in the first place fully paid and satisfied: And, subject thereto,

I GIVE, DEVISE, AND BEQUEATH all my real and personal estate whatsoever and wheresoever, and of what nature or kind soever, (except my household furniture and effects hereinafter bequeathed), unto and to the use of A. B. and C. D., their heirs, executors, administrators, and assigns, according to their several natures and qualities, absolutely and for ever, UPON TRUST nevertheless upon and for the several trusts, intents, and purposes hereinafter mentioned, that is to say,

UPON TRUST to receive the rents, issues, dividends, and profits thereof, and if the same should be insufficient, then by sale, conversion, and investment of any part of my said estate and effects, and by and out of the dividends, interest, and annual produce thereof, to raise and pay the annual sum of £500 unto such person or persons and for such purposes as my dear wife, Sarah B., by any writing under her hand when and as the same shall become due (but not by way of assignment, charge, or anticipation), shall from time to time appoint, during her life, and in default of such appointment into the proper hands of the said Sarah B., for her sole and separate use. Provided always, that the receipts of the said Sarah B. under her own hand, and given from time to time after the rents, dividends, interest, or other proceeds shall have accrued due, shall be, and that no other receipts shall be, sufficient discharges to my said trustees for the amount of the monies therein expressed to be received:

AND from and immediately after the decease of my said dear wife, UPON TRUST to sell, dispose, convert, and get in all my said real and personal estate, and, after payment of all legacies given, and all reasonable expences and charges attending the execution of the trusts declared by this my will, upon trust to pay and divide one moiety of the clear surplus of the produce of my said real and personal estate, unto, between, and among my two sons, C. B. and D. B. equally, share and share alike; and as to the other and remaining moiety, UPON TRUST to invest the same in some or one of the public stocks or funds of Great Britain in their own names or the names or name of the trustees or trustee for the time being of this my will, and to receive the dividends, interest, and annual proceeds thereof, and pay the same from time to time as and when such dividends and proceeds shall become due (but not by way of assignment, charge, or other anticipation) into the proper hands of my said two daughters respectively, during their respective natural lives, in equal shares and proportions, for their respective sole and separate use and benefit, free from the control, debts, or engagement of any husband with whom they may respectively intermarry. And I do hereby will and declare, that the respective receipts alone of my said two daughters under their own respective hands, to be given from time to time after the said dividends and proceeds shall have actually accrued due, shall be, and that no other receipt shall be, sufficient discharges to the trustees for the time being of this my will for the amount of the monies therein respectively expressed to be received.

And immediately from and after the decease of either of my said daughters, UPON TRUST to sell out and dispose of one moiety of the stocks, funds, and securities so to be purchased as last aforesaid, and to pay and divide the same to or among such person or persons as my said daughter so dying as last aforesaid shall by any deed, or by her last will and testament (notwithstanding

she may be under coverture) respectively lawfully executed, shall direct or appoint; And upon the decease of my surviving daughter, upon trust, as to her share of the said last-mentioned stocks, funds, and securities, in like manner to pay or divide the same to or among such person or persons as my said surviving daughter shall by any deed, or by her last will and testament (notwithstanding she may be under coverture) respectively lawfully executed, direct or appoint; and in case of both or either of my said daughters dying without making any such appointment or appointments, then as to the share or shares of such one or both so dying as last aforesaid, UPON TRUST to pay the same respectively to my next of kin according to the Statute of Distributions.

I give and bequeath all the household furniture, plate, linen, and effects which will be in or about my dwelling-house at the time of my decease to my dear wife, Sarah B., for her own sole and proper use and benefit absolutely.

I likewise give and bequeath to my said dear wife the sum of £500, to be paid to her within one month after my decease, free of legacy duty, for the purpose of housekeeping for herself and my said children until they shall be paid the several provisions, either principal monies or interest, hereinbefore made for them respectively.

I GIVE, devise, and bequeath all lands, messuages, and hereditaments vested in me at the time of my decease upon any trust, unto E.F., his heirs, executors, administrators, and assigns, upon such and the same trusts as I hold the same respectively.

Provided always, and I do hereby declare, that if the said A. B. and C. D., or either of them, or any future trustee to be appointed in their or either of their stead, shall happen to die, or shall refuse or become incapable to act in the aforesaid trusts, it shall be lawful for my said wife Sarah B. during her life, and after her decease for the surviving or acting trustee or trustees for the time being of this my will, or the executors or administrators of the surviving or acting trustee, by any deed to be by him or them duly executed according to law and attested by one or more than one witness, from time to time to nominate, substitute, and appoint any other person or persons to be a trustee or trustees in the stead of the trustee or trustees so dying or refusing or becoming incapable to act as aforesaid, either jointly with the continuing trustee or solely, and thereupon all my said trust estates, stocks, funds, securities, and premises shall be immediately vested in, and shall be conveyed, assigned, and transferred to such new trustee or trustees, jointly with the surviving or continuing trustee, or solely, as the case may require, upon the trusts aforesaid; and that every new trustee or trustees, immediately after such conveyance, assignment, and transfer, shall have and exercise the same powers as if he or they had been specifically appointed a trustee or trustees by this my will.

And I further declare, that my said trustees, and every future trustee to be appointed under the aforesaid power, shall and may reimburse themselves and himself and each other, by and out of any monies that may come to their or his hands under the trusts of this my will, all costs, charges, disbursements, solicitors' charges, and expences of every kind that may be incurred by them or him in or about the carrying into execution the trusts of this my will or in anywise relating thereto. And I further declare, that the receipts of the said A. B. and C. D., and of the survivor of them, or of any new trustee or trustees to be appointed of this my will under the power aforesaid, shall be a good discharge for all monies which in any or every such receipt shall be expressed to be received, and that all persons paying any money to the trustees or trustee for the time being of this my will shall not be answerable or accountable for any misapplication or nonapplication thereof. And I further declare, that the trustees or trustee for the time being of this my will shall be charged and chargeable only for such monies as shall come

to their or his hands under the trusts aforesaid, and neither of them shall be answerable for the other of them, nor for the acts, receipts, or defaults of the other of them, but each for himself only, and his acts, receipts, and defaults; nor shall either of them be answerable for any banker, broker, or other person with whom any of the aforesaid trust monies may be deposited for safe custody, nor for any attorney or agent whom the trustees or trustee for the time being may employ or authorize in the execution of the aforesaid trusts, nor for any misfortune, loss, or damage which may happen in carrying such trusts into execution, or in relation thereto, except the same shall happen by their or his own wilful neglect.

And I nominate and appoint the said A. B. and C. D. joint executors of this my will.

Dated this — day of — one thousand eight hundred and forty —
A. B.

Signed by the said testator, A. B., in our presence, who, }
at his request, in his presence, and in the presence of }
each other, have subscribed our names as witnesses. }

C. D.
E. F.

1 A will must now be signed at the foot or end thereof, in the presence of two or more witnesses present at the same time, who must together (not apart) attest the will in the presence of the testator. It will not suffice if one witness attests the will and leaves the room, and then the other witness attests the will; they must all be present at the time of the signature by the testator, and of the attestation by the attesting witnesses. No form of attestation is necessary, but the above form will save much trouble when the will is about to be proved. No publication is now necessary, nor is any seal; but publishing or sealing

will not invalidate a will, such acts are treated by the Prerogative Court as mere surplage. Any obliteration, interlineation, or alteration made in a will after execution, will render it void, unless the will with such alteration be again executed by the testator, and duly attested by the witnesses; that is, the signature of the testator, and the subscription of the witnesses, must be placed in the margin, or some other part of the will, opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration written at the end or some other part of the will.

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